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COURT OF APPEAL.

NOVEMBER 12TH, 1910.

*LONDON AND WESTERN TRUSTS CO. v. GRAND TRUNK R. W. CO.

Fatal Accidents Act—Death of Fireman on Railway—Action on Behalf of Parents — Reasonable Expectation of Pecuniary Benefit—Evidence for Jury — Quantum of Damages—Workmen's Compensation for Injuries Act—Excessive Amount Found by Jury—Duty of Appellate Court—New Assessment Directed unless Smaller Amount Agreed upon.

Appeal by the defendants from the judgment of MAGEE, J., at the trial, in favour of the plaintiffs, upon the findings of a jury.

The action was brought by the plaintiff, as administrator of the estate of the late Cecil Burchell, to recover damages, under the provisions of R. S. O. 1897 ch. 166, for the death of Cecil Burchell through the negligence of the defendants, in whose employment he was at the time of his death, as the fireman of a locomotive engine.

The injury was the result of a collision, caused, as the defendants admitted, by the negligence of their servants, and the claim was made and the assessment of damages was based upon the principle of the Workmen's Compensation for Injuries Act.

The jury found that the estimated earnings of a person in the same grade as the deceased in the like employment in this province, for the three years allowed by the statute, would be $1.800, and they assessed the damages at that sum, apportioned between the father and the mother at the sums of $600 and $1,200 respectively.

* This case will be reported in the Ontario Law Reports.

The defendants appealed upon the ground that no pecuniary damages were proved, and, in any event, that the amount allowed was excessive and unwarranted by the evidence.

The appeal was heard by Moss, C.J.O., GARROW and MACLAREN, JJ.A.

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

G. C. Gibbons, K.C., for the plaintiffs.

GARROW, J.A.:—The learned counsel for the plaintiffs, with great earnestness, contended that the question was entirely one for the jury, and that the Courts of the province had in recent years frequently unduly interfered with verdicts upon the ground that the damages awarded were excessive.

No one disputes that, when there is reasonable evidence of damages, it is for the jury to say how much, upon the evidence, such damages should be. But a jury must certainly regard the evidence, just as the Judge must regard the law. And, if either goes wrong, it is the duty of the appellate Court, in the administration of justice according to law, to see that, as far as possible, the wrong is corrected. That, as I understand it, is what appellate Courts are for. And we assert no new jurisdiction, as the books abundantly shew, when we say that we decline to regard the verdict of a jury not reasonably and properly based upon the evidence as any more sacred than the erroneous ruling of a Judge made in the hurry of a trial.

In actions of this kind, the limits of what may and what may not be allowed as damages have been pretty well defined, although we are constantly being reminded that there is still unexplored territory, as, for instance, in the recent case of McKeown v. Toronto R. W. Co., 19 O. L. R. 361, where many of the cases are referred to.

It is not by reason of the death alone, but because the death has disappointed the dependents' reasonable expectations of financial assistance, that damages are recoverable—a circumstance apt to be overlooked.

The cases shew that such expectations need not necessarily be based upon present conditions, but may, upon proper evidence, be founded in the future; as, for instance, in Franklin v. South Eastern R. W. Co., 3 H. & N. 211 . . .; Rombough v. Balch, 27 A. R. 32, 45.

The recovery must, from the nature of the case, be for substantial and not merely nominal damages. Duckworth v. John-

ston, 4 H. & N. 653. The burden of proof is, of course, upon the plaintiffs, who must shew by reasonable evidence that the continuance of life had either an immediate or a future value, financially, to him.

There can be no recovery for pain or suffering or other so-called sentimental damages—the basis being in every case purely financial loss, actual or expected.

The deceased young man had not been paying his parents, for whose benefit the action was brought, anything out of his wages. There is nothing, therefore, here of a basis founded upon the past to go by. And the case is, therefore, narrowed to a consideration of what, from all the circumstances, might reasonably be inferred as to the financial ability and the probable conduct of the deceased towards his parents in the future if he had lived. . . .

The father, residing in England, is aged fifty-eight years, and the mother about four years younger. The father is a commercial traveller, earning about $1,500 per annum, and in no present need of assistance, but he will be obliged, so he says, according to the rules of his employers, to retire at the age of sixty years. He has not been able to make savings. He has four other children, namely, three sons, all doing for themselves, and a daughter, at home. The sons, including Cecil, received a good and rather expensive education, and the father in his evidence says that there was an understanding with them, Cecil included, that they would assist their parents in their old age, in consideration of the large sums which had been expended on their education. . . . When Cecil left home, he was about sixteen years of age. When he died he was not quite twenty-one. . . . He entered the service of the defendants about a month before his death. . . . He apparently kept up a correspondence with his mother, writing for the first two years about every second week, but lately not so often. . . .

Upon the whole, while I regard the sum awarded by the jury as quite out of the question, I find myself, after much consideration, and not without some doubt, unable to say, having regard to the decisions, that the case could properly have been withdrawn from the jury. There were, to begin with, the good terms on which he stood with his parents, and especially with his mother, with whom he corresponded, his improved prospects in his new employment, and the promise. . . . to make some recoupment in consideration of the expense of his education, which, while not imposing a legal obligation, might well have been regarded by a man of his disposition as creating a moral

obligation, which he would have felt bound to implement, so far as he was able, when the time came, as it probably would upon his father's retirement. In the meantime the young man's earning capacity would with experience have increased, although, on the other hand, so would the imminence of the time at which he would probably have married, and thereby reduced, if not destroyed, his ability further to help his parents. These, however, were matters for the consideration of the jury, who, taking into account all the uncertainties and contingencies of the case, were to say how much, if anything, might reasonably, under all the circumstances of the case, have been expected by the parents from the bounty of their son, if the life had continued. But to put the amount at $1,800, or three years' wages, the extreme sum recoverable, in any circumstances, under the Act, seems to be grossly excessive and unwarranted. Indeed, one would be inclined to think from the result that the jury totally misapprehended what they had to try, which was not the value of the life under the statute, but what, if any, pecuniary interest the parents had in the life, which at the best must have been a comparatively small sum.

In Stephens v. Toronto R. W. Co., 11 O. L. R. 19, a case which in its facts was stronger for the plaintiff, this Court reduced a verdict of $2,100 to $500, which was accepted rather than the alternative of a new trial. And in Atchison v. Grand Trunk R. W. Co., 1 O. L. R. 168, the jury in the case of a brakesman awarded only $500, which was complained of as excessive, but upheld in this Court. For other cases in which the Court has interfered with the verdicts of juries in cases of this nature, see Renwick v. Galt, Preston and Hespeler Street R. W. Co., 11 O. L. R. 158, at p. 168; and the list might be greatly extended, for the question is one constantly arising.

There should, therefore, in my opinion, be a new assessment, unless the parties consent to a judgment for a smaller sum, which should not, I think, exceed the amount at which this Court arrived in the Stephens case. If such reduction is agreed upon, the appeal would, as in that case, be dismissed with costs; but, if not, the new trial would proceed, and the costs of the former trial be costs in the case, and the costs of this appeal to the defendants in any event.

MOSS, C.J.O., gave reasons in writing for the same conclusion.

MACLAREN, J.A., also concurred.

NOVEMBER 12TH, 1910.

*REX v. COOTE.

Liquor License Act—Conviction for Second Offence in Absence of Defendant—Inquiry as to First Offence—Construction of sec. 101—R. S. O. 1897 ch. 90, sec. 2—Criminal Code, sec. 718.

Appeal by the Crown, under sec. 121 of the Liquor License Act, from the order of MIDDLETON, J., in Chambers, ante 6, upon the return to a habeas corpus and certiorari in aid, discharging the defendant from custody under a warrant of commitment pursuant to a conviction for a second offence against the Act.

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

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

J. Haverson, K.C., for the defendant.

MACLAREN, J.A.:—The proceedings in question on this appeal took place under R. S. O. 1897 ch. 90, sec. 2, as the new statute, 10 Edw. VII. ch. 37, had not come into force at the time of the trial. This section (2 of ch. 90) provides that "where a penalty or punishment is imposed under the authority of any statute of the province of Ontario . . . and is recoverable before a Justice of the Peace . . . the like proceedings and no other shall and may be had . . . for hearing the complaint and for the conduct of the Court . . . as under the statutes of the Dominion of Canada then in force, might be had and should be performed, if the penalty or punishment had been imposed by a statute of Canada, unless in any Act hereafter passed imposing the penalty or punishment it is otherwise declared."

The Dominion statute in force was sec. 718 of the Criminal Code, which provides that where, as here, the accused does not appear at the time appointed by the summons, "the Justice may proceed ex parte to hear and determine the case in the absence of the defendant, as fully and effectually, to all intents and purposes, as if the defendant had personally appeared," or, if he thinks fit, may issue his warrant and adjourn the hearing.

* This case will be reported in the Ontario Law Reports.

In this case the defendant was accused of a second offence against the Liquor License Act. Section 101 of that Act provides that in such a case the Justice shall in the first instance inquire concerning the subsequent offence only, and, if the accused be found guilty thereof, he shall then be asked whether he was so previously convicted, but, if he stands mute of malice, or does not answer directly to such question, the Justice shall then inquire concerning the previous conviction or convictions.

In my opinion, the two statutes should be read together, and I think effect can be given to both. The second on its face provides only for the case where the accused is present; the Criminal Code expressly provides that, if the accused is not present after being duly summoned, the Justice may proceed with the case as fully and effectually, to all intents and purposes, as if the defendant had personally appeared, or, if he thinks fit, he may issue his warrant and bring the accused before him.

In this case the magistrate exercised the discretion which the statute gave him, and I do not think we have any right to review his action.

The provincial Act provides that the Dominion statute is to apply unless in any Act hereafter passed it is otherwise declared. Here we are not dealing with an Act "hereafter passed," nor is it "otherwise declared," so we have neither of the conditions required by the Act.

The case of Rex v. Nurse, 7 O. L. R. 418, relied on, is, in my opinion, not in point. There the conviction was quashed because the magistrate took evidence as to previous convictions before deciding whether the subsequent offence was proved or not, and there was then in the section a clause prohibiting such a course, as it stated that it was only after the accused had been found guilty of the subsequent offence "and not before" that the inquiry as to previous convictions should be entered upon. The words "and not before" have since that decision been struck out by the legislature. The same remark applies to the Nova Scotia case, Regina v. Salter, 20 N. S. R. 206. In both these cases the magistrates adopted a course expressly prohibited by the statutes there construed; in the statutes applicable to this case there is no such prohibition; and, in my opinion, the procedure is quite in harmony with them.

Further, if one looks at the object of the provision in question, this view is very much strengthened. Its object may be said to be twofold; first, to provide against the premature admission of evidence that would be illegal at that stage and would be certain to prejudice the accused; second, to ask the accused at

the proper stage to plead to this second charge, and, if he confessed, to obviate the necessity of producing evidence to support it.

The plan adopted in this case is not, in my opinion, open to any objection, and is quite in harmony with both the letter and the spirit of the law.

I would allow the appeal.

MOSS, C.J.O., MEREDITH and MAGEE, JJ.A., each gave reasons in writing for the same conclusion.

GARROW, J.A., also concurred.

NOVEMBER 12TH, 1910.

McKNIGHT v. ROBERTSON.

Contract—Construction — Surrounding Circumstances — Prior Contract—Enforcement of Obligation to Furnish Money—Discretion of Person Undertaking to Furnish—"During his Present Illness"—Limitation of Period—Duration of Litigation—Release.

Appeal by the defendant from the judgment of a Divisional Court, 1 O. W. N. 469, 679, allowing in part the plaintiff's appeal from the judgment of LATCHFORD, J., at the trial, and directing judgment to be entered for the plaintiff.

The plaintiff, by occupation a cook, had prior to May, 1907, a claim against the "Columbus" in respect of certain mineral lands, which, from ill-health and lack of means, he was unable to establish by a necessary action. The plaintiff was so ill as to be confined to bed much of the time, suffering from two apparent causes, one chronic and probably incurable—the other, and probably the more painful and for the time the more urgent and disabling of the two, an inflammatory condition of the bladder, which was regarded as temporary and curable.

The defendant, a business man, who chanced to meet the plaintiff at the hotel in Cobalt, offered to help him with the litigation for a share in the claim, and an agreement was then prepared and executed, dated the 22nd May, 1907, whereby the defendant undertook to prosecute the action against the "Columbus," supplying the necessary funds, and to take care of the plaintiff until the litigation was over, in consideration of receiving two-thirds of the claim.

Under this agreement the defendant caused the plaintiff to be removed from Cobalt to Hamilton, and to be there placed under competent medical attendance. A new agreement, dated the 31st May, 1907, was then prepared by the solicitors for the defendant and executed by both parties, in which, after reciting that the plaintiff "is sick and in need of funds and has applied to Robertson therefor," that he was the owner of certain mineral rights, and had agreed to assign to the defendant a two-thirds interest therein, it was agreed that, in consideration of $1 and of the defendant agreeing to furnish to the plaintiff from time to time such sums of money as he, the defendant, might think reasonable for the care of the plaintiff "during his present illness," the plaintiff granted, assigned, transferred, and set over unto the defendant a two-thirds interest in the mineral rights. No reference was made in the second agreement to the first, and no explanation was given in the evidence of any reason for its execution.

The action for the recovery of the plaintiff's rights was prosecuted by the defendant, and resulted in a settlement by which the plaintiff was to receive 25,000 shares of "Columbus" stock. The settlement was effected in November, 1907, and the shares were issued in December. Of these it was admitted that the defendant was entitled to 16,666 and the plaintiff to 8,334. The defendant had 8,000 shares transferred to the plaintiff, and retained 334, claiming a lien for subsequent advances.

This action was brought for the 334 shares and for the recovery of $797.05 and interest for expenses of the plaintiff "during his present illness."

LATCHFORD, J., the trial Judge, was of opinion that the liability intended by both parties to be created by the two agreements was one limited to the period at which the action against the "Columbus" would be concluded; and he dismissed this action without costs, except as to the 334 shares, which he ordered to be delivered to the plaintiff.

The plaintiff appealed to a Divisional Court, which held that the second agreement should be regarded as having been substituted for the first, that the words "present illness" included illness of a permanent as well as of a temporary character, and that the defendant was bound to pay something towards the plaintiff's support, and had broken the agreement by declining, after the Columbus litigation was at an end, to continue to make payment; and the Court directed a reference to the Master to ascertain what sums should have been paid "as reasonable" for the

care of the plaintiff during the period mentioned in the statement of claim.

The defendant appealed to the Court of Appeal.

The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, JJ.A., and MIDDLETON, J.

G. Lynch-Staunton, K.C., for the defendant.

E. Meek, K.C., for the plaintiff.

GARROW, J.A.:— . . . It appears to me, with respect, that the view expressed by Latchford, J., at the trial, was the correct one. There is nothing in the evidence to shew clearly that the second agreement was intended to supersede or take the place in all respects of the first; nor is it, in my opinion, essential to reach a definite conclusion one way or the other upon that point. The words of difficulty are all in the second writing, upon which really the plaintiff's whole case rests, and are these—"and of the said Robertson agreeing to furnish to McKnight from time to time such sums of money as he, the said Robertson, may think reasonable for the care of the said McKnight during his present illness." Upon this language two questions arise: (1) the sufficiency in law of the defendant's promise to supply such sums of money as he may think reasonable; and (2) was the defendant's liability in any event to extend beyond the end of the Columbus litigation?

Dealing first with (2) . . . we are entitled upon the question of construction to look at the surrounding circumstances, which would, of course, include the making of the first writing and its contents—and that, I think, whether it was wholly superseded by the second or not. And in it we find the defendant's agreement in this respect expressed in these words, "to look after the personal interests and needs of the said Alfred McKnight during the period in which this agreement shall remain in force." And in another part of that agreement its duration is expressly limited to a period of ninety days or until the Columbus litigation is at an end. So it is beyond question that the plaintiff's claim would have been entirely baseless under the first agreement, which the defendant, it is admitted, duly performed. We have next the undisputed circumstances that no new bargain was made of which the second agreement is the result. Why it was prepared at all, no one has explained, but probably the idea was to head off an abvious objection to the first on the ground of champerty. The plaintiff was suffering from illnesses, the one

chiefly troubling him being of a temporary character—the other, paralysis, incurable, or so regarded. The main purpose of the real agreement between the parties, no one can doubt, was to secure vigorous prosecution of the Columbus claim. If the action resulted successfully, the defendant would get back his advances in the shape of a share in the property; while the plaintiff, a man otherwise entirely without means, would get his stipulated share. On the other hand, if the litigation failed, the defendant would be out his advances, and the plaintiff no worse off than before. But in the latter case it is surely absurd to suppose that, in addition, the parties could have intended that the defendant should be saddled with an obligation to continue to maintain the plaintiff as long as he lived, if his illness so long continued, which, at least in the case of the paralysis, seemed probable. And yet the contention of the plaintiff that the liability of the defendant was not intended to be limited except by the duration of the illness would necessarily include the case of failure as well as of success in the Columbus litigation. . . .

[Reference for rules of construction to Caledonian R. W. Co. v. North British R. W. Co., 6 App. Cas. at p. 131; Pollock on Contracts, 7th ed. (1902), p. 255; Leake on Contracts, 5th ed. (1906), p. 146; Ford v. Beach, 11 Q. B. 866.]

And, having regard to these rules and to all the circumstances of the case, I have no doubt at all that, to carry out the real intention and agreement of the parties, the words "during his present illness," in the second agreement, were intended to be and should be regarded as limited to the period during which the Columbus litigation was in progress, just as the similar phrasing in the first agreement was limited.

This, of course, makes it unnecessary to enter at large into (1). But, if I had not reached the conclusion I have above expressed upon the other point, I should certainly have had some difficulty in agreeing with the Divisional Court that it is a fair or permissible construction or enforcement of the agreement to substitute for the defendant's discretion that of the Master. See the cases discussed in Loftus v. Roberts, 18 Times L. R. 532.

For these reasons, I think the appeal should be allowed and the judgment of Latchford, J., restored, with costs.

MEREDITH, J.A.:— . . . My conclusion upon the whole case is, that the plaintiff failed to shew that, upon the proper construction of the documents, he is entitled to any relief extending beyond the time of his recovery from his curable ailment; a conclusion which, upon the weight of the evidence, ac-

cords with that which the parties understood was, and acted upon as, the character and extent of their agreement.

In this view of the case, it is unnecessary to consider whether the contract in this respect, being limited to such sums of money as the defendant might think reasonable, is one enforceable at law.

I would allow the appeal, and restore the judgment directed to be entered at the trial.

MOSS, C.J.O., and MACLAREN, J.A., agreed in the result.

MIDDLETON, J., dissented, for reasons stated in writing.

He was of opinion (1) that there was an agreement capable of being enforced—a contract to pay something, the exact amount being left to the defendant's determination; the defendant had not the right to refuse to pay any sum at all, and, upon his taking this attitude, the duty of the Court is to ascertain how much the defendant, acting in good faith, ought to have paid for this purpose; referring to Loftus v. Roberts, 18 Times L. R. 532; Broome v. Speake, [1903] 1 Ch. 586, 599, [1904] A. C. 342; Bryant v. Flight, 5 M. & W. 114.

He was further of opinion (2) that the defendant's liability was not limited to the duration of the minor malady; and (3) that the plaintiff did not release the defendant.

He was in favour of dismissing the appeal with costs, with a variation in the terms of the judgment below directing a reference.

HIGH COURT OF JUSTICE.

BOYD, C. NOVEMBER 11TH, 1910.

RE STANDARD MUTUAL FIRE INSURANCE CO.

McDONALD & HENRY'S CASE.

Fire Insurance—Winding-up of Mutual Insurance Company — Contributories—Mutual Policy—Liability on Premium Note—Refusal of Assured to Pay Extra Rate for Increased Hazard—Refusal of Company to Continue Insurance unless Paid — Cancellation of Policy—Correspondence—Estoppel—Statutory Conditions 3, 19—Notice.

Appeal by McDonald & Henry, a mercantile firm, from an order of an Official Referee, in a winding-up, placing their names on the list of contributories.

J. J. Coughlin, for the appellants.

E. P. Brown, for the liquidator.

BOYD, C.:—When the appellants were called on by the liquidators to pay up $160, balance due on premium note representing insurance from the 31st January, 1908, they wrote that the policy had not been in force since December, 1907; that it was then cancelled by the company refusing to carry the insurance because of the installation of a gasoline engine; that they had insured their building in another company, and notified the company of what had been done. They referred to the correspondence in verification of this position. The correspondence, taking the language used by the company, fully substantiates this defence. This I may briefly summarise, premising that the policy was for $5,000 for three years, at a total cost of $200, and that the assured had paid $40, covering the first year of the policy, which was dated the 31st January, 1907; and that one Ward was the local agent of the company at Stratford, with whom the correspondence with the company was had, and by him communicated to the assured. . . .

[Summary of correspondence, etc., between the 8th July, 1907, and the 24th February, 1908.]

The liquidation order was made on the 22nd March, 1909.

There was but little evidence given before the Official Referee. . . . From that it appears that the appellants reinsured on the 14th January, 1908—the engine being then installed—and that Ward cancelled it then. (This is in McDonald's evidence.) Ward was examined also, who says he had an interview at the head office with the manager, White; will not say whether he cancelled or agreed to cancel the policy, but understood he would report favourably. . . . Nothing done to close of year, when renewal receipt came, which he returned, and told the company that the firm had insured in another company.

White is called, and says he did not agree to cancel policy. . . .

I have no doubt that the transaction, as thus detailed in the correspondence, clearly indicates that the parties joined issue as to the extra rate; that it was insisted on by the company as a condition essential to the continuance of the insurance; and that the assured refused to pay it, and were told by Ward that the effect of their refusal, coupled with the installation of the gasoline plant, was tantamount to a release or cancellation of the policy.

In the circumstances, I feel no difficulty in holding that the company are estopped from now saying that the policy and the

liability for the unearned premiums continued in force; that they are estopped from setting up that there was no actual cancellation by the official act of the company. There is no statutory requirement as to the shape in which a cancellation shall be made, and it would be a gross injustice to allow the appellants to be put on as contributories for $160.

The 3rd statutory condition indorsed on the policy is that a change material to the risk shall void the policy—that the company, when notified, may cancel the policy and return the premium for the unexpired period, or may demand an additional premium, which the assured is to pay if he desire the continuance of the policy, and, if he neglect to pay, the policy shall no longer be in force. And the 19th condition indorsed is that the insurance may be terminated by the company giving notice to that effect. What took place here was tantamount to that notice to terminate; and, apart from that, the policy was no longer in force by the refusal of the company to continue the insurance unless the extra rate was paid.

The judgment of the Official Referee errs as to the facts when he says the change material to the risk did not take place till February, 1908, and that it was without notice to the company. The judgment also appears to omit entirely the fact of and effect of the correspondence between the 7th October and the 29th November, in which the company treat the policy as terminated and withdraw the proffer of rebate.

The judgment should be reversed with costs.

Technically, perhaps, the name of the insured should not be removed from the list of contributories; for, if any losses or claims accrued during the year in which they were insured, ending January, 1908, which are yet outstanding against the company, the appellants may have to answer for their share on the footing of mutual assessments for that period. But, as I understand, there was no such claims: see R. S. O. 1897 ch. 203, sec. 111.

SUTHERLAND, J. NOVEMBER 11TH, 1910.

MORTON v. ANGLO-AMERICAN INSURANCE CO.

Fire Insurance—Proof of Loss—Sufficiency—Provision for Arbitration—Waiver—Gasoline Stored or Kept on Premises — Change in Occupation of Premises Material to Risk—Absence of Knowledge by Insurers—Knowledge of Local Agent.

Action upon a fire insurance policy.

H. Cassels, K.C., for the plaintiffs.

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

SUTHERLAND, J.:—George Morton, one of the plaintiffs, and his brother John were the owners of a property in the city of Fort William, No. 200 Simpson street. John Morton was a real estate and insurance agent, and was the local agent of the defendant company there. George assisted him, particularly in the fire insurance portion of the business. They occupied in connection with the business a small room in one corner of the building in question, and the main portion of it was leased for the purposes of a pool-room and bowling-alley to George Morton and one Murphy, his co-plaintiff in this action.

On the 10th March, 1908, the plaintiffs applied to the defendants in writing for an insurance of $1,100 on one billiard-table and appliances, four pool-tables and appliances, and a bowling-alley, which were then in the premises. The application was prepared by George Morton, and signed by him, "George Morton, agent," and in it he requested that the loss, if any, should be payable to George Morton and H. Murphy. He also filled in the agent's report on the back, and signed it "John Morton, per G. M." A rough diagram on the back of the application shewed the premises to consist of one large room. A policy in the defendant company, No. 160754, dated the 10th March, 1908, was issued in pursuance of this application, for $1,100, covering the property mentioned, and with loss, if any, payable to George Morton and H. Murphy.

On the 24th June, 1908, the plaintiffs sold out their pool and bowling business to one J. E. Terry, by an agreement in writing, which stated that they retained the ownership of the property until payment of the consideration-money should be made in full. At this time the policy . . was assigned by the plaintiffs to Terry. There is attached to the policy a memorandum to the following effect: "Notice received and accepted that this policy has been transferred to Joseph E. Terry, of Fort William, Ontario; loss, if any, is now made payable to him as his interest may appear."

One of the pool-tables being exchanged for a new one, an additional $300 of insurance was taken out. . . . A policy in the defendant company, No. 163697, dated the 3rd July, 1908, for $300, was issued in the name of Joseph E. Terry, and with loss, if any, payable to George Morton and H. Murphy, as their interest may appear. . . .

On or about the 24th June, 1908, the plaintiffs went out of possession . . . and under a lease in writing John Morton and the plaintiff George Morton leased the premises to Terry . . . "expressly reserving and excepting that portion now occupied by the lessors as a real estate office, for one and a half years from the 1st July, 1908."

After . . a couple of months, it appears that, to the knowledge of . . George Morton, Terry sold out the property which he had purchased, and which was covered by the insurance, to one Renton. . . . The plaintiff George Morton and his brother John also moved out of the building, and . . . the small corner room that had previously been occupied by them was leased by them to a man named Morris for the purposes of a restaurant. Morris sold out this restaurant later to a man named Prendergast, and he again to one named Gordon. The defendants were never notified in any way of the sale by Terry to Renton, nor that a part of the premises in which the insured property was contained had been converted into a restaurant. . . . The change of occupancy from a pool or billiard room or a real estate and insurance agent's office to a restaurant was, as I think and find, one which was important and material to the risk in connection with the policies, and it was the duty of the plaintiffs to notify the defendants of the change. They did not do this.

In the restaurant a fire occurred on the night of the 25th January, 1909, with the result that the greater part of the property insured under the two policies was destroyed. The plaintiffs thereupon made claim for a loss of $1,322. In putting in the proofs of claim, the plaintiff George Morton made an allowance or deduction of $200 for part of the insured goods saved from the fire. . . .

The defendants . . . say as to the first policy that the loss is payable to Joseph E. Terry, and that the plaintiffs have no cause of action.

By statutory condition No. 17, the loss is not payable until sixty days after completion of the proofs of loss, and the defendants say that the said proofs of loss are not yet complete, and, even if complete, the period of sixty days had not expired at the date of the issue of the writ commencing this action, and has not yet expired. The plaintiffs say . . . that after the fire they applied to the defendants to obtain the necessary papers on which to make proof of claim, but the defendants neglected and refused to furnish these, and that consequently they had to prepare and send in and did prepare and send in on or about the 24th March, 1909, the best proofs possible for them to furnish in the circum-

stances, and they ask to be relieved, and, furthermore, they say that no objections were made by the defendants on this ground.

I think the plaintiffs have done all it was possible for them to do, in the circumstances, to furnish the defendants with proofs of the loss.

The defendants also plead that in and by the policies, and statutory condition No. 16 indorsed thereon, it is provided that if any difference arises in the value of the property . . . such value and amount . . . shall . . . be submitted to arbitration. The plaintiffs . . . say that the defendants totally repudiated all liability . . . and that the assured, having asked for an appraisal, and having named appraisers, ought, in the circumstances, to be relieved from the performance of this condition.

I should be inclined to agree with the plaintiffs as to this contention. . . .

The defendants laid much stress at the trial upon the defence that gasoline was brought upon and stored or kept in the building containing the property insured, or some portion thereof, without the knowledge or permission of the defendants, contrary to the terms of the policies, and the conditions thereof, and that thereby the defendants are released from liability for the plaintiffs' loss.

[Detail of evidence as to gasoline on premises.] .

Upon this evidence, and considering that I was bound by the decision of the Supreme Court of Canada in Equity Fire Insurance Co. v. Thompson, 41 S. C. R. 491, I had come to the conclusion that it was impossible for me to do other than find that gasoline was brought upon and stored in the building containing the property insured, without the knowledge or permission of the defendants, and that the latter were entitled to succeed in the action on that score alone. Before giving my judgment, however, the above decision was reversed by the Privy Council (26 Times L. R. 616), and on this branch of the case I should, therefore, now be obliged to find for the plaintiffs.

Having, however, also come to the conclusion that a change material to the risk, within the control and knowledge of the plaintiffs, occurred when that portion of the premises which had been used as a real estate and insurance office was leased as a restaurant, without notice having been given by them to the defendants, I think the latter are entitled to succeed upon this ground: Guerin v. Manchester Fire Assurance Co., 29 S. C. R. 139.

George Morton, one of the plaintiffs and part owner of the building, was, with his brother and co-owner, John Morton, responsible for the bringing about of this change by leasing the corner room for restaurant purposes. The carrying on of the business of a restaurant usually and necessarily, I think, requires a greater and more varied and dangerous use of fuel and fire than would be required in the case of a real estate and insurance business or of a pool-room. This would be particularly true in the case of a restaurant conducted in the careless way, as to fire and the use of gasoline, which is shewn to have existed here, and to the knowledge of the plaintiff George Morton and his brother. It was this change which led to the fire in question, as it originated in the restaurant, and occasioned the loss in respect of which this action has been brought.

I do not think that the knowledge of John Morton, their local agent, of the change, which I have found to be one material to the risk, can, in the circumstances, be imputed to the defendants. He did not communicate his knowledge to them, as it was his duty to do. He, no doubt, purposely refrained from doing so, on account of the interest of his brother and himself in the building, and the interest he thought his brother had in the chattel property and its insurance under the policies in question.

Action dismissed with costs.

BRITTON, J. NOVEMBER 12TH, 1910.

McCORMICK v. FRASER.

Lunatic—Issue as to Lunacy—Inquiry as to Mental Condition—Evidence — Presumption — Senile Dementia — Finding in Favour of Alleged Lunatic—Costs.

By order of SUTHERLAND, J., in Re Fraser, 1 O. W. N. 1105, the trial of an issue was ordered to determine whether "Michael Fraser is, at the time of such inquiry, of unsound mind and incapable of managing himself or his affairs." The order was affirmed by a Divisional Court, ante 26.

The issue was tried before BRITTON, J., without a jury, at Barrie and Toronto; and the learned Judge afterwards visited Michael Fraser and talked with him at his home, Fraser not having been present at the trial. This was with the consent of counsel, and two of the counsel accompanied the learned Judge.

The proceedings in Fraser v. Robertson, an action brought by Catherine McCormick, as next friend, in the name of Michael Fraser, against his wife and her father, are noted in 1 O. W. N. 800, 843, 894.

Catherine McCormick was the applicant in Re Fraser, and the plaintiff in the issue.

A. E. H. Creswicke, K.C., and A. McLean Macdonell, K.C., for the plaintiff.

J. King, K.C., and F. W. Grant, for the defendant.

BRITTON, J.:—The defendant, Michael Fraser, is a retired farmer and resides at the town of Midland. He is the sole survivor of seven brothers. The father and mother of the defendants are both dead, and so are all the brothers and the only sister of the defendant. The defendant is over eighty years of age. During the summer of 1909 Hannah M. O. Robertson, who resided in Dundas, Ontario, visited at or near Midland, and an acquaintance was formed between her and the defendant, which resulted, as it is said, in a contract of marriage, for which marriage the 30th September, 1909, was appointed. A marriage on that day was prevented by persons who shortly before that date had assumed control over the defendant and his house. One of the persons who acted in preventing the marriage was Robert Irwin, who was acting executor and co-executor with the defendant of the will of John Fraser, deceased, who was the brother of the defendant, and who died on the 31st August, 1909. These persons in control of the defendant and his house remained there, one or more of them, more or less of the time, until the 13th January, 1910, when, with the assistance of others, Hannah M. O. Robertson and her father entered the defendant's house and the marriage ceremony was performed. Hannah M. O. Robertson having become Mrs. Fraser, took possession and assumed control, and to all appearance, and according to the evidence, she and the defendant have lived and now live happily together as man and wife. . . .

[The learned Judge then referred to the proceedings in Fraser v. Robertson, which was an action to have the marriage ceremony declared a nullity.]

The grounds on which a declaration of lunacy is asked are that Fraser is a "senile dement," or, if not suffering with senile dementia, which is a disease, he is in that stage of senility, normal senility, if you will, as to be incapable of managing himself or his affairs.

At the outset I may say that I should think a case made out against Fraser's sanity under the statute, if it clearly appeared in reference to his person and property that he is unable to instruct others or to act himself with any proper and provident management; if it is made clear that he is under that imbecility of mind that would permit of his being robbed by ony one and every one who came in contact with him, bad enough to do it, he would, although not strictly insane, need protection as much as in the case of actual insanity. See Ridgeway v. Darwin, 8 Ves. W. 65. . . .

[Reference to Re Milne, 11 Gr. 153, per Van Koughnet, C.]

The presumption is in favour of sanity. The parties alleging insanity must prove it, and, in using the word "insanity," I do so, as I have endeavoured to qualify its meaning, for the purpose of determining this issue.

Evidence of hereditary taint is competent to corroborate direct proof. It was alleged that the father of Michael was insane. . . . The facts . . . do not at all satisfy me that the father was insane. . . .

It is beyond question that three brothers of Michael, namely, Walter, Randolph, and Fred, were more or less insane; James, Samuel, and John were apparently sane. . . . There is, however, the family taint against Michael, and that is one of many facts to be considered.

The evidence as to Michael himself was in proof of acts and conduct and sayings said to be inconsistent with his character and his previous habits. . . .

[The learned Judge then set out the evidence as to eleven different acts or sayings or sets of acts and sayings alleged to shew insanity, and examined them. He referred to Re Milne, 11 Gr. 153; Greenwood v. Greenwood, there referred to; Shook v. Watts, 1 Beav. 105; Freer v. Peacocke, 11 Jur. 250; Ditchburn v. Fearn, 6 Jur. 201. He then referred to the medical testimony; and then detailed his (the learned Judge's) conversation with the defendant at his home.]

It was not argued that Michael was labouring under disease of the mind to such an extent as to render him incapable of appreciating the nature and quality of his acts, within the meaning of the Criminal Code—but that is not the test to be applied here.

It is in evidence that many of the symptoms generally indicative of senile dementia may exist without the disease; and it may be that Michael Fraser is in that condition, both as to his age and ailments, which may end in senile dementia, but I am dealing with him as he is now, and I find that he is not, at the time of

this inquiry, of unsound mind or incapable of managing himself or his own affairs.

By the order, the costs were reserved to be disposed of by the trial Judge.

In view of sec. 35 of the Lunacy Act, I reserve the question of costs, and the parties may speak to me, if they desire to do so, in my Chambers.

DIVISIONAL COURT. NOVEMBER 12TH, 1910.

*BOURGON v. TOWNSHIP OF CUMBERLAND.

Municipal Corporations — By-law Limiting Number of Liquor Licenses in Township — Time for Going into Operation — Coming License Year—Restriction to Taverns—Liquor License Act, sec. 20—Former By-law not in Terms Repealed—Action for Declaration of Invalidity of By-law—Effect of Declaration, if Made.

Appeal by the plaintiff from the judgment of BOYD, C., 1 O. W. N. 1012, dismissing the action, which was brought for a declaration that a certain by-law of the defendants limiting the number of licenses in the township was void and of no effect.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

A. R. Clute, for the plaintiff.

A. E. Fripp, K.C., for the defendants.

RIDDELL, J.:—In the township of Cumberland there were four tavern licenses and no shop licenses: on the 11th January, 1909, the council passed a by-law in these terms: "The Municipal Corporation of the Township of Cumberland in council assembled this 11th day of January, 1909, enacts that the number of licenses for the sale of intoxicating liquors be limited to three." There is no pretence that the council had in mind any other than tavern licenses.

The plaintiff had been one of the four license-holders, and he applied for a license in 1909, but the commissioners did not renew his license, allowing him, however, till August, 1909, to dispose of his stock. . . .

* This case will be reported in the Ontario Law Reports.

As the only result of this action (if the result should be favourable to the plaintiff) would be a declaration that the by-law is invalid, and as, before the time came for the issue of another set of licenses, a perfect by-law could be passed by the council, I do not think we should in any case allow the appeal and make such declaration.

But, on the merits, the judgment appealed from is right. R. S. O. 1897 ch. 245, sec. 20, reads: "The council . . may by by-law . . limit the number of tavern licenses to be issued . . for the then ensuing license year beginning on the 1st day of May or for any future license year until such by-law is altered or repealed, provided such limit is within the limit imposed by this Act." The words "for any future license year" admit of two interpretations. They may mean "for any year future as regards the date of the by-law;" or they may mean "for any year future as regards 'the then ensuing license year' mentioned in the section." . . . That meaning which will not result in absurdity or inconvenience is to be preferred. If the latter were the true interpretation, the result would be that a council elected for 1909 would, without saying a word about the number of licenses for that year, be allowed to fix the number of licenses for the years 1910 and 1920. The former interpretation allows the council, if they are dealing with their own year, to deal at the same time with all succeeding years, without depriving the future councils of their power to deal with their years by altering or repealing the by-law.

The interpretation put upon the section by Mr. Justice Robertson in the one sense in Re Wilson and Town of Ingersoll, 25 O. R. 439, at p. 443, is authoritatively disapproved by the Court of Appeal in Re Brewer and City of Toronto, 19 O. L. R. 411, at pp. 416, 417. . . .

The result is inevitable—if a by-law contains words whose effect is to cause the by-law to come to an end at the termination of the then succeeding license year, it will so come to an end: but, if not, the by-law is general, and applies to all years until altered or repealed.

But in any case any limiting by-law must have effect in the then succeeding license year. A limiting by-law, therefore, as it must (if it become effectual at all) come into operation at the beginning of the then ensuing license year, does not need to state that fact—there is no need of specifying what the law itself specifies. . . .

The present by-law, then, is a good general or standing by-law so far as regards this objection.

The objection that the kind of license is not specified, and, for all that appears on the face of the by-law, it may apply to shops as well as taverns, is equally untenable.. . . .

[Reference to Walker v. Stretton, 12 Times L. R. 363; Regina v. Saddlers' Co., 32 L. J. Q. B. 337, 360.]

It is possible to read the by-law as applying only to tavern licenses; and I am of opinion that that should be done.

The conclusion arrived at does not conflict with anything decided in Re Hassard and City of Toronto, 16 O. L. R. 500. . . .

The objection that the former by-law was not repealed is answered by "the well-known principle of law that if in Act of Parliament is passed containing clauses which are repugnant to and inconsistent with prior legislation, the legislature cannot have two minds at one and the same time, and therefore the subsequent mind must alter the first mind:" per Field, J., in Brown v. Great Western R. W. Co., 9 Q. B. D. at p. 753. Of course this principle is as old as the law itself (Co. Litt. 112); and it applies to inferior legislatures as well as to the Imperial Parliament, and not less so to municipal councils than any other.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

BOYD, C. NOVEMBER 14TH, 1910.

RE MOUNTAIN.

Will—Construction—Secured Debts—Postponement of Payment—Payment out of Accumulated Income—Rights of Creditors—Exoneration of Property Charged — Charitable Trust in Respect of Lands Charged—Transfer after Payment of Charges—Condition of Gift Taking Effect — Creation of Bishopric within Long Period — Substitution of Another Charitable Object in Event of Condition not being Fulfilled — Rules against Remoteness—Trust Subject to be Divested—Suspended Gift—Valid Charitable Bequests—General Intention—Incomplete Detail—Restraint upon Alienation—Invalidity.

Motion by the executors of the will of the Reverend Jacob J. S. Mountain, deceased, for an order declaring the true construction of the will.

R. C. Smith, K.C., for the executors.

Glyn Osler, for certain beneficiaries.

J. A. Macintosh, for certain other beneficiaries.

Travis Lewis, K.C., for the Synod of the Diocese of Ottawa.

D. C. Ross, for Bishop's College, Lennoxville.

BOYD, C.:—By carefully spelling out this complicated will, it appears that the testator provided for the payment of his obligations by a double process, and for that purpose divided his debts into two classes. (1) what he calls his "just debts;" and (2) debts secured by him on land or personalty.

He first provides for the payment of his "just debts" and funeral expenses as soon as possible after his death, and then makes the exception that the payment of debts—(a) secured on real estate or (b) those for which his bank stock has been transferred—should be postponed till they have been paid off from the income of his estate.

The distinction is again marked when he transfers all his property to his executors; this is so transferred "after payment of his just debts and funeral expenses," to be held by them in trust. He then, in the 11th paragraph, provides for the transfer of lands in trust to the Synod of the Diocese of Ottawa, but this is to be read in connection with the 19th paragraph, by which it is provided that this transfer is to be made as soon as "the obligations of my personal and real estate have been discharged," and later in the same paragraph he says: "After all existing claims on my estate, real and personal, as hereinbefore described, shall have been satisfied, then the accumulation of rents shall be safely invested," etc.

All these indicate and direct a gathering in and application of income from the whole estate, vested already in the executors, in order thereout to pay the secured debts, which are therefore not to be paid in ordinary course out of all available assets forthwith, but to be paid from time to time as the income permits till all are finally satisfied.

It is uncertain rather in what category the obligation to Windsor University is. By the 19th paragraph of the will it is classed with "the obligations on his real and personal estate." But the codicil of the 6th April, 1903, would rather go to indicate a payment at one time. No information has been obtained from the University as to the nature of the claim which may exist against the testator, and I can add nothing to what I have said. My judgment is that the payment of these secured claims is to be

made out of accruing income of the estate, by the executors, assuming, that is, that the creditors are willing to wait. But, if the claim is enforced by the creditors, I do not see that the next of kin have any equity or status to require the executors to postpone dealing with respect to the other trusts of the estate, for so long as it might have taken to accumulate enough to pay all these secured claims in the manner directed by the testator. The legal rights of the secured creditors would frustrate the delay contemplated by the testator, but cui bono? Surely for the advantage of the beneficiaries under the will. The testator's object in accumulating the rents is thereout to have the creditors paid, but the object of accumulation ceases when the creditors enforce payment out of the general assets in the usual course of administration. I think his intention is clear to exonerate the lands and property charged with debts from the payment of the charges by the beneficiaries. The general estate is to pay all debts sooner or later.

As soon as the obligations on the real and personal estate are satisfied, then the trust arises in respect of the lands. It was agreed during the argument that an accumulation of income would be required for about five years in order to pay all these secured debts thereout. The lands are then to be conveyed to the Synod of the Diocese of Ottawa, to be held in trust for the endowment of a Suffragan Bishopric of Cornwall. But, the will proceeds, if the accomplishment of the said Suffragan Bishopric is long delayed . . . if the appointment and consecration of such Bishop do not take place within twenty-five years after my death, then the properties intended for the endowment of the See of Cornwall shall by transfer become the property of Bishop's College, Lennoxville.

The will was made on the 25th June, 1902, and the last codicil confirming his will was made on the 29th May, 1909, and the testator died in the Isle of Wight, on the 1st May, 1910. The appointment of any Bishop for a Diocese of Cornwall has not yet taken place—though some steps have been taken towards the establishment of a Coadjutor Bishopric in that locality. But the matter has in no sense reached that point of completion required by the testator. The question is whether the trust to convey by the executors of the testator is to remain in abeyance for twenty-five years from his death, or for such lesser period as may lapse before a Coadjutor or Suffragan Bishop has been appointed and consecrated for the new See of Cornwall, or is it a void bequest by reason of infringing the rules against remoteness? Even if the conveyance to the Synod was not to be made till the Bishop was

appointed, it may be persuasively argued that the testator was aware of the condition of his estate, and contemplated that some five years would elapse from his death before the lands were to be taken out of the hands of the executors—they holding them under the trust to satisfy, first, the secured creditors, before the claim of the Synod arose. Thus, in the view of the testator, five years would be occupied in clearing the real estate, and only an interval of twenty years would be the period of suspense as to whether or not a Bishop should be appointed. That length of time would not be objectionable in point of remoteness.

But I prefer that reading of the will which would call for the conveyance of the lands to the Synod forthwith upon the satisfaction of the secured debts—by that body to be held in trust expectant upon the Episcopal appointment for the period of twenty-five years from the testator's death—with provision for the transfer of the lands by the Synod to the Lennoxville College, if no Bishop had been duly appointed before the end of the twenty-five years.

The language of the testator permits of this construction, and the Court will be slow to seek to frustrate his general charitable purpose.

All the real and personal estate is vested in the executors to hold in trust . . . for the purpose as to the lands mentioned of being "legally conveyed to the Synod of the Diocese of Ottawa, to be held in trust by said Synod for an endowment of the Bishopric of Cornwall, whenever the Bishop of Cornwall is being appointed" (sic.)

Again in paragraph 20 he adverts to this trust conferred by the earlier clause on the Synod of Ottawa, in this way: "If the appointment of such a Bishop does not take place within twenty-five years after my death, then and in such case the properties which had been intended for the endowment of the See of Cornwall shall also by transfer become the property of Bishop's College, Lennoxville." That is, as I read it, the then trustees for the Synod shall at the end of the twenty-five years (if no Bishop is appointed) transfer what they hold to the trustees of the College "in trust towards the endowment of a Professorship of Natural Science."

In brief, after payment of the secured debts, the real estate held in trust is to be conveyed in fee simple to the Synod, subject to be divested if a Bishop is not appointed in twenty-five years, in favour of the College.

Here is found an immediate gift for charitable uses, delayed as to the actual conveyance till the secured debts are paid, and

therefore vested at the death and effective in law, though the particular application of the gift may be in suspense for twenty-five years or may never take effect at all—in which contingency there is a valid transfer to another charity at the end of the twenty-five years. Chamberlayne v. Brockett, L. R. 8 Ch. 210, lays down the general principle, and there is a particular application of it in In re Swain, [1905] 1 Ch. 669, which is much in point as to the scheme of this will.

The disposition of the lands to the first charity (the Synod) being valid, the provision for the transfer in certain events to the second charity (the College) is also a valid charitable bequest: Christ's Hospital v. Grainger, 16 Sim. 83, affirmed 1 Macn. & G. 460.

The testator had fifty Hudson Bay shares of considerable value, which are held by the executors in trust for the payment of debts as aforesaid. I have considerable doubt as to their future disposal. They are mentioned specifically in connection with the endowment of the new Bishopric and the lands intended therefor. The will reads: "If the yearly income, together with any other official income from whatever source, be insufficient to produce a salary of $2,000 a year for a Suffragan Bishop . . . then, in such case, the income of my Hudson Bay shares or such part of the income as may be requisite shall be applied towards the same object:" paragraph 12. "But if it be unnecessary so to apply the income of the said Hudson Bay shares . . . then I bequeath these shares to the University of Bishop's College, and constitute such corporation my residuary legatees so far as said shares are concerned, upon the following trusts and conditions" (i.e., to found a Mission Fellowship, etc.)

I incline to think that the shares, after debts satisfied, are to be held by the Synod of the Diocese to accumulate the income for the purposes of the expected endowment of the new Bishopric, and, if and when that is established within the twenty-five years, to apply the accumulated as well as the yearly accruing income in payment of the salary named. If there is a surplus, or the Bishopric is not created within the period, then that surplus or the shares themselves are to be transferred to Bishop's College. That is to say, the final beneficiary takes in subordination to the prior beneficiary, and only so much as can be called "residue" after the just claims for the endowment are satisfied. This construction is warranted, I think, by the exceptional rule which obtains in favour of charities, viz., that it is preferable to give effect to the general intention of the testator, though the detail be incomplete, than to declare an intestacy. The testator means

to allocate all these Hudson Bay shares (income and capital) to one or other of the named charities: In re White, [1893] 2 Ch. 43.

The restraint upon the sale of the Isle of Wight land till a tunnel is made between the Isle and the mainland, if such should be made within the lifetime of any of the executors or twenty-one years thereafter, would appear to be an illegal provision under In re Rosher, 28 Ch. D. 801, followed and approved of in Blackburn v. McCallum, 33 S. C. R. 65.

These were all the points before me, and counsel agreed that the disposal of these would sufficiently clear the way for proceeding with the administration of the estate, and I answer them as above indicated.

Costs out of the estate.

MIDDLETON, J. NOVEMBER 17TH, 1910.

HUNTER v. HAMILTON BRIDGE WORKS CO.

Negligence—Injury to and Consequent Death of Servant—Obligation to Employ "Look-out Man"—Cause of Injury—Voluntary Incurring Risk—Injury Caused Solely by Negligence of Deceased—Forgetfulness—Costs—Issue between Defendants—Claim for Indemnity.

Action for damages for the death of one Hunter, alleged to have ben caused by the negligence of the defendants, the Hamilton Bridge Works Co. and the Hamilton Steel Co., or one of them.

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

W. A. Logie, for the plaintiff.

G. Lynch-Staunton, K.C., for the defendants the Hamilton Steel Co.

J. W. Nesbitt, K.C., and D. L. McCarthy, K.C., for the defendants the Hamilton Bridge Works Co.

MIDDLETON, J.:—In this action, after the best consideration I can give, I conclude that the plaintiff fails:—

(1) Because there was no evidence upon which the jury could find an obligation on the part of the bridge company to employ a "look-out man."

(2) Because there was no evidence that the failure to employ a "look-out man" caused the accident.

(3) Because, upon the undisputed facts, the only proper inference was that, knowing the dangerous nature of the employment, the deceased voluntarily undertook the risk.

(4) Because, upon the undisputed facts, the accident was solely caused by negligence of the deceased himself. The man was in a position of safety so long as he did not place himself in the way of the moving cranes—he knew his peril, and it was his duty not to forget the passing cranes, and so place himself in a position where death was almost certain. Forgetting may not be negligence in some circumstances, but where a man voluntarily places himself in a position calling for the exercise of extreme care in some particular respect, he must not forget—or it is his own negligence that causes the accident.

The action will be dismissed as to the steel company upon the answers of the jury, and as to the bridge company for the reasons above given—in the circumstances without costs.

The issue between the defendants now becomes a matter of costs only. I dismiss the claim for indemnity with costs: (1) because, there being no liability to the plaintiff, there can be no claim over; (2) because the agreement between the defendants does not give a right of indemnity when the bridge company is itself negligent, and the claim of the plaintiff (if any) must be based on negligence.

The costs now awarded do not cover any costs incurred in resisting the plaintiff's claim against the steel company.

MIDDLETON, J. NOVEMBER 17TH, 1910.

GRIFFITH v. GRAND TRUNK R. W. CO.

Railway — Injury to and Consequent Death of Person Crossing Track — Highway-crossing — Neglect to Give Statutory Signals—Cause of Injury—Finding of Jury—Connection between Neglect and Result—Proper Inference—Evidence.

Action for damages for the death of one Griffith, while returning from his work to his home on the 29th December, 1909, by being run down by a train of the defendants at a highway crossing.

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

W. M. McClemont, for the plaintiff.

J. W. Nesbitt, K.C., and D. L. McCarthy, K.C., for the defendants.

MIDDLETON, J.:—This case has given me anxious thought, as the present state of the authorities indicates that the law applicable is yet in a plastic condition, and from the cases it is by no means easy to ascertain whether general statements made by individual Judges, in dealing with the matters then before them, are to be taken as applying to the particular facts then before them, or whether these dicta establish general propositions of universal application.

The facts are simple. The deceased was returning from his work to his home on the 29th December last. The jury have found, upon evidence proper to be submitted to them, that he was run down by a train of the defendants at the highway-crossing on Kenilworth avenue. This train gave no warning, as required by the statute, either by whistle or bell. Another train was passing upon the other track in the opposite direction, at the same time, which gave the necessary signals. No one saw the accident.

The jury have also found that the accident was caused by the violation of the statutory duty to whistle and ring the bell, and case of a restaurant conducted in the careless way, and to fire and have negatived contributory negligence.

The question I have to determine is, whether the plaintiff can, upon this state of facts, recover. Was there any evidence to warrant the finding of the jury in his favour, that the breach of the statutory duty was the cause of the accident? "Contributory negligence" is a defence, and, for the reasons given in McKeand v. Canadian Pacific R. W. Co., 1 O. W. N. 1059, in my view, occasions no difficulty in the way of the plaintiff's recovery. In the absence of any evidence, the railway company, upon whom the onus is, fail to establish their defence.

The plaintiff has then shewn the violation of a statutory duty, and just such an accident as that against which the statute was intended to guard. I think the jury may find the relationship of cause and effect between this breach of duty and this accident. This is not "a guess" in any other sense than the drawing of any inference must be a guess. There cannot be a certainty, in the absence of the evidence of an eye-witness; but the Courts would be impotent, indeed, if the result of judge-made law conferred immunity upon a railway company when an accident

occurred, and the breach of a statutory duty was clearly shewn, and the precise accident was the result to be anticipated from the breach of that duty.

This case, upon the reasoning accepted in Grand Trunk R. W. Co. v. Hainer, 36 S. C. R. 180, falls outside of the principle in the Wakelin case. Bearing in mind the precise question to be considered in Marshall v. "Wild Rose," [1910] A. C. 486, that case is of value in considering the question before me.

Fraser v. Victorian Railways Commissioners, 8 Comm. L. R. 54, is in conflict with the opinion I have formed. In considering that case, it must be kept in mind that the obligation to warn by whistle and bell was not statutory, and also that the commonwealth has in Commissioners of Railways v. Leahey, 2 Comm. L. R. 54, placed the obligation of the person about to cross the railway to look and listen upon a somewhat higher plane than our Courts have adopted. That case carries the decision in the Wakelin case far beyond what was really there determined. The dissenting judgment of Isaacs, J., entirely commends itself to me, and, without repeating what is there said, I adopt his criticism of the opposite view as an effective answer to the defendants' arguments in this action.

In Jacob's very valuable book on the Railway Act the learned author, after referring to the cases, says, p. 538: "After a careful analysis of McArthur v. Dominion Cartridge Co., [1905] A. C. 72, as applied by the Supreme Court in Grand Trunk R. W. Co. v. Hainer, 36 S. C. R. 180, it is difficult to escape the conclusion that, when there has been a direct breach of an absolute statutory or common law duty on the part of the railway company, this will go a long way toward determining the presumption that such breach of duty was the cause of the accident." To this may be added the statement of Davies, J., in the Hainer case, representing the view of the majority of the Supreme Court—that the absence of exact proof is not fatal to the plaintiff's case when connection between the defendants' negligence and the plaintiff's injury "can from the proved facts be reasonably inferred and is not mere conjecture."

Judgment for the plaintiff for $2,000 and costs.

STUART v. HAMILTON JOCKEY CLUB—MASTER IN CHAMBERS.—Nov. 10.

Third Party Procedure — Service of Notice — Time — Con. Rule 209—Service of Statement of Claim—Con. Rule 362 — Proper Case for Indemnity—Costs.]—Motion by John Stuart.

called upon by the defendants as a third party, to set aside the order, notice, and service upon the applicant. The facts of the case are stated in the note of a previous motion, ante 167. The defendants were sued by the executrix of John J. Stuart, deceased, for permitting and recording a transfer of three shares of their capital stock standing in the name of the deceased by the applicant to one J. L. Counsell, also made a third party. The motion was based, first, on two grounds of irregularity, viz., (a) that the notice was served too late under Con. Rule 209, and (b) that no statement of claim was served with the notice. As to (a), the Master adheres to his opinion in Ontario Sugar Co. v. McKinnon, 3 O. W. R. 64, against the objection. The other objection, he says, can easily be rectified now, under the beneficial provisions of Con. Rule 362. The applicant also contended that it was not a proper case for the issue of a third party notice; but the Master thought it a very clear case, referring to Pettigrew v. Grand Trunk R. W. Co., 22 O. L. R. 23; Sheffield Corporation v. Barclay, [1905] A. C. 392; Dugdale v. Lovering, L. R. 10 C. P. 196. Motion refused. In view of the omission to serve the statement of claim, costs to be costs in the third party issue as between the defendants and the applicant. Costs to the plaintiffs as against the applicant in any event. E. C. Cattanach, for the applicant. C. A. Moss, for the defendants. W. J. Elliott, for the plaintiff.

LEVESQUE v. NORTH BAY LIGHT HEAT AND POWER CO.—MASTER IN CHAMBERS.—NOV. 11.

Venue—Place where Cause of Action Arose—Convenience—Witnesses—Expense—Terms.]—Motion by the defendants to change the venue from Sudbury to North Bay. The injury to the plaintiff for which he sought to recover damages in this action occurred at North Bay on the 23rd July, 1910, but the action was not begun until the 12th October. It was admitted that the cause of action arose at North Bay, where the plaintiff was engaged in the defendants' service, and the decision in McDonald v. Park, 2 O. W. R. 812, 972, applied. The defendants deposed to at least ten witnesses all resident at North Bay and engaged in their service, so that their being taken to Sudbury at this time of year would be highly inconvenient to the business of the defendants. The plaintiff's solicitor, in his affidavit, which was the only one in answer to the motion, did not speak of having any witness other than the plaintiff himself. The Master said that, in these circumstances, the venue should be changed: Gardiner v. Beattie, 6 O. W. R. 975, 7 O. W. R. 136. McDonald v. Dawson, 8 O. L. R. 72,

distinguished. The plaintiff desired a speedy trial, and with the venue changed there could be no trial with a jury until the spring sittings at North Bay. As the injury occurred in July, there was time enough to have had a trial at the North Bay jury sittings in October if the writ of summons had been served during the long vacation. In my view, the defendants were not responsible for the delay. They are willing to pay the necessary expenses of the plaintiffs to attend the trial at North Bay. The Master directs accordingly that $25 be accounted for if the plaintiff succeed in the action. If the plaintiff is willing to go to trial at the North Bay non-jury sittings on the 12th December, the defendants should consent. Order made changing venue. Costs in the cause. J. A. Macintosh, for the defendants. J. W. Heffernan, for the plaintiff.

BARROW v. INGERSOLL BOARD OF EDUCATION—FALCONBRIDGE, C.J.K.B.—NOV. 11.

Negligence—Collapse of Platform—Injury to Pupil at School — Orders of Schoolmaster — Liability of School Corporation — Burden of Proof—Delay in Bringing Action.]—Action for damages for injuries alleged to have been sustained by the plaintiff on the 21st May, 1900, when a pupil (then thirteen years old) at the Central School in the town of Ingersoll, by reason of the collapse of a platform (erected by the Caledonian Society) on which the plaintiff and her fellow-pupils were seated. The plaintiff alleged that the Principal of the Central School ordered her and the other pupils to place their feet under the plank or board which formed the seat or step of the stand next lower than that on which the plaintiff and her fellow-pupils respectively were sitting, and that her obedience to this order was, on the collapse of the platform, the cause of her injury, or at least of her being so seriously injured as she alleged. The Principal denied this, and stated that, on the contrary, he warned the children to keep their feet above and not under the next plank below. In these circumstances, the Chief Justice feels bound to apply the usual rule as to the burden of proof—with the less regret as the accident happened on the 21st May, 1900, and neither the defendants nor the Caledonian Society ever heard of the plaintiff having been hurt until this action was brought, nearly ten years afterwards. And it would not be easy to refer the serious injury of which the plaintiff complained (involving the amputation of a foot) to this accident. In this view of the facts, it would be useless to discuss the interesting point of law presented as to the liability of the defendants,

upon which the following authorities may be consulted: Morris v. Carnarvon County Council, 79 L. J. K. B. 169; Cling v. Surrey County Council, ib. 481; Beach on Corporations, sec. 739; Underhill on Torts, Can. ed., p. 67; Maxwell v. Clark, 4 A. R. 460; 35 Cyc. 971; Castor v. Uxbridge, 39 U. C. R. 120; O'Neill v. Windham, 24 A. R. 34; Dallas v. Town of St. Louis, 32 S. C. R. 120; Hesketh v. City of Toronto, 25 A. R. 440; Gordon v. Virtue, 5 B. C. R. 553; and as to the jurisdiction of a teacher over a pupil going to or returning from school, Cleary v. Booth, [1893] 1 Q. B. 465; 35 Cyc. 1136. Action dismissed, with costs if exacted. J. G. Gibson, for the plaintiff. J. C. Hegler, K.C., for the defendants.

SKINNER v. BUCKLEY.—FALCONBRIDGE, C.J.K.B.—Nov. 12.

Fraud and Misrepresentation — Sale of Business — Innocent Misrepresentations by Agent—Non-reliance on.]—Action to set aside the sale of a theatrical business on the ground of misrepresentations. The Chief Justice says that the plaintiff, in order to succeed, must prove on convincing testimony that the defendant or her agent was guilty of fraudulent misrepresentations. The misrepresentations alleged to have been made by Brownscombe, the agent of the defendant, were: (1) with reference to the amount of business transacted in the Avenue Theatre, viz., that there had been two or three shows per night to full houses; (2) that there were at least two good picture-machines in the theatre; (3)—more in the nature of a guaranty than a representation—that the landlord or owner of the building would give a lease with the ordinary statutory covenants for the remainder of the five years. The Chief Justice finds that the plaintiff does not discharge himself of the onus of proof (referring to the evidence); that any representation made by Brownscomb, if in any respect inaccurate, were not fraudulently made, but innocently; and, as to the lease, that what was said was only a promise of what could be secured in the future. The Chief Justice could not find, on all the evidence, that, even if Brownscombe had made innocent representations which were not quite true, the plaintiff relied upon them. Action dismissed with costs. A. G. MacKay, K.C., for the plaintiff. W. H. Wright and J. A. Horning, for the defendant.

GIBSON v. TORONTO BOLT AND FORGING CO.—MASTER IN CHAMBERS—Nov. 14.

Particulars—Statement of Defence — Discovery.]—Motion by the plaintiff for particulars of the statement of defence. Action

for the price of work done by the plaintiff. The Master says that the plaintiff is entitled to know what case he is going to have to meet at the trial. He should have some statement of the large expense to which the defendants say they were put from making alterations caused by imperfections in the plaintiff's plans, and necessarily stating what such alterations were. The plaintiff may examine the defendants' foreman if he wishes to do so. The plaintiff is also entitled to particulars of materials ordered, but not used, for which the defendants ask to be allowed. Particulars of want of supervision are not necessary. Reference to Trussed Concrete Co. v. Wilson, 9 O. W. R. 239; Coates v. Croyle, 4 Times L. R. 735. The best possible particulars to be given in four days, unless the plaintiff elects to examine the foreman. If the foreman is examined, the motion will be enlarged until this has been done. Costs in the cause. W. G. Thurston, K.C., for the plaintiff. M. Lockhart Gordon, for the defendants.

PIERCE v. WALDMAN AND WALDMAN SILVER MINES CO.—SUTHERLAND, J.—NOV. 14.

Partnership—Action to Establish—Oral Agreement—Evidence—Release — Allegation of Fraud—Failure to Establish.]—The plaintiff alleged that two mining claims (A. 10 and A. 22) in the "Gillies Limit," were transferred by the defendant Waldman to the defendant company, and he sought in this action a declaration that he was and is a partner with the defendant Waldman in the acquisition and sale of the claims and entitled to one-half of the proceeds derived from the defendant Waldman's dealings with the claims. He also asked a declaration that a certain agreement of the 17th August, 1909, made between him and the defendant Waldman, whereby, in consideration of 200,000 shares of the stock of the defendant company being transferred to him (the plaintiff), he released the defendant Waldman from all liability, was obtained by fraud, misrepresentation, and deceit; and an account and payment of the sum to which he should be found entitled. The learned Judge, after an elaborate statement of the evidence, said that the plaintiff was unfortunately not able to produce any written agreement. A writing is not absolutely essential—a partnership may be evidenced by the dealings of the parties, by correspondence, or otherwise. But the importance of a written contract is evident from the facts of this case. A person who has entered into a mere verbal agreement for partnership with another will not be able to sustain an action for its breach

unless he can prove the material terms upon which the partnership was to be entered into: Lindley on Partnership, 7th ed., p. 94. The arrangement, even as sworn to by the plaintiff, was somewhat loose and indefinite in its terms. It was incumbent upon the plaintiff to shew that there was an intention of both parties to enter into a partnership; and, in default of a writing, and in the face of the denial of the defendant that there was any intention on his part to enter into a partnership, the existence of the partnership should be very clearly made out from the conduct, admissions, and writings of the defendant. On the whole evidence, a partnership had not been made out. It was also difficult for the plaintiff to get away from the effect of his signing the release of the 17th August, 1909. It is in very broad terms, and the plaintiff admitted that it was read over to him before he executed it. He was not an ignorant man, but one accustomed to business. Such a man, having deliberately set his hand to a release, should not, unless in a very exceptional case, be permitted afterwards to repudiate it. The agreement was binding upon the plaintiff and could not be set aside. Action dismissed with costs. T. W. McGarry, K.C., and W. N. Ferguson, K.C., for the plaintiff. E. F. B. Johnston, K.C., for the defendant Waldman. A. C. Macdonell, K.C., for the defendant company.

FISHER v. DOOLITTLE AND WILCOX LIMITED—BRITTON, J.—NOV. 14.

Trespass to Land — Possession — Sufficiency — Injunction — Damages — Fouling Stream — Nuisance — Filling up Stream — Apprehended Danger.]—The plaintiffs alleged that they were the owners and in possession of part of lot 13 in the 1st concession of West Flamborough; the defendants owned the land immediately adjoining, and were engaged in large quarrying operations thereon. The plaintiffs' land was a ravine or gorge; the land of the defendants was high and level, and the westerly limit thereof joined the brow or top of the ravine or gorge; and the defendants got rid of their earth, dirt, and refuse stone by dumping it over the brow of the mountain, as it was called, upon the plaintiffs' land. The plaintiffs complained of this wilful trespass upon their land and of damage done to their trees, shrubbery, and grass. The plaintiffs were also the owners of a paper mill on other land, upon the margin of a creek, and the plaintiff used the water for power, etc. The plaintiffs alleged that the refuse thrown into the ravine would be washed into the creek and pollute the water, fill

up the creek, etc. The plaintiffs asked for an injunction, for a declaration that they were the owners of the land, for damages, and for a mandatory order compelling the removal of material dumped over the brow of the hill. Upon the evidence, the learned Judge is not able to find that the plaintiffs have made out a paper title to the land called "the gorge," but he finds that they were in possession at the time of the granting of the lease to the defendants; and holds that this possession, in the absence of proof of title by the defendants, is sufficient to entitle the plaintiffs to maintain trespass. He finds that the plaintiffs have not suffered any damage from the fouling of the water; but he says that, upon the weight of evidence, there is danger of the stream being filled up by the refuse dumped by the defendants and the course of the stream being disturbed. Judgment for the plaintiffs for an injunction and $200 damages with costs on the High Court scale. If the plaintiffs desire a reference as to damages, instead of accepting $200, they may have it, at their own risk as to costs. G. Lynch-Staunton, K.C., and G. C. Campbell, for the plaintiffs. E. D. Armour, K.C., and T. G. Haslett, for the defendants.

HULL v. ALLEN—MASTER IN CHAMBERS.—NOV. 15.

Evidence — Cross-examination of Plaintiff on Affidavit — Place for Examination—Convenience—Con. Rules 444, 491, 492.] —Motion by the defendant for an order requiring the plaintiff to attend for cross-examination upon an affidavit at Toronto, instead of Woodstock, the county town of the county in which the plaintiff lived. The Master said that the decision in Dryden v. Smith, 17 P. R. 500, was a conclusive answer to the motion, unless a case was made out for the application of Con. Rule 444, assuming that it could be applied, in a proper case, to vary Con. Rule 491—as would seem to be the effect of Con. Rule 492. The plaintiff was at first willing to attend at Toronto, and did attend on the 20th October, but no examination took place on that day, and he now declines to attend again, saying that he is eighty years of age, that his wife is also very old and requires his constant attendance, and that his solicitor at Woodstock has charge of the case for him. He further says that he never agreed to attend at Toronto, although he did attend (fruitlessly) in order to expedite the case. These seemed to be sufficient grounds, and were not displaced by anything urged by the defendant. Motion dismissed; costs in the cause. J. T. Small, K.C., for the defendant. T. H. Wilson, for the plaintiff.