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HIGH COURT DIVISION.

LENNOX, J. NOVEMBER 2ND, 1914.

MURDOCK v. KILGOUR.

Canada Temperance Act—Voting on—Form of Ballot—Returning Officer—Injunction against Making Return.

This action was brought by Andrew Elisha Murdock against F. W. Kilgour, president of the Welland County Hotel Keepers' Association, Hugh A. Rose, returning officer, and His Honour L. B. C. Livingston, Judge of the County Court of the County of Welland, for a declaration in respect of a vote taken in the county of Welland upon the question of the adoption of the Canada Temperance Act in that county.

The plaintiff moved for an order prohibiting the defendant Livingston, until the trial and determination of the action, from determining or certifying, as a result of the pending scrutiny under the Canada Temperance Act, whether the majority of votes given on the proceedings had and taken in the county, pursuant to a proclamation of the Governor in Council in that behalf, for a polling of votes under the Act, was or was not in favour of the petition to the Governor in Council for bringing into force in the county Part II. of the Act, or for an injunction instead of a prohibition; and for an injunction restraining the defendant Rose, returning officer under the proclamation, from transmitting any return to the Secretary of State with reference to the question whether or not the majority of votes was in favour of the petition.

The motion was heard in the Weekly Court and was turned into a motion for the judgment.

W. E. Raney, K.C., for the plaintiff.

James Haverson, K.C., for the defendants.

LENNOX, J.:—The plaintiff does not desire an order prohibiting the County Court Judge.

There are two questions to be determined, namely:—

1. Have I jurisdiction?

2. Was the vote taken according to law?

The first question is the only one presenting any difficulty. I cannot see that there is much help to be derived from the authorities referred to. I am of opinion that I have jurisdiction.

The other question, I think, is hardly open to argument. Literal compliance with the statute is not essential, but there must be at least substantial compliance. To mention only one point the ballot used cannot be said to be even the substantial equivalent of the one prescribed by the statute. It is not, of course, relevant to argue that it is as good or better than the statutory form.

There will be a perpetual injunction restraining the returning officer as asked for. I make no order as to costs.

LENNOX, J. NOVEMBER 2ND, 1914.

SAWYER v. CANADIAN PACIFIC R.W. CO.

Damages—Personal Injuries—Assessment of Damages—Expert Evidence.

Action for damages for personal injuries sustained by the plaintiff by reason of the defendants' negligence.

J. F. Faulds, for the plaintiff.

Angus MacMurchy, K.C., for the defendants.

LENNOX, J.:—At the close of the plaintiff's case, counsel for the defendants admitted liability and asked me to withdraw the case from the jury, submitting that a Judge could make a fairer assessment of damages than a jury. I directed that the application be renewed after expert evidence for the defendants had been put in. In the end I withdrew the case from the jury. The plaintiff did not seek out either a doctor or a lawyer for a long time. He knew that he was injured, but did not realise that his injuries were very serious, or likely to be permanent. He was not of the army of keen hunters of litigation who do so much to congest the business of the Courts.

I am inclined to think that more prompt medical treatment might have facilitated recovery, but I am not sure of this. The medical testimony left this point undetermined—a matter of speculation—and, in the circumstances, I am not called upon to be astute in marking this point against a litigant of a type so rarely found.

The defendants called two very distinguished medical men, specialists, upon the questions arising in this action. One of them was very positive in saying that the plaintiff should have been treated in a nursing home or institution of that character; and, with this treatment, pronounced, pretty positively, the certainty of speedy and complete recovery. I was much more impressed however by the thoughtful, cautious, and somewhat qualified statements of Dr. McPhedran, the other expert called by the defence.

On the other hand, it is not, and could not be, questioned that Dr. Clifford Reason, also an eminent specialist in nervous diseases, who attended the plaintiff, had opportunities for study of the plaintiff's condition and requirements not open to the defendants' witnesses. I have come to the conclusion that Dr. Reason was right in treating the plaintiff at his home, and that his recovery would not have been, and would not be, facilitated by removing him from his old surroundings. I am not satisfied that the plaintiff, under any kind of treatment, will recover as speedily as suggested by the evidence for the defence, or that he will ever completely recover from the effects of the defendants' negligence.

There will be judgment for the plaintiff for $2,300 with costs.

BRITTON, J. NOVEMBER 2ND, 1914.

SHARPE v. CANADIAN PACIFIC R.W. CO.

Railway—Death of Servant—Line-man Run over by Engine of another Railway Company—Trespasser—Workmen's Compensation for Injuries Act—Conforming to Orders of Superior—Negligence—Evidence—Absence of Warning—Findings of Jury.

Action brought on behalf of the parents of Thomas L. Sharpe, who was killed on the evening of the 19th March, 1913, on the

track of the defendants the Toronto Hamilton and Buffalo Railway Company, by a light engine of that company, running reversely, to recover damages for his death.

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

F. D. Kerr and V. J. McElderry, for the plaintiff.

J. D. Spence and G. W. Wallrond, for the defendants the Canadian Pacific Railway Company.

J. A. Soule, for the defendants the Toronto Hamilton and Buffalo Railway Company.

BRITTON, J.:—At the close of the case for the plaintiff and again at the close of the evidence, counsel for the defendants asked for dismissal of the action. I reserved my decision and submitted questions to the jury, which the jury answered; and they assessed the damages at $1,000.

The deceased was a "line-man" in the employment of the defendants the Canadian Pacific Railway Company, and on the day of his death had with others been working for that company at Welland. That company had certain running rights on the railway of the defendants the Toronto Hamilton and Buffalo Railway Company; and the Canadian Pacific Railway Company had a car, called a boarding-car or sleeping-car, which the workmen could use, and, if the workmen used it, they were charged a certain sum agreed upon, which was deducted from their wages. This car was on a dead-end track in the north-western part of the yard of the Toronto Hamilton and Buffalo Railway Company.

On the morning of the accident, the deceased, with his boss and four other workmen, went to Welland to do some work. They travelled part of the way upon a hand-car, then walked to the station of the Toronto Hamilton and Buffalo Railway at Hamilton, and took a Canadian Pacific train for Welland. At the close of the day, they returned to Hamilton, and intended to go to the sleeping-car to stay all night. Upon arriving at the place where the hand-car had been left, they found that the hand-car had been removed. Then all started to walk to the sleeping-car or boarding-car. Just before the accident, all were walking on the east-bound track.

At the place of the accident there were three tracks, one for east-bound trains, one for west-bound trains, and the third track had upon it cars at rest. These men were walking westerly

upon the east-bound track, when a train was seen approaching them from the west. The men all got off the east-bound track, stepping to the north upon the west-bound track. Four of them went further to the north and entirely off the west-bound track; but the deceased and one other continued to walk westerly upon the west-bound track, when they were overtaken and run over by the light engine running reversely.

The deceased was not in the employment of the Toronto Hamilton and Buffalo Railway Company. He was not upon their tracks by any permission of that company, express or implied. There was no evidence of permission by the Toronto Hamilton and Buffalo Railway Company to any of the men in the employ of the Canadian Pacific Railway Company to walk upon these tracks. If it should be deemed of any importance that these workmen, on the occasion in question, used a hand-car upon the tracks of the Toronto Hamilton and Buffalo Railway, or that workmen of the Canadian Pacific on other occasions used a hand-car to go to and from their work, I cannot say that there was evidence of any express permission by the Toronto Hamilton and Buffalo Railway Company to the Canadian Pacific Railway Company or to the employees of that company. It would be a fair inference that the use of a hand-car by the Canadian Pacific men upon the tracks of the Toronto Hamilton and Buffalo Railway Company was permitted by the latter company, but that does not affect the present case.

The jury have found that it was actionable negligence to use a red light instead of a white light at the rear end of a locomotive—front end when running reversely—so as to create liability to a person injured when rightfully upon the track. I neither assent to nor dissent from that finding, but I am of opinion that the accident to the deceased was not occasioned by the absence of a white light.

I put my decision upon the ground that the unfortunate deceased was a trespasser as to the Toronto Hamilton and Buffalo Railway Company, and that there was no duty on the part of that company to the deceased to use a white light, or any other than not wilfully to run him down or put him in danger.

I do not think that there was any evidence to go to the jury as to negligence in the use of red or white lights on the part of the Toronto Hamilton and Buffalo Railway Company.

The accident did not occur by reason of any neglect on the part of the Toronto Hamilton and Buffalo Railway Company to fence. There was a notice warning persons who were not em-

ployees of the Toronto Hamilton and Buffalo Railway Company to keep off their right of way.

Whether the deceased was a workman of the Canadian Pacific Railway Company and under the direction of a man to whose orders the deceased was bound to conform, or not, makes no difference to the Toronto Hamilton and Buffalo Railway Company. The deceased was not an employee of the Toronto Hamilton and Buffalo Railway Company; and as to these defendants the action must be dismissed.

Upon the answers of the jury affecting the defendants the Canadian Pacific Railway Company, I am of opinion that the plaintiff is entitled to judgment against that company.

The deceased was, in my opinion, at the time of the accident a workman in the employ of the Canadian Pacific Railway Company. He was then returning from the work of the day to the place provided by these defendants, to remain over night. He had the tools of his trade and for his work in his possession. It was intended both by the deceased and his employers that he should continue work for these defendants on the following and other days. The sleeping-car was provided by those defendants for the deceased and other workmen similarly employed. Ashby and Brunker were persons in the employ of the Canadian Pacific Railway Company, having charge of the deceased and directing him as to his work and the place where it was to be performed. These were persons to whose orders the deceased was bound to conform. These persons assumed that they had the right to go through the opening in the fence and to go upon the right of way of the defendants the Toronto Hamilton and Buffalo Railway Company and to walk along the tracks.

As between the deceased and the Canadian Pacific Railway Company the deceased was rightfully upon the track. He was invited to go with those over him, and by them, to this place of danger. There was no warning to the deceased by his boss of any danger.

So far as appears, the deceased did not know that he was upon the tracks of the Toronto Hamilton and Buffalo Railway or upon any right of way other than that of his employers. There was, in my opinion, negligence on the part of those servants of the Canadian Pacific Railway Company who were over the deceased, and the accident occasioning the death of the deceased was caused by his conforming to the instructions given to him. The "boss" led the way, the deceased followed, and the accident happened by reason of his following instructions.

In order to shew compliance with an order of a master or superior officer, it is not necessary that the order should be of a formal and imperative character. If the employee knows what evidently is required of him, and even if he suggests something in the way of doing it, he being ignorant of danger, and if the master adopts and directs it, and in the doing of it an injury to the workman is caused, there may be liability by the master.

If the employer signifies in any reasonable way what is wanted, and the servant, all in good faith, obeys, that is sufficient. See Labatt on Master and Servant, vol. 4, p. 3915.

There will be judgment for the plaintiff against the defendants the Canadian Pacific Railway Company for $1,000 with costs.

The action against the defendants the Toronto Hamilton and Buffalo Railway Company will be dismissed with costs if such costs are demanded.

LATCHFORD, J. NOVEMBER 2ND, 1914.

GAUTHIER v. VILLAGE OF CALEDONIA.

Highway—Injury to Pedestrian by Fall upon Ice-covered Sidewalk—Liability of Municipal Corporation—Evidence—Negligence—"Gross Negligence"—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 460, *sub-sec.* 3.

Action for damages for personal injuries sustained by reason of a fall upon an ice-covered sidewalk in the village of Caledonia.

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

W. E. Kelly, K.C., for the plaintiffs.

H. Arrell, for the defendants.

LATCHFORD, J.:—This action is brought by Alexis Gauthier and his wife against the defendant corporation for damages resulting from injuries sustained by Mrs. Gauthier on the morning of the 6th March, 1914, by falling on an ice-covered sidewalk near her residence, at a point immediately east of a driveway leading from the travelled way of a street into the premises of one Martindale.

Mrs. Gauthier's injuries were very serious. Her left leg was broken in two places. While she made a good recovery, she is still lame and suffering from pain and from shock to the nervous system.

The weather on the day prior to the accident was warm, and the snow on the lawns of the plaintiffs and their neighbour Martindale melted rapidly. Some of the resulting water was not absorbed by the still frozen sod, but flowed over and upon the granolithic sidewalk on the north side of the street, there forming, when the temperature fell during the night, a coating of ice, about a quarter of an inch in thickness, and extending diagonally across the sidewalk over an irregular area not more than two or three feet in greatest width.

During the night there was a slight fall of snow—just sufficient to cover and conceal the ice formed on the pavement, which at the point in question has an inclination towards the east of about one foot in twenty.

The lightly covered ice upon the down grade of the pavement eastward made the sidewalk unsafe and dangerous, and the accident to Mrs. Gauthier was caused by this dangerous condition, and not by any negligence on her part.

A number of credible witnesses living west of the plaintiffs on the same street, and on their way to and from work using the sidewalk several times each day, testified that they never saw water flowing across the sidewalk near the driveway or forming ice there. No complaint was ever made to the defendants by the Gauthiers or any other person regarding the condition of the sidewalk at the point referred to, nor had the defendants any knowledge or notice of the formation of the ice.

I find that under ordinary circumstances the water from the lawns did not flow over the pavement but ran down easterly inside the line of the sidewalk. The levels taken by Mr. Fair, a civil engineer of long experience, shew that in a distance of five feet north from the inner line of the pavement there is a fall of over two inches. This depression would have to be filled before there could be a flow over the sidewalk. Vehicles passing into or out of Martindale's, when the soil in the driveway was soft, would sink and form, on each side of the wheels, elevations which, especially when frozen, would impede the flow to the east, and tend to divert it over the pavement. The evidence on the point is slight, but to my mind sufficient. Such conditions could exist but seldom at the same time, and the overflow would accordingly be of the rare occurrence spoken of by the witnesses.

The plaintiffs say that the water flowed over the sidewalk only three or four times during the winter of 1913-14. Mrs. Gauthier saw no ice there except on the morning of the accident, and the witness Pettigrew on but that and another occasion. Martindale and his wife both swear they never observed ice on the sidewalk, formed, as this was, by flowing water, except on the occasion when Mrs. Gauthier was injured. On the same day the witness Harris slipped and fell at the same place; and shortly before or shortly afterwards Miss Lyons also fell there. Neither observed ice there previously; and Harris says he would not have fallen but for the circumstance that the ice was lightly covered with snow.

It is strenuously urged that the defendants should have placed a catch-basin with proper drainage at a point where it would gather and dispose of such water as overflowed, and, when frozen, rendered dangerous the sidewalk. Failure to provide such a means of disposing of the overflow is in fact the chief negligence attributed to the defendants, and the only negligence —if such it can be called—established against them.

The facts established do not, in my opinion, afford the plaintiffs any right of action.

Since 1894 no municipal corporation has been liable for accidents arising from persons falling owing to the presence of ice upon a sidewalk except in cases where "gross negligence" on the part of the corporation has been established: 57 Viet. ch. 50, sec. 13. The enactment then passed has been carried down through the several revisions of the Municipal Act, and is now found in R.S.O. 1914 ch. 192, sec. 460, sub-sec. 3.

Prior to 1894, when mere negligence to repair on the part of a municipal corporation gave a right of action, it was held, in a case where the facts are very like those of the present case, that the plaintiff was not entitled to recover: Forward v. City of Toronto (1888), 15 O.R. 370. In the judgment of the Common Pleas Division, unanimously reversing the verdict at the trial, Mr. Justice Rose said (p. 373): "To permit this verdict to stand would in effect be to declare that wherever the corporation build sidewalks in front of lanes, or carriage ways, where the land sloped toward the street, or indeed in front of any land sloping towards the street, it at once became burdened with the duty of preventing water running from such higher land upon the walks and forming into ice, or with the duty of without delay removing such ice, although it had no notice of its formation other than the notice derived or imputed from the formation of the land and the building of the walk. To declare such to be the law, would be to

bind upon municipalities burdens hard to be borne, and to require of them the performance of a duty which they might well declare to be impossible."

"Gross negligence," as used in the Act of 1894, has been defined as "very great negligence:" Sedgewick, J., in City of Kingston v. Drennan (1896), 27 S.C.R. 46, at p. 60; Osler, J.A., in Ince v. City of Toronto (1900), 27 A.R. 410, at p. 414.

To hold the defendants liable in the present case would be to deprive them of the benefit of the statute exempting them from liability when an accident is occasioned by ice on a sidewalk in all cases where there has not been gross negligence on their part.

Such negligence not having been established, the plaintiffs fail. It is not, I think, a case for costs.

MEREDITH, C.J.C.P., IN CHAMBERS. NOVEMBER 4TH, 1914.

RE CHARLTON AND PEARCE.

Municipal Corporation—Regulation of Buildings—Residential Streets—"Fronts"—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 406(10)—*Municipal By-law—Highway—Approval of Plan of Subdivision—Municipal Amendment Act*, 4 *Geo. V. ch.* 33, *sec.* 20—*Mandamus to City Architect—Approval of Plans of Building.*

Motion by W. B. Charlton for a mandamus directed to the Corporation of the City of Toronto and one Pearce, the City Architect, to compel the respondents to approve the applicant's plans for the erection of a building at the corner of Thorburn avenue and Dufferin street, in the city of Toronto; the approval having been withheld by reason of a city by-law requiring buildings fronting on Dufferin street to be a certain distance from the street line; and the question being whether the proposed building fronted on Dufferin street or on Thorburn avenue, or both.

The by-law was passed under sec. 406(10) of the Municipal Act, R.S.O. 1914 ch. 192.

A. W. Anglin, K.C., for the applicant.

C. M. Colquhoun, for the respondents.

MEREDITH, C.J.C.P.:—Although the practice in such matters as this has for many years been much simplified, it must not be forgotten that the remedy by way of mandamus, such as is here sought, is an extraordinary one, to be applied only to proper subjects, and only when other methods will not afford adequate relief.

In this case the parties desire that the matter in dispute between them be determined upon this motion, and are agreed, substantially, upon all the material facts affecting it. But the desire of the parties would not warrant the Court in so dealing with it if it be not a proper case for a mandamus; I am, however, of opinion that it is. If the applicant have a legal right to the permission he seeks, the respondent Pearce, who is a public officer, is, as such public officer, in duty bound to give it.

Whether the applicant is so entitled depends, as it is agreed on all hands, upon the single question, whether the building he desires to erect would front—within the meaning of the legislation and by-laws in question—on Dufferin street: the one ground upon which the permission sought is withheld being that it would.

But, upon the facts admitted, in the case of Re Dinnick and McCallum (1913), 28 O.L.R. 52, there is a decision, of a Court of Appeal of this Province, to the contrary. It may be that the decision in that case is not in accord with the intention of the Legislature: and it unquestionably makes room for obstructions to those long vistas which, it is contended in this case, and was in that, the Legislature intended might be created in residential parts: but, if such were the intention of the Legislature, the Legislature failed to express it; and has not since seen fit to remove the obstruction that case created in the way of carrying into effect that intention: and so Dinnick's case rules this case in this lower Court.

The contention is, that that is not so, because St. Clair avenue, the highway on which the house was to front in that case, was a long-established one, while that in this case—Thorburn avenue—is of more mushroom-like growth, having come into existence under a subdivision-survey and plan made only in the year 1911. But Thorburn avenue is none the less a highway upon which buildings may "front" within the meaning of the legislation and by-law in question. The municipality has by its own acts made it a highway which the municipality is bound to keep in repair. Among other things, it has, in writing upon the face of the plan, approved of it. That it need not have done:

see the Municipal Amendment Act, 1914, 4 Geo. V. ch. 33, sec. 20, for recent legislation on the subject.

An order may go, if it be now necessary: but it will not, of course, be binding upon any public interests in the matter, or upon any private interests, if there be any in either case not represented on this motion, which might be prejudicially affected by the erection of the building.

It is not a case for giving costs to any party against another. The respondent Pearce admittedly acted in good faith throughout, desiring merely to perform the duty imposed upon him, in the other by-law, justly: and there is nothing to indicate that the municipal corporation interfered in the matter in any way; therefore no order, in any respect, is to go against it. The motion as to it will be dismissed without costs: as to the other respondent, the order may go, if necessary, but without costs.

HUBERDEAU v. VILLENEUVE—FALCONBRIDGE, C.J.K.B.—NOV. 5.

Damages—Negligent Performance of Work under Contract—Loss of Profits—Cost of Repairs — Loss of Business — Counterclaim—Costs.]—Action for damages for negligence and breach of contract by the defendant in work done by him for the plaintiff. The defendant counterclaimed for instalments of the purchase-money of land sold by the defendant to the plaintiff. The learned Chief Justice finds that the plaintiff is entitled to damages for the collapse of an oven on the 11th August, 1913, as follows: profit as of a whole week, $35; his own personal trouble and inconvenience, $5. As to the break on the 10th February, 1914, the plaintiff's witness Gordon Empey said that good materials were used and that the workmanship was quite good in the re-built oven, and that the break was caused by violence applied from the inside, either by accident or design. It was not a very large hole, and it would take a couple of days to repair it. If the defendant ought to be held liable in these circumstances, the amount would be assessed as follows: cost of repairs, $7; loss of time and profits, $10. The falling off in the plaintiff's business was attributable (1) to his lack of capital, (2) to his having had small-pox in his house in October, and (3) to his own eccentricities of character and manner, of which he afforded a striking exemplification in the witness-box. Judgment for the plaintiff for $57 with Division Court costs. Judgment for the defendant on his counterclaim for the instalment of $100 due on the 1st June,

1913, and that of $100 due on the 1st December, 1913, with interest on $1,600 from the 1st May, 1913, at 6 per cent. and costs on the Supreme Court scale. The plaintiff to set off pro tanto his judgment for $57 and costs, and the defendant to have judgment for the balance. Auguste Lemieux, K.C., for the plaintiff. John Maxwell and Raoul Labrosse, for the defendant.

MORTSON v. LAMOURIE—FALCONBRIDGE, C.J.K.B.—NOV. 6.

Improvements—Agreement for Purchase of Land—Moneys Expended by Purchaser—Right to Recover—Absence of Privity —Wrongful Distress—Damages—Costs.]—Action for damages for wrongful distress and for money alleged to have been spent by the plaintiffs in improving the defendant's property. As to the claim of the plaintiffs for repairing and remodelling the hotel premises in contemplation of the agreement of purchase, the learned Chief Justice said that one Phayre, the assignee of Mulligan, was the real vendor, and the defendant was only a consenting party, and he had not even executed the agreement. It was not a joint sale; the defendant was rather in the position of a mortgagee giving his assent. The plaintiffs might or might not have a charge on the property, but they could not recover from the defendant, who had no arrangement or discussion with them about the repairs. The distress was admittedly wrongful. By consent a chattel mortgage was given by the plaintiffs to the bailiff who made the seizure, pending the trial of this action. As a term of an adjournment of the trial on the 16th June last, the defendant discharged that mortgage at his own expense. The plaintiffs were, therefore, not disturbed or evicted from possession of their goods. But they said that the registration of the chattel mortgage injured their credit so that they could no longer buy except for cash. The hotel had been a losing business for a year prior to the distress, so that the plaintiff Angus Mortson "can't say that he was any 'real money' out." Judgment for the plaintiffs for $50 on this count, with costs on the Division Court scale and no set-off of costs. J. H. McCurry, for the plaintiffs. G. H. Kilmer, K.C., and J. M. McNamara, K.C., for the defendant.