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APRIL 8TH, 1902.

DIVISIONAL COURT.

RANKIN v. STERLING.

Vendor and Purchaser—Specific Performance—Possession—Waiver—Improvements—Account as to—Title by Possession—Costs.

Action for specific performance of a contract dated 23rd February, 1901, for the sale to plaintiff for $380 of a piece of land in the village of Campbellford; $75 was to be paid down and possession given, and the balance of the purchase money with interest was to be paid on or before 1st May, 1901, when the conveyance was to be given. The defendant, the vendor, was to furnish an abstract, to make out a perfect title, and to deliver the conveyance at his own expense. The abstract shewed a good paper title from the Crown to Richard VanNorman, who became owner in 1862, and had made a mortgage to his vendor, one Wilkins, which had never been discharged. No title was ever shewn from VanNorman or Wilkins to the defendant, but his solicitor sent a statutory declaration shewing title by length of possession, which plaintiff alleged was incorrect. He, however, continued in possession and made improvements, and on the 2nd August, 1901, commenced this action. It was admitted at the trial before MacMahon, J., that the only objection to the title was how it passed from VanNorman. The trial Judge held that the plaintiff had not waived his right to have a good title shewn, and directed a reference as to title, and, in case a good title could not be shewn, directed that the Master was to ascertain the value of the plaintiff's improvements and what would be a fair occupation rent, and reserved further directions and costs. The defendant appealed.

J. J. Warren, for defendant.

G. H. Watson, K.C., and W. L. Payne, Colborne, for plaintiff.

The judgment of the Divisional Court (FALCONBRIDGE, C.J., and STREET, J.) was delivered by

STREET, J.—By the terms of the contract the plaintiff was entitled to a perfect title, and the defendant continued to assert down to the trial that he had a good title, either by paper title or by possession. Under these circumstances the plaintiff's remaining in possession should not be held to be a waiver of his right to insist upon a good title being shewn. Waiver is a question of intention, to be determined from the acts of the party, and it seems impossible to hold that the purchaser has waived his right to a good title by acts done at a time when he was insisting upon a good title being shewn, and the vendor was insisting that his right was perfectly good: Re Gloag and Miller, 23 Ch. D. 320. The question of waiver was the only question upon the pleadings necessitating a trial, and, had it not been raised, judgment might have been obtained upon a motion, for the only other question raised upon the pleadings which could be disposed of before the question of title had been determined, was that of title, and that would have been referred to the Master upon motion on the pleadings. Having failed upon the question of waiver, therefore, the defendant must pay the costs of the hearing.

There should also be a general reference as to title to enable plaintiff to make title either from VanNorman or by possession, the latter being a title which a purchaser may be compelled to take if it can be satisfactorily established: Scott v. Nixon, 3 Dr. & War. 388: Gaines v. Bonnor, 33 W. R. 64; Dart V. & P., 6th ed., p. 462.

An account should not have been directed as to improvements. There is nothing in the pleadings or evidence to take this case out of the general rule which restricts the damages of a purchaser to the costs of the investigation of the title: Bain v. Fothergill, L. R. 7 H. L. 207. Nor is there anything to bring it within the doctrine of Engel v. Fitch, L. R. 3 Q. B. 314, and 4 Q. B. 659. See also Williams v. Glenton, L. R. 1 Ch. 209, and Day v. Singleton, [1899] 2 Ch. 320, 332-3.

The rule followed in the old case of Miloson v. Wordsworth, 2 Sw. 365, and stated by Sugden, 14th ed., p. 347, is that which still prevails in the absence of fraud or other special circumstances. . . .

The reference should be as to title, and when a good title was first shewn. The plaintiff should have costs of the

trial in any event. Further directions and subsequent costs reserved. No costs of appeal.

W. L. Payne, solicitor for plaintiff.

R. L. Gosnell, Blenheim, solicitor for defendant.

MEREDITH, C.J. APRIL 10TH, 1902.

CHAMBERS.

RE PHILLIPS v. HANNA

Division Court—Jurisdiction—Splitting Cause of Action—Mortgage Interest post Diem—Damages—Permissive Clause of Division Courts Act.

Motion by the defendant for prohibition to the 1st Division Court in the united counties of Northumberland and Durham.

The defendant, in 1884, made a mortgage to the plaintiffs' testator securing $1,300 and interest. The principal was to be repaid in four instalments of $100 each in 1888-1891, and the remaining $900 in 1892. The interest was to be paid annually on the unpaid principal till the whole sum secured should be paid in full.

The whole principal sum being unpaid, the plaintiffs sued the defendant in the Division Court for $81.50, being one year's interest on the principal sum from 1st February, 1900, to 1st February, 1901, and interest thereon from the latter date.

R. McKay, for defendant.

F. E. Hodgins, for plaintiffs.

MEREDITH, C.J.—The interest for which the plaintiffs sue, being interest *post diem*, is not due to them *qua* interest, but is recoverable only by way of damages, and it was not intended by sec. 79, sub-sec. 2, of the Division Courts Act, R. S. O. ch. 60 (which provides that "where a sum for principal and also a sum for interest thereon is due and payable to the same person upon a mortgage . . . he may . . . sue separately for every sum so due"), to qualify the provision (sub-sec. 1) which forbids the dividing of a cause of action, except where the sum claimed for interest is due according to the terms of the instrument sued on. . . . The plaintiffs, if entitled to recover interest from 1st February, 1900, were entitled to recover as their damages interest down to the date of the issue of the summons, so that the sum to which they were entitled, if interest were allowed at 6 per cent., would be about $140, and this sum is divided for the purpose of suing in the Division Court, and that is forbidden by sec. 79.

Order made for prohibition with costs.

R. R. Loscombe, Bowmanville, solicitor for plaintiffs.

Simpson & Blair, Bowmanville, solicitors for defendant.

MEREDITH, C.J. APRIL 10TH, 1902.

CHAMBERS.

UDA v. ALGOMA CENTRAL R. W. CO.

Particulars—Statement of Defence—Material on Application for—Order after Issue Joined.

Action by servant against master for negligence causing personal injuries. The defendants alleged (3) that the injury was caused by the negligence of the plaintiff, and (5) that it was caused by the negligence of the plaintiff's fellow-servant. The Master in Chambers ordered the defendants to give particulars of these defences. The defendants appealed.

W. E. Middleton, for defendants.

H. L. Dunn, for plaintiff.

MEREDITH, C.J.—The material was an affidavit of the plaintiff's solicitor stating that the particulars were required for the purpose of pleading, there being no affidavit from the plaintiff that the nature of the defence intended to be set up was not known to him. Having regard to the nature of the action and these circumstances, the order should not have been made, and I am unable to see what good purpose it can serve except to add to the costs of the litigation. . . . Also, it is manifest that the particulars were not needed for the purpose of pleading, for when the notice of motion was served the pleadings were closed and the cause was at issue.

Appeal allowed; costs to the appellants in any event.

Denton, Dunn, & Boultbee, Toronto, solicitors for plaintiff.

Hamilton, Elliott, & Irving, Sault Ste. Marie, solicitors for defendants.

MEREDITH, C.J. APRIL 10TH, 1902.

CHAMBERS.

PENNINGTON v. MORLEY.

Mechanics' Liens—Action begun by Statement of Claim—Service out of Ontario—Statutes and Rules—Powers of High Court of Justice.

Application by defendants Crosby and Nordyke in an action to enforce a mechanic's lien, which was commenced by

filing a statement of claim pursuant to sec. 31 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. ch. 153, to set aside as against them the judgment pronounced after trial by the Judge of the County Court of Essex, and all proceedings subsequent to the filing of the statement of claim, upon the ground that the statement of claim was improperly served upon the applicants out of the jurisdiction, and, even if that were permissible, no order allowing that mode of service was made. The applicants were not British subjects, and resided in the State of Michigan.

J. H. Moss, for applicants.

W. M. Douglas, K.C., for plaintiff.

MEREDITH, C.J.—The Courts of this Province have no inherent jurisdiction to allow service of any proceeding to be effected out of Ontario; jurisdiction for that purpose must be conferred by statutory authority.

Under the English Judicature Act and Rules the provisions for allowing service out of the jurisdiction form a complete code of procedure, and the English Courts have no jurisdiction to allow service out of England except in cases which come within these provisions, and therefore the service of a statement of claim filed as the initial step in an action may not be so served, it not being mentioned as one of the proceedings which the Court may allow to be served out of its jurisdiction (In re Busfield, 32 Ch. D. 123); and there are numerous cases in England to the same effect. See also Re Confederation Life Association and Cordingly, 19 P. R. 16, 89.

It follows that, unless our Judicature Act and Rules differ from those of England, there is no authority in the Courts of this Province to allow service out of Ontario of a statement of claim filed as the initial step in an action.

It was argued that Con. Rule 3 has the effect of making the provisions of the Rules as to service of the writ of summons applicable to service of any proceeding by which an action is commenced. That Rule, however, is limited to matters of practice; the matter in question here is not one of practice, but of jurisdiction: Attorney-General v. Sillem, 11 H. L. Cas. 703; In re Anglo-African S. S. Co., 32 Ch. D. 348.

[History and review of the Ontario legislation respecting service out of the jurisdiction.]

Service out of Ontario is dealt with by the existing Rules 162-167. They do not extend, in terms at all events, to service of a statement of claim such as that in question, al-

though the Rules which were replaced by them made provision for allowing service, not only of a writ of summons and notice of a writ, but also of any other document by which a matter or proceeding is commenced.

The Ontario Judicature Act, 1881, gave to the High Court of Justice the jurisdiction which at the commencement of that Act was vested in or capable of being exercised by, among other Courts, the Court of Queen's Bench, the Court of Chancery, and the Court of Common Pleas (sec. 9), and therefore the jurisdiction to allow service out of Ontario conferred by R. S. O. 1877 ch. 40, secs. 93, 84, and ch. 50, secs. 49, 50, was vested in the High Court.

I was at one time inclined to think that the effect of this was to make the English cases inapplicable here, but the reasoning which led to the decision in In re Busfield is opposed to that view; and I am, therefore, of opinion that our Judicature Act and Consolidated Rules form a complete code on the subject of service out of the jurisdiction, and that the Court had no jurisdiction to allow service of the statement of claim to be effected upon the applicants out of Ontario.

Even if I had been of a different opinion, an order for service out of Ontario not having been obtained, I should have held that the service which was effected was nugatory, and that the Judge had no power to allow service *nunc pro tunc*, as he assumed to do.

It is a defect in the law that no provision is made for service out of the jurisdiction of the initial proceeding in an action unless that proceeding is a writ of summons or a notice in lieu of a writ of summons.

Application granted with costs here and below.

Clarke, Cowan, Bartlet, & Bartlet, Windsor, solicitors for applicants.

Fleming, Wigle, & Rodd, Windsor, solicitors for plaintiff.

ROBERTSON, J. APRIL 10TH, 1902.

WEEKLY COURT.

RE REX v. MEEHAN.

Mandamus—Police Magistrate—Jurisdiction—Information—Criminal Offence—Municipal Election—Voting more than once.

Motion by the prosecutor, A. D. Turner, to make absolute a rule calling on the police magistrate for the city

of St. Thomas and the defendant to shew cause why the magistrate should not be directed to receive the oath of Turner to an information preferred against the defendant. The rule was granted under R. S. O. ch. 88, sec. 6. The information sought to be laid against the defendant was for that he did, on the 6th January last, at St. Thomas, after having voted once and not being entitled to vote again at the election for aldermen, wilfully and corruptly apply for a ballot paper, in his own name, and did wilfully and corruptly vote three times for aldermen, and did thereby commit an interference with an election. The magistrate held (see 1 O. W. R. 136) that he had no jurisdiction to hear the case and dispose of it summarily, or to hold a preliminary investigation and determine whether the accused should be committed for trial if the evidence warranted him in so doing.

By 1 Edw. VII. ch. 26, sec. 9 (O.), it is provided that in towns and cities where aldermen are elected by general vote, every elector shall be limited to one vote. Section 193 of the Municipal Act declares (f) that no person shall, having voted once, and not being entitled to vote again, apply for a ballot paper in his own name; and by sub-sec. 3, a person guilty of any violation of this section shall be liable to imprisonment for a term not exceeding 6 months. By sec. 138 of the Criminal Code, every one is guilty of an indictable offence, and liable to one year's imprisonment, who, without lawful excuse, disobeys any Act of the Parliament of Canada, or of any Legislature in Canada, by wilfully doing any act which it forbids, unless some penalty or other mode of punishment is expressly provided by law.

J. M. McEvoy, London, for the applicant.

E. E. A. DuVernet, for the magistrate and the defendant.

ROBERTSON, J.—As the section of the Act of 1 Edw. VII. referred to does not contain a particular mode of enforcing the prohibition, and the offence is new, the only remedy is by indictment, as provided by sec. 138 of the Code. Therefore, the magistrate had jurisdiction to take the information in question and to issue a summons to the defendant to hear and answer the charge, and to hear the case and determine whether the defendant should be committed for trial, and moreover he was bound to do so. And, as the magistrate had not exercised any discretion, but had simply declined jurisdiction, it was the duty of the Court to order him to exercise his jurisdiction.

Rule absolute. Costs of applicant to be paid by defendant.

McEvoy, Pope, & Perrin, London, solicitors for the applicant.

DuVernet & Jones, Toronto, solicitors for the respondents.

MEREDITH, C.J. APRIL 11TH, 1902.

TRIAL.

PUTERBAUGH v. GOLD MEDAL CO.

Libel—Proof of Publication—Letter Dictated—Privilege.

Action for libel tried at the Toronto Winter Assizes. The jury disagreed, and the defendants moved for judgment in their favour upon the grounds: (1) that publication of the alleged libel was not proved; and (2) that if there had been publication, the occasion was privileged. The alleged libel was a letter written in the name of the defendant company by the defendant Abra, the company's manager, to the plaintiff. The letter was dictated by Abra to the stenographer of the company, who typed it and copied it in the company's letter book.

E. E. A. DuVernet, for plaintiff.

F. C. Cooke, for defendants.

MEREDITH, C.J.—I am bound by Pullman v. Hill, [1891] 1 Q. B. 524, to hold that there was evidence of publication and that the occasion of the publication to the stenographer was not privileged. I should have preferred, had I been at liberty to do so, to hold otherwise, and to apply the principle of Lawless v. Anglo-Egyptian Cotton and Oil Co., L. R. 4 Q. B. 262, and Harper v. Hamilton Retail Grocers' Association, 32 O. R. 295, but, in the circumstances of this case, according to the decision in the Pullman case, that principle is inapplicable. See 7 Law Quarterly Review (1891), pp. 101-2.

Motion refused.

DuVernet & Jones, Toronto, solicitors for plaintiff.

Pinkerton & Cooke, Toronto, solicitors for defendants.

APRIL 10TH, 1902.

C. A.

REX v. GODSON.

Criminal Law—Incest — Evidence — Contents of Destroyed Letters — Inference from Non-menstruation — Misdirection—Substantial Miscarriage—New Trial.

Case reserved by the Chairman of the General Sessions

of the Peace for the County of York. The prisoner was indicted upon a charge of incest with his daughter on the 21st January, 1900. At the trial the evidence of one Rogers, who arrested the prisoner at Regina, was admitted as to the contents of certain letters written by the prisoner to his daughter and his sister, respectively, and letters received by him from them. The prisoner admitted sending and receiving certain letters, which he said had been destroyed. The evidence was objected to. Evidence as to the contents of the letters was also given by the daughter, and was objected to. In his charge to the jury the Judge said: "There is a circumstance which I will just simply mention in conclusion, that if the aunt and the girl told the truth, she was not with child on the 16th January, because she had her usual monthly courses at that period, five days before the date when this said alleged offence was committed." And upon objection by the prisoner's counsel to these remarks, the Judge added: "I do not say it was conclusive testimony, I only say it was fairly conclusive testimony, that on the 16th January she was not impregnated." "As to the fact of menstruation after impregnation there has been no evidence offered on either side beyond the bare fact that on the 16th January the girl had her usual monthly periods. It is common knowledge, to this extent, that these periods occur at regular intervals, and that they cease after impregnation. It is unfortunate, perhaps, that some of the medical men were not asked along that line, but certainly there is no evidence to shew it is at all a frequent or common occurrence, that a woman will have her menstruation after she has been impregnated."

The prisoner was convicted, and the following questions were reserved for the consideration of the Court:—1. Was the evidence of Rogers and the daughter as to the contents of letters written by her to her father properly admitted? 2. Was the Judge right in charging the jury with reference to the inference that might fairly be drawn from the fact that the girl had not menstruated after the 16th January, 1900? 3. If, in the opinion of the Court of Appeal, the Judge was wrong in either of his rulings, as a matter of law has there been a mistrial?

C. C. Robinson, for the prisoner.

Frank Ford, for the Crown.

OSLER, J.A.—The first question must be answered in the affirmative and the second in the negative. There was

misdirection in telling the jury that the fact of menstruation after the 16th January was fairly conclusive testimony that the girl was not then impregnated. Menstruation after impregnation may perhaps be assumed to be an unusual occurrence; although in the absence of medical evidence it is hardly right for the Court to go that far. In Taylor on Medical Jurisprudence, ed. of 1897, p. 511, it is said to happen, and caution is advised against forming an opinion. Such a direction to the jury was calculated to impress the jury very strongly in favour of the truth of the girl's story as to the date upon which, from the fact that the Chairman has reserved the case, we must infer that a good deal may have turned, having regard to her other evidence, which has not been stated to or brought before this Court. There may have been corroboration of the girl's evidence, but it is not before the Court, and on this important incident the jury were practically told to find against the prisoner, and, that being so, there has been a substantial wrong or miscarriage at the trial within the cases under sec. 746 (f) of the Criminal Code or analogous provisions: Bray v. Ford, [1896] A. C. 44; Attorney-General v. Makins, [1894] A. C. 57, 69. The offence in question was not one at common law, and was only cognizable in Ecclesiastical Courts.

ARMOUR, C.J.O., MACLENNAN and MOSS, JJ.A., concurred.

New trial directed under sec. 746 (B) of the Code.

APRIL 11TH, 1902.

C. A.

FOWLIE v. OCEAN ACCIDENT AND GUARANTEE CO.

Accident Insurance— "Accidental" Death—Onus of Proof—Finding of Jury—Notice and Particulars of Death—What Sufficient—Waiver—R. S. O. ch. 203, sec. 152.

Appeal by defendants from judgment of BOYD, C., entered for plaintiff upon verdict of a jury. The action was to recover upon an accident policy insuring against "accidental bodily injury caused by violent external and visible means." The contract was qualified by R. S. O. ch. 203, sec. 152. The deceased was last seen alive at Gravenhurst on 3rd June, 1898, after getting off a north bound train. He was next seen lying on the railway track at Severn Bridge, 8 miles south of Gravenhurst, about 4 the following

morning, by the engine-driver of the south bound train, who loudly sounded the whistle, but the train men saw no sign of life, and the body was run over and so mangled as to make it impossible to tell whether he was alive or dead when struck. On the 6th June, 1898, his son informed defendants' agent at Orillia, and he wrote to the manager at the head office for Canada in Montreal, informing him of the death and stating that the assured "seems to have been walking on the track to or from the station when he was overtaken by a train," and the letter asked for claim papers. The manager in reply forwarded the usual papers, which were completed and returned at once.

H. Cassels and R. S. Cassels, for the appellants.

G. Lynch-Staunton, K.C., and L. F. Stephens, for the plaintiff.

ARMOUR, C.J.O.—The letter of the agent and the fatal death claim forms furnished constitute sufficient notice and particulars to satisfy the condition in the policy that notice and full particulars of the accident must be given within 21 days to the corporation: Brawstein v. Accidental, 1 B. & S. 705. In December, 1898, the manager wrote plaintiff that, under the circumstances attending the death, the defendants did not consider themselves liable owing to clause B2 of the policy. . . This amounted to a waiver of fuller particulars or proofs: Boyd v. Cedar Rapids Ins. Co., 70 Iowa 325; Morrow v. Lancashire, 29 O. R. 377, 26 A. R. 173; McCormack v. Royal Ins. Co., 163 Penn. St. 184. There is no doubt that the death of deceased was from bodily injury caused by violent external and visible means, but the question was whether it was accidental, and of this the plaintiff was bound to satisfy the jury. "Accidental" is defined by R. S. O. ch. 203, sec. 152. Three causes of death were suggested by the evidence: (1) death at the hands of another; (2) death by his own hands; (3) death by a locomotive engine, through voluntary or negligent exposure to unnecessary danger. There was evidence in support of each of these causes which must have been submitted to the jury: Trew v. Railway Passengers' Assce. Co., 5 H. & N. 211, 6 H. & N. 839; Fidelity Co. v. Wein, 182 Ill. 496; Anthony v. Mercantile, 162 Mass. 354. The charge at the trial called attention to all the facts, and has not been questioned. The jury found that there was "no evidence to satisfy us that this man came to his death by his own hand, but that he came to his death through external injuries unknown to us." This is not a finding that death was "accidental"

within the meaning of the statute, and that was necessary to make defendants liable under the contract. Assuming the finding negatives suicide, it does not follow that the death was "accidental," and the finding is too vague to be construed as a finding of "accidental" death within the statute, and there must therefore be a new trial, but it must be confined to that question. Costs of appeal and former trial to abide the event.

MACLENNAN and MOSS, JJ.A., concurred.

Lees, Hobson, & Stephens, Hamilton, solicitors for plaintiff.

Cassels, Cassels, & Brock, Toronto, solicitors for defendants.

APRIL 10TH, 1902.

C. A.

FRANKEL v. GRAND TRUNK R. W. CO.

Railways — Carriage of Goods—Claim for Non-delivery—Place of Delivery — Consignees — Refusal to Accept — Termination of Transitus—Position of Carriers—Bailees—Duty to have Goods Ready for Delivery—Damages for Breach.

Action for breach of contract to carry and deliver five car loads of scrap iron which the plaintiffs had sold to a rolling mill company. The contract of sale provided for delivery at the purchasers' mill at Sunnyside, Toronto, and in the shipping bills the property was addressed to the plaintiffs or the mill company, Sunnyside. The mill was situate near the defendants' main track. There was no station there, but there was a siding leading off the track into the mill. The station nearest to the mill was Swansea, and the cars containing the scrap iron arrived there, and notice of their arrival was sent to the plaintiffs and to the mill company. The station agent had previously been instructed by the plaintiffs to deliver all cars addressed to the plaintiffs at Swansea or Sunnyside, to the mill company. The mill company, after inspection of the goods at Swansea, refused to accept them. The cars were not sent on to Sunnyside, but remained at Swansea, and, being in the way of the traffic, had been, before the refusal to accept, run up a side-line and left in a cutting. This was early in February, and while the cars were in the cutting the wheels became covered with clay by reason of a thaw, and then were frozen fast, and the

cars were not got out until the end of April. The trial Judge found in favour of the plaintiffs, and assessed the damages at $1,000. The defendants appealed.

Wallace Nesbitt, K.C., and H. E. Rose, for appellants.

G. F. Shepley, K.C., and J. Baird, for plaintiffs.

THE COURT held, OSLER, J.A., dissenting, that the mill company were the consignees of the scrap iron, and had a right to put an end to the transitus at Swansea by refusing to receive it, and there was no necessity for the defendants to tender the goods at Sunnyside.

Held, however, MACLENNAN, J.A., dissenting, that the defendants were liable to the plaintiffs in damages for not keeping the cars, after the refusal, in such a position that the plaintiffs could unload them and remove their property.

[The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A. LISTER, J.A., died while the case was under consideration. A majority of the remaining members of the Court agreed upon a judgment varying that of the trial Judge by limiting the plaintiffs' recovery to damages suffered by reason of the delay up to the time that the defendants had placed the cars in such a position that the plaintiffs could take their goods.]

Lobb & Baird, Toronto, solicitors for plaintiffs.

John Bell, Belleville, solicitor for defendants.

APRIL 10TH, 1902.

C. A.

CANADIAN PACIFIC R. W. CO. v. CITY OF TORONTO.

Municipal Corporation — By-law — Vehicles Standing on Highway —Agreement with Railway Companies—Contravention of—Injunction—Quashing By-law not in Public Interest.

Appeal by defendants from judgment of STREET, J., consolidating an action for an injunction with a summary application to quash a by-law of defendants, and granting the injunction and the motion. The plaintiffs were the Canadian Pacific and Grand Trunk Railway Companies and one Leonard, a ratepayer of the city.

By the Municipal Act, R. S. O. ch. 223, sec. 559, subsec. (3), councils of cities, towns, and villages are empowered

to pass by-laws "for authorizing and for assigning stands for vehicles kept for hire on the public streets and places."

The defendants' council passed a by-law, by the first section of which it was enacted that no cab, cart, express waggon, or other vehicle kept for hire, should stand upon or in any street while waiting for hire or engagement or while unengaged upon and in the streets and subject to the regulations thereafter mentioned; and by sec. 2, "the stands for cabs, carriages, and other vehicles kept for hire for the carriage of persons shall be as follows"—proceeding then to define and set forth the several streets and places therein or parts thereof on which such stands should be.

While this by-law was in force an agreement was entered into between the Canadian Pacific and Grand Trunk Railway Companies and the defendants, one clause of which was as follows:—"The Grand Trunk will dedicate to the public a street not less than 66 feet wide, extending along the north side of the Union Station block from Simcoe street to York street. The city agrees that, at the request of the Grand Trunk and the Canadian Pacific, a part of the said street shall be dedicated for cabs or express waggons, but this shall not be done except on such request."

This agreement was expressly authorized by 55 Vict. ch. 90 (O.), and was executed in pursuance of such authority, and Station street, as laid out, represented the street which the plaintiffs the Grand Trunk Railway Company covenanted to dedicate, and which they conveyed to the defendants for that purpose.

The defendants, without the request of the plaintiffs, passed a by-law, 3757, "to authorize cabs, carriages, and express waggons to stand on Station street;" and this was the by-law in question in the action and motion. It was passed upon the request of the cab-owners in the city, and upon a bond being given to indemnify the city against any action, etc.

E. E. A. DuVernet, for appellants.

A. B. Aylesworth, K.C., and Shirley Denison, for plaintiffs.

ARMOUR, C.J.O.—There was without doubt jurisdiction in the Court to enforce the performance by the city of its agreement, and to enjoin it against committing any breach of it. And there was also jurisdiction in the Court to set aside the by-law passed in breach of the agreement, irrespec-

tive altogether of the provisions of the Municipal Act in relation to the quashing of by-laws, just as the Court has jurisdiction to enforce the performance by an individual of his agreement, to enjoin his committing a breach of it, and to set aside whatever he may have done in breach of it. This jurisdiction was properly exercised by the judgment appealed from. The Act 55 Vict. ch. 90, by the express provision of sec. 39 of the Interpretation Act, is to be deemed a public Act, but whether by-law 3757, passed in breach of the agreement made valid and binding by it, can be said to be illegal within the meaning of sec. 378 of the Municipal Act so as to admit of its being quashed under the provisions of that section, at the instance of any resident of the city, or any other person interested in it, merely because it was passed in breach of the agreement, is a more difficult question; but it is unnecessary to determine this, for the by-law was clearly illegal, under the authorities, having been passed not in the interest of the general public, but in the interest of a particular class. There is nothing in the agreement interfering with the dedication of this street to the public or preventing the user of it as a common and public highway, and the drivers of cabs and express waggons, as well as the general public, are entitled to use it as such, but they, as well as the general public, must use it as such common and public highway in a lawful manner: Rex v. Cross, 3 Camp. 225; Rex v. Jones, *ib.* 229; Rex v. Russell, 6 East 427; Attorney-General v. Brighton, [1900] 1 Ch. 276.

The appeal must be dismissed with costs.

OSLER, J.A.—The true construction of the agreement, in my opinion, is, that no part of Station street shall be set aside as a stand for cabs, etc., except upon the request of the railway companies. The defendants ask us to read it as if it left them free to pass a by-law under the general section of the Municipal Act, designating the whole street as a stand for cabs, but restraining them from limiting a part only of it for that purpose except upon request. This may be thought an ingenious way of construing the agreement, but it is, I think, an unsound and illusory one, and quite inadmissible. It would defeat, if it were adopted, the very plain object and intent of the agreement. The action was, therefore, well brought to restrain the defendants from committing a breach of the agreement under which the street had been dedicated to the public, and conveyed to them. The terms of the agreement being authorized by special Act, the defendants' powers under the provisions of the general

Act are limited, and can be exercised only *sub modo*, and in accordance with the authority derived under the former.

As regards the motion to quash the by-law; it succeeds on the very plain principle that the defendants have attempted to exercise their powers not *bona fide* in the interest of the public generally—their only right to act under sec. 559—but at the request and in the private interests of a few members of the public, and upon being indemnified by them against doing an act the impropriety of which, as being contrary to their agreement, the council appear to have been fully alive to: In re Morton and City of St. Thomas, 6 A. R. 323; In re Peck and Town of Galt, 46 U. C. R. 211.

On every ground, I think the appeal fails and should be dismissed.

MACLENNAN, J.A.—If restricted from designating a part of the street as a stand, the defendants must necessarily be restricted as to every part, and therefore as to the whole. Nor do I think any of the other arguments urged by the appellants are entitled to prevail. The case is simply one of contract, and whatever question there might be of the power of the city to enter into it, is set at rest by the Act of the Legislature. The by-law is a distinct violation of the agreement, for which an action is a proper mode of seeking redress, and, in my opinion, the jurisdiction of the Court is clear to declare the by-law illegal, and to restrain further violation by injunction. The only way in which the defendants could violate the agreement was by passing a by-law, and an injunction to restrain the violation of the agreement necessarily extends to future by-laws. The judgment might have included an award of nominal damages for the breach of contract, and it would then be in form, what it is now in substance, a common law action, with an award of an injunction rendered proper and necessary, inasmuch as the breach of the agreement was deliberate.

It is not necessary to do so, and I refrain from expressing my opinion upon the rights of licensed cab and express men to use the streets in question in following their business; or on the question whether, in the absence of by-law to the contrary, they may not stand anywhere upon any street waiting for employment, so long as they do not obstruct traffic.

MOSS, J.A.—I agree.

MacMurchy, Denison, & Henderson, Toronto, solicitors for plaintiffs.

DuVernet & Jones, Toronto, solicitors for defendants.

FALCONBRIDGE, C.J. APRIL 12TH, 1902.

TRIAL.

HAM v. PILLAR.

Vendor and Purchaser—Delivery of Conveyance—Covenant for Possession—Enforcement.

Action to compel a vendor to give possession of the land conveyed, under the covenant in the conveyance. Tried at Kingston.

H. L. Drayton, Toronto, and J. English, Napanee, for plaintiff.

J. L. Whiting, K.C., for defendant.

FALCONBRIDGE, C.J.—The plaintiff is entitled to rely on his covenants. There is but little dispute as to what took place on the 31st October, but, in any view of the facts, plaintiff's rights under the deed were not taken away. The deed was not delivered by mistake. There was ample opportunity for deliberation and consultation, inasmuch as the deed had to be sent for and procured from the office of defendant's solicitor. It does not seem to be a case for specific performance, but for damages. Judgment for plaintiff with costs up to judgment. Reference to Master at Napanee as to damages. Further directions and subsequent costs reserved. Thirty days' stay.

J. English, Napanee, solicitor for plaintiff.

J. Mudie, Kingston, solicitor for defendant.

APRIL 12TH, 1902.

C. A.

GRAVES v. GORRIE.

Copyright — Works of Fine Art — Imperial Acts — Application to Colonies.

Appeal by plaintiffs from order of a Divisional Court (1 O. L. R. 309) affirming judgment of ROSE, J. (32 O. R. 226). The plaintiffs are art publishers in London, England. The defendant is a printer and publisher in Toronto, Ontario. The plaintiffs claim to be entitled to the copyright in Great Britain and Ireland, and the British colonies and possessions,

of a picture of the bull-dog on the Union Jack known as "What we have we'll hold," first published in London in July, 1896, and duly entered by the plaintiffs at Stationers' Hall, London, pursuant to 25 & 26 Vict. ch. 68 (Imp.) The Courts below held that the said Act, which is an Act amending the law relating to copyright in works of fine art, does not extend to the colonies.

J. T. Small, for plaintiffs.

J. H. Denton, for defendant.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held, as to the territorial application of the Act, that there are no words expressly extending the area of protection of a copyright granted by it to the colonies, and it was laid down as long ago as 1769, in Rex v. Vaughan, 4 Burr. 2500, that no Act of Parliament made after a colony is planted is construed to extend to it without express words shewing the intention that it should. If this rule was proper, then it is much more proper that it should prevail in 1862. See also Routledge v. Low, L. R. 3 H. L. 100; Williams v. Davis, [1891] A. C. 460; New Zealand v. Morrison, [1898] A. C. 349. A consideration of the scope and object of the Act does not lead to the conclusion that it was intended to affect the colonies, nor are the words used calculated to have that effect, nor can it be said that the policy of Parliament supports such a conclusion. By reference, too, to the various Copyright Acts it will be seen that when it is intended to include the colonies, express words are used. (Review of them.) Nor can the intention to include the colonies be gathered from a careful consideration of the wording of the different sections of the Act. The object of sec. 8 was to put authors of all literary and artistic works first produced in the British possessions upon the same footing and entitle the authors of all literary and artistic works first produced in those possessions to the benefit of the Copyright Acts, but this had not the effect of extending the area of protection granted by the Copyright Acts to the British possessions: Page v. Tounand, 5 Sim. 395; Winslow, 92. By no reasonable construction can the application of sec. 9 of the International Copyright Act "to every British possession as if it were part of the United Kingdom," have the effect of applying the Copyright Acts "to every British possession as if it were part of the United Kingdom," and as extending the area of protection granted by those Acts "to every part of the British possessions as if it were part of the United

Kingdom." The judgments below are right and should be affirmed and the appeal be dismissed with costs.

Henderson & Small, Toronto, solicitors for plaintiffs.

Pearson & Denton, Toronto, solicitors for defendant.

APRIL 12TH, 1902.

C. A.

RE CITY OF TORONTO ASSESSMENT APPEAL.

Assessment and Taxes—Valuation of Property—Electric Companies—Rails, Poles, and Wires—Wards—Franchise—Going Concern—Integral Part of Whole—1 Edw. VII. ch. 29 (O.)

Appeal by the city corporation from a decision of the County Judges of York, Halton, and Ontario, upon the question of the assessment of the Bell Telephone Company, the Toronto Electric Light Company, the Toronto Railway Company, and the Toronto Incandescent Light Company, in respect of plant, including wires, poles, etc. The board of County Court Judges reduced the assessments as confirmed by the Court of Revision. The question upon the appeal was whether the board of Judges were right in deciding that the Act 1 Edw.VII. ch. 29, sec. 2 (O.), made no difference in the mode of valuing the rails, poles, wires, and other plant belonging to the companies, erected or placed upon the highways, which was held to be proper by the decision in Re Bell Telephone Co. and City of Hamilton, 25 A. R. 351, and Re London Street R. W. Co., 27 A. R. 83.

A. B. Aylesworth, K.C., and J.S. Fullerton, K.C., for the city corporation.

G. Lynch-Staunton, K.C., and E. H. Ambrose, Hamilton, for the Bell Telephone Company.

H. O'Brien, K.C., for the Toronto Electric Light Company and the Toronto Incandescent Light Company.

J. Bicknell and J. W. Bain, for the Toronto Railway Company.

THE COURT, (ARMOUR C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held (MACLENNAN, J.A., dissenting) that the board of Judges were right in their decision.

OSLER, J.A.—The new clause does no more than enable the assessor to assess the property all together in one ward,

or to apportion the assessment among two or more of the wards, as he may deem it convenient. It merely removes one of the difficulties pointed out in the cases before decided, but does not extend the principle on which the value of such property, apart from the franchise of the company or its use to a going concern, is to be ascertained by the application of the rule provided by sec. 28 of the Assessment Act for ascertaining its value. It is now to be valued as if it were all in one ward. That is to say, as a whole or as an integral part of a whole, but still without reference to its connection with a franchise or its use as the property of a going concern. The learned chairman of the board (McDougall, Co. J.) has given a very full and satisfactory exposition of the new section, to which nothing can be added, except that the decisions by which the Court of Appeal is bound require much more comprehensive legislation to remove their effect than anything which is found in that clause.

ARMOUR, C.J.O., and MOSS, J.A., wrote opinions to the same effect.

MACLENNAN, J.A. (dissenting)—The injunction to assess all property at its actual cash value still remains. So does the mode of appraisement, as if in payment of a just debt from a solvent debtor. But the obligation to assess in several wards is swept away, and it may be assessed all together in any one ward, or it may be apportioned amongst two or more wards, and in either case it shall be valued as a whole, or as an integral part of a whole. Each of the companies owns, and is assessed for, freehold land in the ordinary sense, as well as for their rails, poles, wires, etc., upon the public streets, and the two kinds of real estate are connected, both in construction and in use, and, taken together, answer the description in the sub-section "real property belonging to . . . any . . . incorporated company, and extending over more than one ward in any city," and what the section says is, that it may be assessed together in any one of such wards. That is what has been done here. It has been valued as a whole, that is, as if the company, being solvent, were conveying the whole to a creditor in payment of a just debt. In valuing the land of the company extending over several wards *as a whole*, the value of the rails, poles, wires, etc., must be included as a part of the whole. But, even if it becomes necessary to value a part of the company's real property separately, as in the case of that part which may be in a township outside of a

city or town, where perhaps it has no land other than the rails, poles, wires, etc., on the public highways, the result must be the same. It must be the full value of these fixtures to the company, because they must be valued as an integral part of the whole. It plainly means, that it is not to be valued without reference to the whole of which it is a part, but as an essential part of the whole—as something without which the whole would be incomplete. It is to be valued, in short, at what it is worth to the debtor, being solvent, as a part of the whole, so that he, being solvent, would be willing to let it go at that value in payment of a debt.

Appeal dismissed with costs.

APRIL 10TH, 1902.

DIVISIONAL COURT.

MORRISON v. GRAND TRUNK R. W. CO.

Discovery—Examination of Officer of Corporation—Railway Company—Engine-driver—Rules 439, 461.

Appeal by plaintiff from order of STREET, J., in Chambers (*ante* 180), reversing order of Master in Chambers, which allowed plaintiff to examine for discovery, as an officer of defendants, an incorporated company, the driver of an engine attached to a train of which the plaintiff's husband was the conductor in charge at the time of his death, in an action against the company for negligence causing such death. Upon the appeal the book of the defendants' rules, which was not before STREET, J., was put in evidence.

J. G. O'Donoghue, for plaintiff.

D. L. McCarthy, for defendants.

BOYD, C.—The engine-driver was practically in charge of the train after the conductor was killed, and he is the man who presumably knows at first hand how the accident happened, and is in this regard the proper person to make discovery. He is also an "officer" of the company, recognized as such and so named in the Railway Act, R. S. C. ch. 190, sec. 85 (1) and (4); see also 51 Vict. ch. 29, sec. 214 (g), and secs. 243, 292. The rules of the company indicate that both driver and conductor are in charge of a train.

Dawson v. London Street R. W. Co., 18 P. R. 223, Casselman v. Ottawa, etc., R. W. Co., *ib.* 261, and Odell v. City of Ottawa, 12 P. R. 446, followed.

FERGUSON, J., agreed.

MEREDITH, J., agreed that the engine-driver was an officer, but did not base his opinion upon the peculiar circumstances of this case.

Appeal allowed and order of Master restored. Costs of appeal and below to be in the cause.