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COURT OF APPEAL.

April 21st, 1911.

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—Place Where Accident Occurred—Finding of Jury—Connection between Neglect and Result—Proper Inference—Evidence.

Appeal by the defendants from the judgment of Middleton, J., at the trial, in favour of the plaintiffs, upon the findings of a jury. The facts are stated in that judgment, which is reported ante, p. 252, and in the judgment of Moss, C.J.O., infra.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

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

W. M. McClemont, for the plaintiffs.

Moss, C.J.O.:—This is an action by the widow and children of one James A. Griffith to recover damages for his death. The deceased, who was an employee of the Hamilton Steel & Iron Co., was on the evening of the 29th of December, 1909, found lying dead outside of the south rail of the southern track of the defendants' main line between Niagara Falls and Hamilton. His body was found about 350 yards east of a highway called Kenilworth Avenue which is crossed by the railway. Two passenger trains bound east towards Hamilton had passed the crossing. His body was found within a few minutes after the last of these trains had crossed, and from the appearance of the remains, and other evidence, there is no doubt that he was run down by either one or the other of these two trains. There was no eye-witness of the accident, and when last seen alive he was going home from his work at the Hamilton Steel & Iron Com-

pany's works in a direction which would lead him into Kenilworth Avenue some distance north of Kenilworth Avenue, whence he would proceed south along Kenilworth Avenue, crossing the tracks there in order to reach his house which stands in a field lying south of the tracks and east of Kenilworth Avenue. He was not seen on Kenilworth Avenue or on the railway track, but it appeared that his habit was to cross the tracks at Kenilworth Avenue and proceed south for some distance and then to turn east to his home. It was his usual custom to follow this route and he was never known to walk along the railway tracks, or within the right of way, towards the east from Kenilworth Avenue crossing.

The questions submitted and the answers by the jury were as follows:—

"1. Did the deceased come to his death by contact with a train of the defendants? A. Yes.

2. Was his death occasioned by the negligence of the railway? A. Yes. If so, in what did the negligence consist? A. Absence of warning in not ringing bell and not blowing the whistle.

3. Where was the deceased when he was struck by the train? A. At the crossing.

4. (As to damages).

5. Which train struck the deceased, if he was struck by a train? A. Express train going east."

In answer to a question by the learned trial Judge as to the meaning of the last answer the jury explained that they meant the train which did not ring the bell.

A motion to enter judgment for the defendants had been made at the conclusion of the evidence, upon which the learned trial Judge reserved his opinion, and upon motion for judgment upon the answers he reserved judgment. Subsequently, for reasons stated, he directed judgment to be entered for the plaintiffs for the amount of damages ($2,000) found by the jury.

The evidence establishes beyond question that the deceased could not have been struck by the first of the two passenger trains which passed the crossing not long before the discovery of the body. It is said that both these trains usually pass the crossing between 5.30 and 6 or 6.10 o'clock. The first one is said to be timed to leave Hamilton station at 5.30, and there is the uncontradicted evidence of John Griffith that on the evening in question the first one passed about 5.40 or 5.45 o'clock. The deceased left the Hamilton Iron & Steel Com-

pany's works not earlier than 5.30 o'clock. He was an elderly man and it does not appear that he was a fast walker. Lustie, a fellow employee of the deceased, who lived a short distance further east of the crossing, and took a shorter route, getting upon the railway tracks more than half a mile west of Kenilworth Avenue, and walking east upon the track to his home, said that it took him, walking quietly, between 25 and 30 minutes to reach his house. At a point 110 yards west of Kenilworth crossing he had a 10 minutes' walk to reach home. In other words, it took him between 15 and 20 minutes on the shorter route to reach a point 110 yards west of the crossing. It is apparent, therefore, that unless the deceased made extraordinary speed on the evening in question he could not, if he took his usual course, have arrived at the crossing until after the first passenger train had crossed. And there is nothing to shew that he went by any other than his usual route.

All the evidence and all the probabilities point to the deceased being struck by the second train, and the jury were well warranted in coming to that conclusion. The testimony is all one way as to the absence of the statutory warnings by those in charge of the second passenger train. Every witness who speaks as to the point is clear that the whistle was not sounded and the bell was not rung for the Kenilworth Avenue crossing—there is no evidence to the contrary, and the finding of the jury upon that question cannot be disturbed. If, therefore, the deceased was struck while on the crossing his death was due to the negligence of the defendants. And the next question, and the sole one presenting any real difficulty, is: Is there evidence upon which the jury might reasonably find that the deceased was at the crossing when he was struck?

The finding of some portions of his head, of some of his clothing, and his dinner at a distance of about 300 yards from the crossing, and of his body 50 yards further on, are no doubt weighty circumstances pointing to the contrary. But are they conclusive in view of all the evidence? Two inferences were open to the jury upon the proved facts and circumstances, either that the deceased was struck at the crossing where he might lawfully be, or that he was overtaken and run down while trespassing upon the track some distance east of the crossin. There were submitted for their consideration a number of cogent facts and circumstances upon which they might fairly and reasonably conclude that he was struck at the crossing.

Not to enumerate all, there was the testimony of Lustie and Glanfield, who were walking on the track and were in full view

of the track from a point 110 yards west of the crossing, far beyond where the body was found, before the east bound train passed them. If the deceased had been proceeding down the track then they would have seen him, but he was not seen—there was his well-known usual custom to avoid the tracks and to cross at Kenilworth Avenue going south to his home, there was the fact that the train was running at between 25 and 30 miles an hour, so that the interval of time between the crossing and 300 yards east of it was not more than 23 or 25 seconds, a space easily permitting of a body being carried that distance forward before striking the ties or rails. It was for the jury to determine, and it cannot be said that there was not reasonable evidence to support their finding. At the same time, when the east bound passenger train was nearing the crossing from the west, a freight train on the north or west bound track was nearing it coming from the east. The engines of these two trains passed each other a short distance to the east of Kenilworth crossing. The freight train gave all the statutory signals for the crossing while the passenger train gave none. What in all likelihood happened was that the deceased, having reached the north side of the crossing, and hearing and seeing the freight train, concluded, as he reasonably might, that he could cross before it reached the crossing, did cross the north track and go upon the south track, and not hearing or noticing the passenger train was struck by it. At this time Lustie and Glanfield's view of the crossing would be obscured by the train so that they could not see the deceased just at that moment. It was said that this train was somewhat late on this occasion, and the deceased, who was in the habit of crossing at the same hour, may have supposed that it had already passed, and so have devoted his attention entirely to the freight train.

The result is that the appeal fails, and it should be dismissed with costs.

Garrow, J.A., gave reasons in writing for the same conclusion.

Maclaren and Magee, JJ.A., also concurred.

Meredith, J.A., dissented, for reasons stated in writing. He was of opinion that as the case now stood, it was not distinguishable, in principle, from Wakelin v. London and South-Western R.W. Co., 12 App. Cas. 41, a case of supreme author-

ity, and stated that he would, if the case were to be determined upon the evidence as it now stood, allow the appeal and dismiss the action. In view, however, of the peculiar circumstances of the case, he was in favour of granting a new trial to the plaintiffs, if they chose, within a month, to take it—costs of the former trial and of this appeal to be costs in the action to the defendants in any event.

APRIL 21ST, 1911.

ZUFELT v. CANADIAN PACIFIC R.W. CO.

Railway—Negligence—Efficient Headlight on Snow Plough—Statutory Signals—Excessive Speed—Answers of Jury—Verdict of Ten Jurors under sec. 108 *of Judicature Act—Same Ten not Agreed in Every Instance—Meaning of "Village" in Railway Act, sec.* 275*—New Trial—Costs.*

Appeal by the defendants from the judgment of MAGEE, J., at the trial with a jury, awarding the plaintiff $3,000 and costs. This was an action by the father and mother of Ernest Edgar Zufelt and Ida Marion Zufelt, who while driving on Zorra street, in the village of Beachville, and crossing the defendants' railway, were struck by a snow plough attached to a train, and received injuries which resulted in their death, which accident is said to have been caused by the defendants' negligence.

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

I. F. Hellmuth, K.C., and A. MacMurchy, K.C., for the defendants.

W. M. Douglas, K.C., and G. F. Mahon, for the plaintiffs.

MOSS, C.J.O.:—The plaintiffs assigned four acts of negligence or breaches of duty on the part of the defendants, whereby the injuries were inflicted which caused the death of the plaintiffs' son and daughter.

These were: (1) failure to properly protect the crossing at which the accident occurred; (2) want of an efficient headlight on the snow-plough preceding the locomotive engine; (3) failure to give the statutory signals by bell and whistle on approaching the crossing; and (4) running at excessive speed through a thickly peopled portion of the village of Beachville.

As to the first ground, no specific question was addressed to the jury, nor did they in terms make any finding upon it. In answer to questions bearing on the other grounds, they found that the headlight on the snow-plough was not an efficient headlight, the one in use not being placed in a suitable position so as to shew the light directly in front of the snow-plough; that there was a failure to sound the whistle of the engine at least 80 rods before reaching the crossing, and to ring the engine bell continuously for a distance of 80 rods before reaching the crossing and until the engine had passed it, that the place was a thickly peopled portion of Beachville, that the train was running at a speed of 15 miles per hour, and that such speed was excessive considering the locality. And in response to the 9th question they summed up their findings as to the cause of the injury in the following answer: "Insufficient headlight on the said snow-plough, failure to sound the whistle and bell, and excessive speed." They exonerated the deceased, and their brother who was driving the sleigh which was struck, from any want of care in approaching the crossing or avoiding the accident. After some interrogation of the jury as to their agreement upon the several answers returned by them, the learned trial Judge entered judgment for the plaintiffs for $3,000, the damages found by the jury.

Probably no other course was open to him, but in view of the testimony, and having regard to the frame of the jury's answer to the 9th question, it cannot be said that the result is very satisfactory. It is not easy to determine whether the jury by that answer intended to find that any one or two of the breaches found was or were sufficient to cause the injury, or whether it was their opinion that but for the combination of all three causes the accident would not have happened. Whatever may have been their opinion, a perusal of the great mass of testimony adduced shews plainly enough that the issue to which the greatest attention was directed was as to sounding the whistle and ringing the bell. Apart from the finding of the jury upon that issue, there is not sufficient to maintain the judgment.

There is no obligation, statutory or otherwise, upon railway companies to maintain a headlight on a snow-plough when placed and running, as it must always be when working, in front of the locomotive. But according to the evidence there was a headlight on this particular snow-plough placed in the most advantageous position it was possible to have it, having regard to the form and construction of a snow-plough, and the nature of the service to be performed by it. There was no evidence to shew that any

better or more effective means of shewing a light from a snow-plough was known or in use. There is in truth no evidence upon which a jury could reasonably find negligence so far as the headlight was concerned.

The finding, with regard to running at an excessive speed through a thickly peopled portion of Beachville, is not complete, for all the necessary facts are not found. It appears from the testimony that in approaching the crossing from the west, the line of the defendants' tracks runs upon and along another highway—Durham street—but whether with, or without, the consent or leave of the municipality obtained before the present provisions of the Railway Act with respect to the Board of Railway Commissioners, or under leave obtained from the Board, or without such leave, does not appear.

No doubt the situation on the ground creates difficulty as to fencing or protection in the manner prescribed by the Railway Act. The facts were not developed as to those matters, and the jury were not asked to, nor have they made any finding on these points.

Then, with respect to the statutory signals, there was in this case much more testimony than is usually presented on behalf of a railway company charged with omitting the signals. For the plaintiffs there is no doubt a considerable body of testimony by witnesses who did not hear the signals. But on the other hand there is much direct and positive testimony, not alone from the train hands or employees of the defendants, but from independent and apparently disinterested parties who deposed to hearing both signals, and gave facts and circumstances tending to support the truth of their statements. In face of such testimony it is very difficult to understand how the jury could have found for the negative of the question, or to see the grounds upon which, on a reasonable view of the evidence as a whole, they could reach the conclusion that the negative evidence countervailed the much more convincing affirmative testimony adduced on behalf of the defendants.

Upon the whole case the result appears to be so unsatisfactory and inconclusive—even apart from the question raised by the replies of the foreman of the jury to the queries addressed to him after they had handed in their answers to the questions submitted to them—as to justify the granting of a new trial: Grand Trunk R.W. Co. v. Sims, 8 Can. Ry. Cases 61.

The question arising under sec. 108 of the Judicature Act, by reason of the statement made by the foreman of the jury, to the effect that, while each answer was agreed to by ten of the jury,

the same ten were not agreed in every instance, is not free from difficulty.

At first sight it may appear strange, and even anomalous, that where the agreement of ten is substituted for that of the twelve there should not be the same unanimity on every question that was formerly required of the twelve. But obviously the object of the legislation was to end or shorten litigation, and to avoid the necessity for a further trial in consequence of disagreement. It is doubtful if much advance to that end is made if the failure to obtain the agreement of the same ten to every question is to have the same effect as a disagreement under the former practice. Sub-section 2 of sec. 108 was apparently enacted for the purpose of avoiding the inconvenience and confusion likely to arise in a case such as the present, where a considerable number of questions were submitted, if the agreement in every answer of the same ten was to be deemed a prerequisite to their giving the verdict, or answering the questions submitted to them. In my opinion that is not the effect of the section.

There will be a new trial, the costs of the former trial and of the appeal to be in the action.

GARROW and MACLAREN, JJ.A., each gave reasons in writing for the same conclusion, in which they dealt, amongst other matters, with the argument of the appellants' counsel that the word "village" in sec. 275 of the Railway Act means an incorporated village, which Beachville was not, stating it as their opinion that there was nothing in the Act to indicate that the public in an incorporated village were intended to be given greater protection than in one not incorporated.

MEREDITH, J.A., gave reasons in writing, in which he concurred with the other members of the Court in allowing the appeal and directing a new trial, but was of the opinion that the costs of the appeal and of the last trial should be to the defendants in any event. He also expressed the opinion that it was necessary that the same ten jurors should have been agreed upon some set of facts entitling the plaintiffs to recover, before any verdict or judgment could be given in their favour.

APRIL 21ST, 1911.

STRATI v. TORONTO CONSTRUCTION CO.

Explosion of Dynamite—Careless Management of Dangerous Material—Neglect of Directions as to Thawing—Exposure to Direct Heat without Screen—Connection between Neglect and Result—Inference from Evidence—Negligence.

Appeal by the defendants from the judgment at the trial of TEETZEL, J., who found in favour of the plaintiff, in an action brought by him as administrator of Leone Lanata who, while in the defendants' employment, was on January 22nd, 1908, killed by an explosion of dynamite.

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

G. H. Watson, K.C., and S. Watson, for the defendants.

W. N. Tilley, and T. K. Allan, for the plaintiff.

GARROW, J.A.:—The defendants carry on the business of railway construction, and at the time of Lanata's death were engaged in construction work for the Canadian Pacific Railway Co., in the county of Grenville. Lanata had been in their employment from the previous July, at first as a common labourer, then two months later he was promoted to the post of foreman-driller, and finally two months later he appears upon the payroll as "powder-monkey," for which it is said he received an additional wage of 25 cents per day.

For such dangerous material, the management of it in the shack or tent where the thawing took place seems to have been conducted in an exceedingly careless and even reckless manner, justifying the very strong remark in his evidence of Mr. Gilbert, an experienced contractor, that it amounted in his opinion to criminal negligence.

The shack was a primitive affair—a tent about 14 by 16 feet in size, reinforced with lumber, with a wooden door, not kept locked when Lanata who was in charge was out, into which anyone could go, and into which workmen, including the foreman Griffin, did go when they felt so inclined. Griffin himself had been in more than once on the day of the explosion, for the purpose of warming his feet, and other workmen had also been in. Lanata was an ignorant Italian, unable to read or write, with a very imperfect knowledge of English. His

duties were not confined to work within the tent. He had to go out from time to time as helper to Griffin, and to return by his direction to the shack for the dynamite as required. When he was absent from the tent there was no one else in charge. In or near the centre of the tent was a stove called a Queen heater, made of sheet-iron, fed from the top with wood. It was of a kind which would from its construction and material quickly heat up and easily become red-hot, and on the day in question was seen to be red-hot, while the thawing operation was in progress. Ranged around the walls were a series of wooden shelves upon which the cartridges or sticks of dynamite were placed nearly upright; and upon the floor was a moveable shelf resting upon three legs placed between the fixed shelving and the stove, to which it approached within about 2 feet, upon which about 40 sticks could be placed. On the occasion in question these shelves, including the moveable shelf, were all occupied with the frozen dynamite cartridges. The cartridges or sticks required to be turned from time to time, about every twenty minutes or so, according to the evidence of Griffin. In moving about to do this, the operator had to pass behind the moveable shelf, or even to move it about. There was no screen between the stove and the shelves, by reason of which the dynamite upon the shelves, and particularly upon the moveable shelf, was exposed to the direct action of the heat from the stove.

The manufacturers issue with every box of the explosive printed directions as to thawing, as follows:—"To thaw Dynamite. This must never be done by putting the cartridge in an oven or exposing them to direct heat. They soon absorb heat enough to reach the exploding temperature if subjected to direct rays, and many accidents result. Neither, as is often done, should the cartridge be plunged in warm water, as several of the ingredients in dynamite are soluble. It is perfectly safe to thaw in a warm room if away from direct heat rays, and a small shack covered with tarred paper, containing shelves for the dynamite, the shack being heated with either a stove or with steam, a SCREEN BEING PLACED BETWEEN THE DYNAMITE AND SOURCE OF HEAT, is strongly recommended on large work. In smaller quantities, dynamite is best thawed by putting it in a pail, this pail being placed in a larger one containing water not hotter than the hand can well bear at the wrist. After the outside cartridges are thawed, put them in the centre of the pail, placing those originally in the centre on the outside, as dynamite is a non-conductor, and the cartridges in the centre

will not get as much heat as the outside ones. We sell several kinds of thawing cans. Remember that carelessness means, if not accidents, at least incomplete explosion, missfires and burnt-out charges, with their resulting fumes. Hamilton Powder Co."

The deceased, who could not read himself, is not shewn to have had these directions read or explained to him, or otherwise brought to his attention, although it is clear upon the evidence that the defendants, through their foreman and other officials, knew of them, and apparently ignored, if they did not despise them.

That an explosion occurred in such circumstances is not surprising. What is surprising is that it was so long delayed. And the evidence which the learned trial Judge accepted, and which I accept, quite justified his conclusion that the explosion was caused by the faulty and negligent manner in which the operation was carried on, and particularly by the application of direct and ill-regulated heat, which in the absence of a screen would, as Mr. Gill explained, set up molecular friction, and in the end bring about an explosion. That seems to be a reasonable explanation, and there is no other that I can see in the evidence, for spontaneous explosion is not suggested.

It is necessary, of course, to observe with some care the movements of the deceased. He was in charge so far as any one was, and it might of course be that, while the defendants' conduct and methods were negligent, after all the catastrophe was not due to them, but to some intervening act of the deceased himself, occurring immediately before the actual explosion.

A careful perusal of the evidence bearing upon this branch has led me to the clear conclusion that at the actual moment of the explosion the deceased was not in the tent at all. He had either not reached it, or had been inside, got the sticks which he was sent for, and had got outside the door. On Pezzamenti's evidence he had probably not yet been inside, and on Griffin's, he had had plenty of time to reach the tent, obtain the dynamite and get outside before the explosion occurred. But whichever of these is correct, and it is of no real consequence which, it is I think clear that he was not within the shack. The shack was blown to atoms and its contents, including the stove, scattered in all directions, but Lanata was found after the explosion, alive, his body intact but his clothing torn and burning; apparently blown by the force of the explosion against the stump of a tree which stood near the entrance to the shack. Had he been inside he must have been blown to pieces. Mr. Gill ex-

plained that when the dynamite has reached the stage of molecular friction to which I before referred, any disturbance in the tent, even a current of air, might precipitate the explosion. The day was very cold—10 degrees below zero—and the opening or closing of the door might thus on this evidence reasonably account for what occurred. If Lanata had not entirely reached the tent and opened the door, this explanation would not of course be in point, but in that case he could not reasonably be even suspected of any immediate negligence causing or contributing to the explosion. If, on the other hand, he had actually reached the inside and performed his message, and in doing so had done something such as dropping a stick in the tent, the nature of the material is so instant that he would scarcely have had time to go outside before being caught in the explosion. For these reasons it seems to me that all suggestion, for it is nothing more, that Lanata himself by his conduct at the time brought about the explosion is negatived.

No case is, in my opinion, made for interference with the judgment upon the quantum of damages or their apportionment.

For these reasons I am of the opinion that the appeal fails and should be dismissed with costs.

Maclaren, J.A., and Magee, J.A., concurred, and Moss, C.J.O. agreed in the result.

Meredith, J.A., dissented, for reasons stated in writing.

April 21st, 1911.

CANADIAN GAS POWER & LAUNCHES, LIMITED, AND JOHN A. MACKAY v. ORR BROS., LIMITED.

Sale of Goods—Written Contract not Containing Entire Agreement—Goods Supplied not Suitable for Intended Purpose —Implied Condition or Warranty—Intention and Understanding of Parties.

Appeal from the judgment of Clute, J., after trial without a jury, dismissing the plaintiffs' action and awarding the defendants $897.52 on their counterclaim. The action was commenced by the plaintiff company to recover from the defendants the sum of $4,041.84, balance claimed to be due and

payable under a contract for the supply to the defendants of one special 50 horse power engine complete with all necessary attachments, and one 500 sixteen candle power dynamo with certain attachments. While the action was proceeding the company was ordered to be wound up, and the plaintiff John A. Mackay was appointed permanent liquidator while the trial was going on. Thereupon the trial Judge added him as a party plaintiff.

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

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

E. F. B. Johnston, K.C., and R. McKay, K.C., for the defendants.

MOSS, C.J.O. (after stating the facts) :—The contract put forward and relied upon by the plaintiffs bears date the 12th of May, 1908. It is a printed form filled up and completed in pencil writing and signed on behalf of the defendants. As completed it is a somewhat loosely constructed instrument, and in some respects at all events does not represent the condition of affairs actually existing at the time. For example, although both the plaintiffs and defendants were resident and carrying on business in Toronto, the defendants request the company to ship to their address . . . from Toronto, Ontario . . . the goods . . . free on board cars or boat or launched at Toronto Bay. It is quite manifest that none of these modes or places of delivery was contemplated in this instance, and we are driven to look outside of the instrument in order to ascertain the real state of the case as understood by the parties when the bargain was made between them. The only address of the defendants that appears in the writing is "44 Richmond E." written underneath the signature. It is shewn that they were at that date, and still are, carrying on an extensive business as proprietors of a restaurant, bowling-alleys, billiard and pool-rooms, etc., in a large building, the south fronting on Richmond street east and the north fronting on Queen street east.

No time is specified within which delivery of the articles is to be made, but by the terms of payment—which, if the whole of the printed matter be read together with the pencil-writing, are ambiguous if not unintelligible—$500 was to be paid in cash on delivery of the engine, another $500 when it was running, and a further $500 when both engine and dynamos were running properly.

Shortly before the 20th of June, 1908, a 50 horse power engine was delivered at the defendants' premises in Queen & Richmond streets, and on the 20th of June a payment of $500 was made. All this goes to shew, what indeed has never been seriously disputed, that the bargaining was for the supply of an engine and dynamos for use by the defendants at the premises in which they carried on their business as proprietors of the restaurant, bowling-alleys, and billiard and pool-rooms in the different floors and rooms of the building.

The evidence is not clear as to the time when the dynamo was delivered, but it was probably not earlier than the beginning of August, 1908. Various trials were made in order to get the engine and dynamo to run properly, but the result was not satisfactory. In the end the defendants refused to accept or pay for them and this action was commenced on the 2nd of December, 1909.

The plaintiffs' position is that the transaction was the purchase by and sale to the defendants of articles specifically described and selected by them, and that the articles furnished corresponded to the order, and all conditions were fulfilled necessary to entitle them to payment of the price.

The defendants on the other hand set up, among other answers to the plaintiffs' demand, that the articles were required for particular purposes connected with the defendants' business, which especially called for absence of noise in working the machinery, and the production of steady electric light; that the company had knowledge of these facts, and also of the fact that the defendants were relying upon the company's skill and judgment to supply what was intended and required in order to accomplish the purpose, and that the sale and purchase carried or implied a condition or warranty that the articles supplied would answer the particular purpose, which condition or warranty was not fulfilled.

The plaintiffs, while denying the defendants' contention, also set up that if the defendants ever intended the articles for purposes such as they alleged, they had by personal enquiry, observation and inspection obtained a knowledge of the working and capabilities of such articles, and were also specially informed as to what could, and what could not be accomplished by the engine and dynamo in question, and of what further was necessary in order to produce the results they aimed at, and that they deliberately made up their minds to accept the articles as they were and take the risk of their failing to do all that was needed, and in that case providing such supplementary articles as might be needed.

Upon this issue, which was entirely a question of fact, the onus was on the plaintiffs. There was a distinct conflict of testimony as to whether or not the defendants understood and appreciated what was required in order to the prevention of noise in operation of the machinery and the production of a steady light, such as was shewn to be necessary in connection with an establishment and business of the kind the defendants were maintaining. For the purposes of this branch of the case it was necessary for the plaintiffs to bring home to the defendants intelligent knowledge of what was necessary in order to produce what they required, a clear appreciation of what was lacking in the articles they were procuring from the company, and a deliberate decision to accept them as they were. In these respects the testimony fails to support the plaintiffs' contention.

The witness Johnson, the manager of the Canadian Motor Electrical Co. who supplied the plaintiffs with the dynamo in question, appears to have been alive to the difficulty of assuring a steady light through the medium of the engine and dynamo without the aid of a storage battery, but, as the learned trial Judge found, none of the others engaged in the discussion about it, including the company's representative Mr. Haggas, seem to have appreciated it. And in view of all the circumstances it is altogether unlikely that the matter was brought forcibly to the defendants' attention. It can hardly be conceived that if it had been, they would have abandoned their existing system of inside lighting which was satisfactory to them, upon the chance of another, against which they were warned, proving equally satisfactory, with the prospect of further trouble and increased outlay in case of failure.

The question is therefore narrowed to the inquiry whether there was attached to the sale an implied condition or warranty that the engine and dynamo would answer the particular purposes for which they were being procured by the defendants.

The contract being in writing, nothing ought to be imported into it which it would not be clear to reasonable people must have been present to the minds of the contracting parties.

But in order to get at what was present to the minds of the parties, the circumstances connected with and surrounding the transaction may be looked at. If for instance a purchaser specifically describes the article he requires, or selects what he wants, relying on his own judgment as to its fitness for the purpose to which he intends to apply it, the mere fact that the

vendor is aware of the use for which it is designed will not raise an implied condition, or stipulation, or warranty on his part that it is fit for that purpose.

An example of this class is Chanter v. Hopkins, 4 M. & W. 399. But many cases decided in the English Courts both before and since the passing of sec. 14 (1) of the Sale of Goods Act, 1893 (of which it has been said that it only formulates the already existing law on the subject—per Collins M.R. in Clarke v. Army & Navy Co-operative Society, [1903] 1 K.B. at p. 163, and in Preist v. Last, [1903] 2 K.B. at p. 148), and in our own Courts have clearly affirmed the rule that where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit and proper for the purpose for which it was designed: Brown v. Edgington, 2 M. & G. 279; Jones v. Just, L.R. 3 Q.B. 197; Bigelow v. Boxall, 38 U.C.R. 452; Clarke v. Army & Navy Co-operative Society, and Preist v. Last (supra), and Ontario Sewer Pipe Co. v. Macdonald, 17 O.W.R. 1014.

Having regard to the circumstances under which the order was given in this case, as developed by the direct testimony, it is difficult to adopt the plaintiffs' contention. This was not the single isolated transaction of giving a defined order to the plaintiffs for the supply of the articles in question, but was the outcome or result of several communications, chiefly verbal, but some in writing, passing between the parties, with reference to the object and purpose for which the articles were required.

The defendants were apparently first brought into contact with the company through the latter's representative Haggas. The defendants were looking for motive power to be applied in operating a fan or fans in the interior of their establishment, and electric flashlight signs on the exterior, and after conferences and consultations with Haggas, they decided to procure from the company a 35 horse power engine, and an order was given for the supply of such an engine. But during these conferences there was discussion as to the desirability and feasibility of lighting the interior by electricity instead of by means of gas with Auer mantels. Haggas was of the opinion that this could not be effectively accomplished with a 35 horse power engine, and proposed or suggested an engine of greater force, with a dynamo capable of producing the required energy. It

seems very evident that as regards knowledge as to what would be needed, the defendants had no experience and no mechanical or technical skill. But they made it plain that they only desired to change their existing system provided the substituted system would be capable of supplying, at a less or no greater daily expense, light equal if not superior in brilliancy and steadiness to that which they were using, and that its production would not occasion noise or heat to an extent at all likely to interfere with the comfort or convenience of those resorting to their establishment for food or amusement.

The learned trial Judge found on the whole evidence that Haggas understood perfectly what the engine and dynamo were required for, that he understood that a varying light would not answer, and that any noise which would interfere with the business would not be tolerated. He certainly gave the defendants to understand, and it was no doubt his desire that they should accept his view, that with a 50 horse power engine and a proper dynamo they could light the interior of their premises in addition to operating the fans and the electric flash lights outside. In the end the defendants decided to abandon the order for the 35 horse power engine and to enter upon the larger scheme. The weight of evidence is that in doing this they intended to rely upon the skill and judgment of the company as manufacturers or producers of the articles the use of which was to produce the end aimed at, and that the company was made aware of and understood what was expected. The letter of Archibald Orr of the 12th of June, 1908, was a plain intimation to the company of the understanding of the writer, who was one of the defendants' board of directors. It is said that these were not the views of the other members. But the evidence does not support that position. The others did not repudiate in any way the statements made as to what the defendants looked to the company to do. They differed only from the writer in not doubting as he did the company's intention and ability to accomplish what was expected of the machinery it had undertaken to furnish.

Then the company's obligation being to furnish in position the machinery capable of properly running so as to produce the results on the strength of which the contract was entered into, it is scarcely open to question that the articles furnished did not, and could not without a great deal of further expenditure of money and trouble be made to perform the purposes for which they were designed. The evidence clearly establishes their failure in these respects. No good purpose

would be served by dealing in detail with the testimony, and pointing out the defects in the working of the engine and dynamo. It is sufficient to say that the learned trial Judge's finding that the machinery for which payment is sought has never been capable of performing the work, or accomplishing the purpose for which it was required, is in accordance with the weight of the testimony, and in some respects not at variance with the opinions of some of the witnesses called on behalf of the plaintiffs.

That being so the judgment should stand, and the appeal be dismissed with costs.

MACLAREN, J.A.:—I agree.

MAGEE, J.A.:—I agree.

MEREDITH, J.A., also concurred in dismissing the appeal, giving reasons in writing.

APRIL 25TH, 1911.

WADE v. ROCHESTER GERMAN FIRE INSURANCE CO.

Fire Insurance—Statutory Condition—Assignment of Policy for Benefit of Creditors—Insurable Interest—Policy not Void—"Assignment" and "Mortgage."

Appeal by the defendants from the judgment of MIDDLETON, J., ante, p. 59, in favour of the plaintiffs.

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

I. F. Hellmuth, K.C., and G. Larratt Smith, for the defendants.

N. W. Rowell, K.C., and L. G. McCarthy, K.C., for the plaintiffs.

MOSS, C.J.O.:—The sole question presented for decision by this appeal is whether an assignment for the benefit of creditors, made by a debtor pursuant to the Act respecting assignments and preferences by insolvent persons, of property insured under a policy of insurance effected in Ontario, falls within the 4th statutory condition, so as to avoid the policy. Although this

precise question does not appear to have come up for determination, it can scarcely be said that it is one of first impression.

The condition reads: "If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorised for such purpose, the policy shall thereby become void, but this condition does not apply to any change of title by succession, or by the operation of the law, or by reason of death."

The meaning and effect of this condition has been considered and dealt with in a number of cases. The broad principle deducible from the decisions is that, unless the property is assigned so as to absolutely divest the assignor of all right, title and interest thereto and therein, the condition does not take effect, and that irrespective of the form of the instrument of assignment. Thus a mortgage created, or a transfer to a bare trustee for the transferror, are outside of the condition, and other cases can readily be supposed to which unquestionably the condition would have no application.

In the case in hand although the assignors part with the title to the extent of passing the legal right to the assignee they do not part with all their right and interest in it. They still retain rights and interests in the property, and more especially so until it has been actually sold or disposed of by the assignee. Until that event has happened there is nothing to prevent the assignors, if their financial circumstances became so bettered as to enable them to do so, upon paying all the claims of creditors and satisfying all demands properly arising under the instrument of assignment, from requiring the assignee to retransfer the property in specie: see Ball v. Tennant, 21 A.R. 602 at p. 610. It seems clear that notwithstanding the form of the instrument, the assignors retained an insurable interest in the property in its unconverted condition, and the case falls within the principle of those already decided upon considerations of a similar kind.

The judgment appealed from should be affirmed.

Garrow, J.A.:—I agree.

Maclaren, J.A., gave reasons in writing for arriving at the same conclusion.

Magee, J.A., concurred in the judgment of Maclaren, J.A.

Meredith, J.A., dissented, being of opinion, for reasons stated in writing, that the appeal should be allowed, and the action dismissed.

APRIL 25TH, 1911.

LENNOX v. GRAND TRUNK R.W. CO., AND CANADIAN PACIFIC R.W. CO.

Railway—Alleged Negligence of Foreman—Shunting by "Kick" —Care in Moving Cars—Alleged Failure to Give Notice— Finding of Jury not Sustainable on Evidence.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., with a jury, in favour of the plaintiff.

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

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

T. N. Phelan, for the plaintiff.

MOSS, C.J.O.:—The plaintiff claims damages from the defendants, the Grand Trunk R.W. Co., and the Canadian Pacific R.W. Co., for injuries received by him, resulting in the loss of his right foot, while in the employment of the defendants, as assistant to one Walter Fuller, electrician, and janitor or caretaker of the Union Station at Toronto.

Under an agreement between them the defendants, under the name of the Union Station Company, jointly operate, manage and control the movements of trains coming into and out of the Union Station, and Fuller and the plaintiff were employed in connection with work required to be done under the agreement.

The Canadian Northern Railway Co. were originally parties, but the action was discontinued as to them. No question is raised as between the now defendants as to their respective proportions of the damages, if the plaintiff is held entitled to recover.

The plaintiff, while standing between two of the railway tracks to the west of and leading to the Union Station, and engaged in assisting Fuller to repair and replace some electric signal wires which had been broken down, was struck by a Pullman car belonging to the Grand Trunk R.W. Co. moving upon one of the tracks in question, and thrown under the wheels in such a way as to crush his foot.

As set forth in the statement of claim the grounds of his complaint were (a) that he was obeying the lawful orders of Fuller and was injured by reason of having done so; (b) that the

Grand Trunk R.W. Co. were guilty of negligence in shunting their car by means of the process known to railway men as a "kick," and that the person in charge of the car failed to give notice to the plaintiff of its approach.

[Reference to the particulars furnished by the plaintiff, in which these grounds were amplified.]

The only eye-witnesses of the accident were the plaintiff, Fuller, and Cheer, the man upon the car by which the plaintiff was struck, and all testified at the trial. Except in one particular there is little variance in their accounts of what happened. Cheer says the plaintiff went between the rails upon the track on which the car was coming. The plaintiff denies this, and Fuller says he did not see the plaintiff on the track. Fuller, however, saw nothing of the occurrence till just at the moment of impact, and it is undisputed that the plaintiff was outside of the rails when he was struck.

In answer to questions the jury found that both defendants were guilty of negligence, the negligence being in Fuller as foreman neglecting to warn the plaintiff against the approaching car, and in Cheer neglecting to warn the plaintiff in time to avert the danger; that Fuller was in a position of superintendence over the plaintiff; that his injuries were caused by the negligence of Fuller, to whose orders the plaintiff was bound to conform, and did in fact conform, in neglecting to warn the plaintiff against the approaching car; and that the injuries were not due solely to neglect or want of care on the plaintiff's part.

There is no finding that Fuller gave a negligent order, or that the plaintiff was injured while obeying an order negligently given by Fuller. As to him the case is narrowed down to negligence in failing to warn the plaintiff of the approaching car. This finding is not sustainable upon the evidence.

[The learned Chief Justice referred to the evidence on this point, his conclusion being stated as follows] :

There was no direction (from Fuller to the plaintiff) to go upon the track to the north of him, or to do anything which necessarily placed him in danger. The plaintiff was perfectly aware of the track, and had been frequently warned to look out for, or be careful of trains, and there was no reason for Fuller to suppose that he would get on, or so near to the track, as to expose himself to danger. . . .

Then as to Cheer's alleged negligence. He was acting as brakesman on the car which was moving slowly down the track. He saw the plaintiff when he was 100 feet away working between the tracks, as he constantly saw workmen doing there and in

other parts of the yard. He had no reason to suppose that the plaintiff would come over to the track, or get in the way of the car, until it was within 8 feet of him when he suddenly stepped backwards on to or near the track. Cheer called to him and immediately applied the brake. There does not seem to have been any want of proper precaution, or anything in his conduct that could be called negligence under the circumstances: Dominion Iron and Steel Co. v. Oliver, 35 S.C.R. 517.

Upon the whole there is no evidence to sustain the findings of negligence on the part of either Fuller or Cheer.

The appeal should be allowed and the action dismissed with costs if demanded.

MACLAREN, J.A.:—I agree.

MAGEE, J.A.:—I agree.

MEREDITH, J.A., gave reasons in writing for arriving at the same conclusion.

APRIL 25TH, 1911.

DAWSON v. NIAGARA, ST. CATHARINES AND TORONTO R.W. CO.

Accident—Negligence—Action by Administratrix of Deceased—Workmen's Compensation Act, secs. 3, 7, 12—Fatal Injuries Act, sec. 2—Assessment of Damages by Jury—Increase by Trial Judge by Amount of Accident Insurance—Basis of Action—Ascertainment of Pecuniary Loss—Matters Proper to be Considered by Jury.

Appeal by the defendants from the judgment at the trial before CLUTE, J., and a jury, in favour of the plaintiff, who sued as administratrix of the estate of her late husband George William Dawson, on behalf of herself and of Sarah Dawson, her husband's mother. The action was to recover damages for his death, alleged to have been caused by the negligence of the defendants while he was in their employment.

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

E. A. Lancaster, K.C., for the plaintiff.

McGregor Young, K.C., for the defendants.

The judgment of the Court was delivered by GARROW, J.A. (after stating the nature of the case as above):—The deceased was foreman of the defendants' repair shop, and on November 20th, 1908, was ordered by the superintendent to do certain work upon an overhead wire in order to permit a swing-bridge, across which such wire had been placed, to be opened, and while engaged in doing such work, fell from the ladder upon which he was standing, and was instantly killed. The work which he was called upon to do was in the nature of emergency work, and not in the line of his ordinary duties. The ladder, supplied by the defendants, was a substitute for the safer repair-car commonly used for doing such work.

There were questions of more or less importance at the trial as to whether the deceased was killed by falling from the ladder simply, or by a shock of electricity from an insufficiently insulated wire, or by a combination of these alleged causes; and a further question as to whether or not he had been guilty of contributory negligence in not using a pair of gloves supplied by the defendants for the purpose of being worn when handling live wires. A release was pleaded but was abandoned at the trial.

The plaintiff had received the sum of $1,000, the proceeds of an accident insurance policy on the life of her late husband, which the defendants at the trial contended, and still contend, should be deducted from any sum to which the plaintiff might be held entitled. The only specific reference to the insurance money which I find in the learned Judge's charge is in these words:

"In order that the question of insurance may not cause a mis-trial, I ask you to state what allowance you make, if any, for insurance, and what amount of damages you give," although he had, in general and quite unexceptionable language, directed the jury that the only loss for which the plaintiff could recover was in its nature pecuniary, and was limited by the provisions of the Workmen's Compensation for Injuries Act to three years' wages.

The jury found (1) that the defendants were guilty of the negligence which caused the accident; (2) in not repairing the feed-wire to the bridge; (3) the death was caused by a defect in the condition of the ways, etc., (in the language of the statute); (4) the particular defect being in not repairing feed-cable on bridge, and not providing safe ways to repair or connect jumper at bridge; (5) and (6) the death was caused by Superintendent Robertson, a person to whose orders the deceased was bound to conform, and did conform, taking him from his regular work, and in not providing him with

safe appliances; (7) Q. Could the deceased by the exercise of ordinary care have avoided the accident? A. No; by not having proper appliances, and in making connections deceased lost his balance and fell to the ground, and (9) they assessed the damages at $1,200.

Upon returning into Court with their answers, the following occurred:—

"His Lordship: Gentlemen,—I notice that you do not say anything about the insurance, whether you have deducted it from the amount of the damages which you found the plaintiff entitled to.

"Foreman of the jury: No, sir.

"His Lordship: You don't mean that we are to deduct the $1,000 insurance from the $1,200 damages you have found?

"Foreman: No, sir.

"His Lordship: You mean you have found there were $2,200 damages, and from that you deducted the $1,000 insurance, leaving $1,200. Is that what you mean?

"Foreman: Yes, sir.

"His Lordship: Is that what they all say?

"Foreman: Yes, sir.

"The jurors individually answered 'yes.' "

And upon these answers the learned Judge directed judgment in favour of the plaintiff for $2,200, against which the defendants appeal.

The main ground of the appeal is that it was erroneous for the learned Judge to increase the finding of $1,200 by the jury, by the amount of the insurance money. I say the main ground, for although an argument was addressed to us, and a contention made, upon the facts, that the evidence of negligence and of the cause of the accident was insufficient, it was, I think, apparent that hope of success was rested chiefly upon the first-mentioned ground. As to the merits, I see no reason to disturb the findings of the jury, based as they seem to be, upon reasonably sufficient evidence. But as to the other, I have come to the conclusion that the defendants have a just cause of complaint, and that, to the extent of directing a new assessment of damages, the appeal should be allowed.

Clute, J., was apparently of the opinion that the insurance money should not be taken into account, or deducted from the plaintiff's damages; no doubt, although he does not say so, because of the language of the latter part of sec. 7 of the Workmen's Compensation for Injuries Act, for which view he had the authority, so far as it goes, of Farmer v. Grand Trunk R.W. Co.,

21 O.R. 299. But as in that case the action was dismissed, what was said upon the present subject was not essential to the result.

In order to properly deal with the question, it seems to be necessary to arrive at a correct view as to the nature of the plaintiff's action. If it is an action under the Workmen's Compensation for Injuries Act, there would be reason in applying to the facts the part of sec. 7 relating to deductions and abatements. But if it is not, if the basis of the action is the Fatal Injuries Act, R.S.O. 1897, ch. 166, then quite different considerations would apply.

Section 3 of the Workmen's Compensation for Injuries Act provides that "when personal injury is caused to a workman . . the workman, or in case the injury results in death, the legal personal representatives of the workman, and every person entitled in case of death, shall have the same right of compensation, and remedies against the employer, as if the workman had not been a workman, nor in the service of the employer, nor engaged in his work."

The effect of similar language in the English Act has been described by Bowen, L.J., in Thomas v. Quartermaine, 18 Q.B.D. 685, at p. 693, thus: "The true view, in my opinion, is that the Act, with certain exceptions, has placed the workman in a position as advantageous as, but no better than, that of the rest of the world who use the master's premises at his invitation on business."

The chief object of the legislation was to obviate the injustice which has occurred to the workman from the application of the doctrine of common employment, by virtue of which he was deprived of any remedy against the master for injury caused by the negligence of a fellow-servant. And the effect was to give him, under specified limitations as to circumstances and amount, an entirely new right of action against the master. Section 7, which limits the amount which can be recovered, also declares that such amount shall not be subject to deduction or abatement, except for the causes set forth in sec. 12.

It follows that in an action by the workman himself the question with which we have here to deal could not arise.

The first Workmen's Compensation Act was 49 Vict. ch. 48. The Fatal Injuries Act, originally 10-11 Vict. ch. 6, now R.S.O. 1897 ch. 166, had then been in force for many years. Section 2 provides that "when the death of a person has been caused by such wrongful act, neglect, or default, as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the

person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony.''

Prior to the Workmen's Compensation for Injuries Act, the only thing which prevented a widow or other person entitled under the Fatal Injuries Act from suing an employer for the death of a deceased workman, caused by the negligence of a fellow-workman, was because by sec. 2, which I have quoted, the right to sue was only conferred where the deceased person, if he had survived, might have brought an action, which until the Workmen's Compensation Act he could not do. Section 3 of the latter Act does not attempt to confer a right of action upon the widow, etc. All it does is to give ''the same right of compensation and remedies against the employer as if the workman had not been a workman.'' The workman himself is given a right to sue under the statute. It is as to him a new right, but as to his representatives, the effect of the statute is simply to remove a difficulty out of the way. The action when not brought by him, but after his death, by his representatives, must thus rest for its basis upon the earlier Act and upon it alone, although the amount recoverable is, of course, necessarily limited by the provisions of the later Act.

Under the Fatal Injuries Act it is settled beyond controversy that the only recovery possible is in respect of proved pecuniary loss. And it is the exclusive province of the jury, upon the evidence and under proper instructions by the Judge, to fix the amount of such loss, limited in such a case as this by the maximum amount which can be recovered under the first part of sec. 7 of the Workmen's Compensation Act, but, in my opinion, entirely unaffected by the latter part of that section, which has no meaning or application that I can see, where the question is as it is here, the ascertainment of the plaintiff's actual pecuniary loss. The jury should, of course, be told that it is their duty to take into account such items as the insurance money in question, but there is no cast-iron rule that I can find which compels them to deduct the whole amount. They are to consider all the circumstances, that included, and to return such a verdict as the whole evidence warrants.

The proper direction is, I think, set out, or at least supplied, in the judgment of Lord Watson in Jennings v. Grand Trunk R.W. Co., 13 App. Cas. 800, where he says: ''Their Lordships are of opinion that all circumstances which, though insufficient to exclude a statutory claim may be legitimately pleaded in

diminution of it, ought to be submitted to the jury, whose special function it is to assess damage, with such observations from the presiding Judge as may be suggested by the facts in evidence. It appears to their Lordships that money provisions made by a husband for the maintenance of his widow in whatever form are matters proper to be considered by the jury in estimating her loss, but the extent, if any, to which these ought to be imputed in reduction of damages must depend upon the nature of the provision and the position and means of the deceased.''

This is followed in the judgment by a reference to the case so much relied upon by the learned counsel for the defendants, of Hicks v. Newport, etc., R.W. Co., 4 B. & S., at p. 403, a *nisi prius* decision by Lord Campbell, printed as a note to Pym v. Great Northern R.W. Co., in which that learned Judge seemed to draw a distinction, which I have never been able to see, between the case of money received under an accident insurance policy and a life insurance policy. It is true that the death by accident causes the money under the former to become payable, so that the money may be said to have been received in consequence of the death, and that but for the accident nothing would ever have been payable; whereas in the case of a life policy, the insurance is against an event certain to happen, and the money does not, therefore, in the same sense become payable in consequence of the death. But the effect of both upon the question of the plaintiff's pecuniary loss is exactly the same. A wife loses her husband and breadwinner. She receives $1,000 under an accident policy and $1,000 under a life policy. Her pecuniary loss is surely mitigated by the receipt of the second exactly in the same way and to the same extent as by the receipt of the first. The language of Lord Watson, which I have quoted, is quite general, applicable, as I think he intended it to be, to the case of both, since in what he subsequently says about the Hicks case he only in terms approves of Lord Campbell's remarks concerning a life policy. See also Bradburn v. Great Western R.W. Co., L.R. 10 Exch. 1; Beckett v. Grand Trunk Railway, 13 A.R. 174, affirmed 17 S.C.R. 713; Mayne on Damages, 7th ed., 552-553.

For these reasons I am of the opinion that if the defendants desire it the appeal should be allowed to the extent of directing a new assessment of damages.

The amount for which the plaintiff now has judgment, although arrived at in my opinion, and with deference, improperly, does not strike me as excessive, or such as a jury acting reasonably might not upon the evidence have found. I, therefore, take the liberty of suggesting to the defendants to consider whether

in the end they will gain by accepting the relief proposed, for another jury may find for a sum not much less, to which will, of course, be added the costs of the further litigation. If in the end they conclude to decline the new assessment, the election to be made within 30 days, their costs of this appeal should, I think, be paid by the plaintiff, but if not, then the costs of the last trial should be costs in the cause, and the defendants' costs of the appeal be costs to them in any event.

MACLAREN, J.A.:—I agree.

MAGEE, J.A.:—I agree.

HIGH COURT OF JUSTICE.

MIDDLETON, J., IN CHAMBERS. APRIL 21ST, 1911.

McNABB v. TORONTO CONSTRUCTION CO.

Pleading—Parties—Motion to Amend Writ and Statement of Claim by Adding Plaintiffs—Motion Granted on Terms—Costs—Practice as to Amendment before Trial.

Appeal from the judgment of the Master in Chambers, ante, p. 992.

J. M. Ferguson, for the plaintiff.
J. Grayson Smith, for the defendants.

MIDDLETON, J.:—Though the motion is late, I think it should be granted in the modified form in which it is now sought.

I cannot agree with the Master and Mr. Smith that this amendment means that all that has been done goes for nothing. That some work was done is not disputed. The contract was not in writing, and there is much doubt whether the firm of Turner, Rowatt & McNabb was ever really formed. Under these circumstances, why not permit the real question to be litigated, and eliminate the immaterial issue whether McNabb or his firm was employed? The addition of Turner and Rowatt cannot harm the defendants, and seems necessary to enable the real question to be tried.

Proper terms must be imposed. These two men may be added

as plaintiffs, and the statement of claim may be amended accordingly. The action must be deemed to be begun by them as of the date of the amendment, and the defendants must have the right to amend their defence as advised. The defendants should elect within a week whether they desire the terms as to trial to stand, in which case the action may be placed on the list for trial in due course on the present entry, or, if they so desire, the plaintiff may stand relieved from the terms imposed, and must enter the action again and give new notice of trial when the cause is at issue (this entry may be without payment of further fee). If no election, the latter alternative will prevail. The costs of the motion to the Master (except the cross-examination of Mr. Mulcahy, as to which there are to be no costs) and the costs lost by reason of the added parties not being plaintiffs in the first instance, are to be to the defendants in any event. If the defendants now amend their defence under this order by pleading matters that ought to have been set up in the first instance, this will not be allowed to them as part of these costs.

There should be no costs of this appeal.

This direction is intended to be in accordance with what I consider to be the well-settled practice that an amendment must be allowed at any time before the trial, when the Court is satisfied that it is sought in good faith, and terms can be imposed to prevent injustice to the other party. If the terms are not adequate I can be spoken to. Both parties seem to think the case is one which should, and, in the natural course, will be referred, and they ought to consider the expediency of agreeing to this, or of moving for a reference without the expense of a trial.

RIDDELL, J. APRIL 24TH, 1911.

HARRIS MAXWELL LARDER LAKE MINING CO. v. GOLDFIELDS LIMITED.

Pleading—Parties—Separate Causes of Action—Improper Joinder by Plaintiffs—What Constitutes Class Action—Party Improperly Suing in Representative Capacity—Plaintiffs Required to Elect on Which Action they will Proceed—Costs.

Motion by the defendants for an order setting aside the statement of claim, on the ground that the plaintiffs have no joint cause of action, and have improperly joined separate and independent causes of action.

G. H. Kilmer, K.C., for the defendants.

F. E. Hodgins, K.C., for the plaintiffs.

RIDDELL, J.:—The statement of claim alleges that the Harris Maxwell Co. had a valuable mining claim, the T. company (practically controlled and owned by McK.), one almost useless; and McK. and the T. Company wished to get control of the Harris Maxwell Co. They accordingly, early in 1910, sent a circular to the shareholders of the Harris Maxwell Co. in the form of an agreement which the shareholders were expected to sign, for the formation of a new company to be known as the "New Ontario Gold Fields Limited," the shareholders in the Harris Maxwell Co. to get share for share in the new company, the new company to arrange that the T. Co. should sell the Harris Maxwell Co. a 30-stamp mill for $30,000 to be paid for out of the first dividend of the Harris Maxwell Co. There are other provisions.

On April 30th, 1910, McK., the Gold Fields Limited, and the T. Co., issued another circular to the shareholders of the Harris Maxwell Co., urging that they should sign the former agreement.

On March 30th, 1910, the defendants procured an agreement purporting to be made by the Harris Maxwell Co., but this was not signed by the authority of the directors of the Harris Maxwell Co. By this agreement the T. Co. agrees with the Harris Maxwell Co. to erect on the Harris Maxwell claims a building for a 30-stamp mill and to erect thereon 30 stamps, for the price of $30,000 payable out of the net profits of the Harris Maxwell Co. "This agreement is entered into by the T. Co., on the conditions, and with the knowledge, that the shareholders of the Harris Maxwell Co., representing a majority of that company's stock, have agreed to exchange their stock, share for share, for stock in the 'Gold Fields Limited,' as have also shareholders representing a majority of the T. Company's stock." This agreement is sealed with the seals of both companies and signed by Walters the President, Paterson the Secretary, and Mason, who seems to have been a director of the Harris Maxwell Co.

The agreement is signed also by others. This agreement was not submitted to, or approved by the directors or the shareholders of the Harris Maxwell Co., but on the 20th June, 1910, an agreement not much different was submitted to the shareholders of the Harris Maxwell Co., including the following: "It is further understood and agreed that it is the intention of the T. Co., to develop and furnish power from the Raven Falls Water Power

at the earliest possible date, and to supply same to operate the mill at a marketable or commercial rate." The shareholders resolved "that the directors be authorized to complete an agreement on the basis submitted, and that the directors secure a solicitor to look after their interest and make such alterations as may be secured by them in the Company's interests." No solicitor was employed, but two out of five of the directors of the Harris Maxwell Co. passed a resolution approving of the former agreement (striking out an interest clause), and adding "same to be completed this year . . . Time to be of the essence of agreement."

The plaintiffs in this action are (1) the Harris Maxwell Co.; (2) Robert Paterson; (3) Horace Mason, and (4) "Walter R. Wakefield, the latter suing on behalf of himself and all other shareholders in the" Harris Maxwell Co. They allege that "the T. Co. was not the owner of the Raven Water power as it was represented to be in the said agreement" (it is to be noted that there is no such representation in the agreement); also that the majority of the shares in the Harris Maxwell Co. was not represented by the signers of the original agreement (circular), nor was the corresponding agreement signed by the majority of the T. Co. shareholders: that the agreement of June-July, 1910, was oppressive and improper (whatever that may mean) and that nothing was done during 1910 to carry out the agreement.

The Harris Maxwell Co. made in March, 1911, an agreement with one Marshall giving him an option on their claim: Marshall sent his engineer and workmen to examine the claim under his agreement with the Harris Maxwell Co., and the employees of the defendants refused to allow them upon the property of the Harris Maxwell Co. No doubt the Harris Maxwell Co. may bring an action for this, as it is a dispute by the defendants of the right of the Harris Maxwell Co. to authorize persons to enter their property, and the question to be tried will be such right.

So much for the first cause of action. Then Mason and Paterson say that they were induced by fraud and misrepresentation of the defendants, and particularly of the defendant McK., to sign the circular agreement—and they set out many misrepresentations not to be found in the circular. They say that they transferred stock to a large amount in the Harris Maxwell Co. to McK. before they discovered the falsity of these representations. These do not in the style of cause represent themselves as suing on behalf of other shareholders, but they do

so in the description of parties at the beginning of the statement of claim, and also in the prayer. This is not sufficient: Barton v. Hamilton, 13 O.W.R. 1118, at p. 1128; In re Tottenham, [1896] 1 Ch. 628, at p. 629. But this is a mere matter of amendment, if the action be properly a class action.

It is plain that it is not—the statement of claim sets out misrepresentations to Mason and Paterson, and claims cancellation of the agreement so far as they are concerned, which is well enough, and also all other shareholders, which is not. The right of each to a cancellation depends upon misrepresentations made to him, and upon his desire to get rid of the agreement; that cannot be the subject of a class action.

Again, as there is no such complication in the way of joint notes and long delay as in Crerar v. Holbert, 17 P.R. 283, the right of Mason and that of Paterson cannot be made parts of one and the same action: Smurthwaite v. Hannay, [1894] A.C. 494.

Then the plaintiff Wakefield does describe himself as suing on behalf of others in the style of cause. His claim, however, is as a shareholder who did not sign the first-named agreement, and as representing those in the same interest. His claim is to have it declared that the alleged agreement between the two companies is not valid, or that it has expired. He also alleges that McK. induced the signing of the said first agreement (circular), and claims that the signatures are not binding. As to this last, he is not of the class who did sign—it is none of his affair if they all abide by their signatures. He cannot sue for any such declaration, and as he cannot sue himself he cannot represent others: Dillon v. Raleigh, 13 A.R. 53; Bruce v. British National Life Co., 4 D. & J. 157, at p. 174; Reg. ex rel. Regis v. Cusac, 6 P.R. 303; Fenton v. Simcoe, 10 O.R. 27, at p. 42.

So far as his claim to have the alleged agreement between the companies declared invalid, or expired by lapse of time, that is also not within his province. There is, and can be, no pretence of want of power on the part of the Harris Maxwell Co. to make such an agreement, and it is for the company, not a shareholder, to ratify or dispute the contract alleged to be made by itself: David v. Ryan, 17 O.W.R. 694.

The action of Wakefield will be dismissed, without prejudice to his right to bring any action against the defendants or any of them as he may be advised, and he will pay one third of the costs of this motion.

The other three actions are (1) the action of the Harris Maxwell Co. (*a*) to set aside the alleged agreement of the 30th March, 1910, and all other agreements between the companies,

and (in effect) a declaration of their title to the lands as against the T. Co., the Gold Fields Co. and McK., an injunction, etc. (2) the action of Paterson to set aside his signature to the circular agreement and all that depends upon this, and (3) the like action on the part of Mason.

These are wholly distinct, and none depends on any other. The plaintiffs must elect upon which of the three actions they will proceed—in the absence of an election within five days the statement of claim will be set aside with costs. If an election be made within five days the plaintiffs will have leave to amend within one day thereafter, but will pay one-third of the costs of this motion, the remaining one-third will be costs to the defendants in any event of the action.

BOYD, C., IN CHAMBERS. APRIL 26TH, 1911.

REX v. DAGENAIS.

Liquor License Act—Conviction for Second Offence—Motion to Quash—Alleged Insufficient Evidence—Affidavit as to Admission in Open Court—Criminal Code, secs. 685, 721 (1, 2), 726, 727.

Application by the defendant to quash conviction.

M. J. O'Connor, K.C., for the defendant.
E. Bayly, K.C., for the crown.

BOYD, C.:—The defendant is confined in the gaol at North Bay under warrant of commitment for a second offence against the Liquor License Act. The gaol is quarantined on account of smallpox, and therefore no affidavit is made by him. He has obtained a writ of habeas corpus, with certiorari in aid, and a motion is made for his discharge, on the ground that there is no evidence before the Court to justify his detention. The matter comes on in an irregular shape, but it has been agreed that I may dispose of it on the materials before me. No return has been made to the certiorari, except of the warrant to commit and the information. The justice has made no formal return, but has sent two affidavits and the certificate of a former conviction, and a regularly drawn up and completed conviction. The affidavits explain why no evidence is returned, because

none was taken, and it is sworn that the defendant was convicted upon his admission of guilt on both charges in open Court, and in the presence of the magistrate. Upon such admission the magistrate can lawfully convict. In all cases the warrant of commitment may be, and usually is, drawn up and executed before the formal conviction is made out. In this case the commitment and the warrant are connected by the conviction, and the absence of written evidence is sufficiently explained. The warrant sets forth the conviction as made on the 16th March, the day of its date, and to all this credence must be given. A conviction may be drawn up or amended after it has been acted upon, the one essential requirement being that the statement of the judgment embodied therein shall be conformable to the facts as they really took place.

It appears by the affidavits that the defendant admitted both charges, and thereupon, without more, the magistrate acted, and declared the defendant convicted, and all that remained was to draw up the conviction according to law, which is provided for the offences charged and admitted. As to these certainty is obtained by the written information under oath of the constable. Now, by the proceedings under the Criminal Code made applicable to liquor cases (see 10 Edw. VII. ch. 37, sec. 4), when the defendant appears at the hearing he is to be informed of the charge, and is to be asked if he has any cause to shew why he should not be convicted, and if he thereupon admits the truth of the information, and shews no sufficient cause why he should not be convicted, the justice present shall convict him: Criminal Code, sec. 721 (1, 2).

A later section under the head of "Adjudication" deals with cases where evidence has been given, and then when the justice convicts (secs. 726 and 727) he may make a minute or memorandum thereof, and in such case the conviction shall afterwards be drawn up under his hand and seal in the proper form applicable to the case.

Where evidence is taken it should be in writing, sec. 721 (5) and Liquor License Act, R.S.O. ch. 245, sec. 99, but there is no such provision where the defendant personally admits his guilt in the face of the Court. That is a very different thing from the confession or admission of the accused under sec. 685, which is brought in evidence before the Court through the medium of a witness. There is no statutory requirement that the justice shall make a minute of his oral conviction, when at the outset the accused admits his guilt, and in such a case I know of no other means (where he does not choose to make a

minute of it) of verifying the fact than by means of affidavits. Apart from statutory regulations the law permits the justice to make a verbal conviction, which is subject to re-consideration so long as no conviction is drawn up: Jones v. Williams, 46 L.J.N.S. 271.

The conviction in this case is based on the personal admission of the defendant that he was guilty as to both illegal sales, and though there was no evidence taken, and no written record of what happened, credence must be given to the formal conviction now produced for the first time. The application is refused.

See Rex v. Goulet, 12 Can. Cr. Cas. 365, per Davidson, J.

ALVES V. KEARNS BROTHERS—MASTER IN CHAMBERS—APRIL 20.

Venue—Motion to Change—Preponderance of Convenience—Interpreter Required—None Available at Proposed New Place of Trial.]—Motion by the defendants in an action for malicious prosecution, to change the place of trial from Toronto to Sault Ste. Marie. The Master said that the facts of this case were in many respects similar to those in Scaman v. Perry, 9 O.W.R. 537, 761. Here, as there, all the proceedings which led to the action took place at Sault Ste. Marie, where all parties were then living. But after the Grand Jury at the Sessions on 8th November, 1910, had found "No Bill" on the charge for which he had been arrested and kept in jail from 12th to 24th June, the plaintiff came to Toronto and brought this action, without any delay, on the 14th December, and named Toronto as the place of trial in his statement of claim, delivered on the 13th March. The plaintiff is a Portuguese from the Madeira Islands, and came thence to Sault Ste. Marie as lately as July, 1908. He swears that he cannot, nor can his wife (who will be a necessary witness on his behalf) give evidence except through an interpreter. It is not denied that none can be had at Sault Ste. Marie. So far as can be gleaned from the affidavits on both sides, there does not seem to be any sufficient preponderance in favour of the motion in view of the cases from Campbell v. Doherty, 18 P.R. 243, to Macdonald v. Dawson, 3 O.W.R. 773, 8 O.L.R. 72. Here it cannot be said that the plaintiff has acted in any sense capriciously or vexatiously in laying the venue at Toronto. The fact of the necessity of an interpreter is not denied, and in view of

the importance of a fair trial, and of the necessity of the Judge and jury being able to understand the plaintiff's evidence and that of his wife, the fact of no interpreter being available at Sault Ste. Marie seems conclusive against the motion. Motion dismissed. Costs in the cause. Davis (Kilmer & Co.), for the defendants. H. E. McKittrick, for the plaintiff.