The
Ontario Weekly Notes

Vol. I. TORONTO, APRIL 6, 1910. No. 28.

COURT OF APPEAL.

MARCH 24TH, 1910.

*RE DAVIES AND JAMES BAY R. W. CO.

Railway—Expropriation of Land—Other Lands Injuriously Affected—Dominion Railway Act—Compensation — Arbitration and Award—Expenses of Arbitration—Appeal—Duty of Appellate Court—Value of Lands — Compensation for Injury—Amounts not Separated in Award — Reduction of Amount Awarded—Interference with Working of Farm — Expense of Construction of New Way—Cost of Maintenance—Interest on Amount Awarded—Jurisdiction of Arbitrators.

Appeal by the railway company, the contestants, from an award of arbitrators upon an arbitration between the appellants and Robert Davies, the claimant, under the Dominion Railway Act.

The claimant was the owner of a parcel of farm lands known as "Thorncliffe Farm," in the township of York, containing about 465 acres.

Through the enclosed portion, and contiguous to the eastern boundary of the farm, a stream, a branch of the Don river, flows from the northern to the southern boundary, where it meets and joins the main stream, which traverses a portion of the southern part of the farm.

In 1905 the contestants, in the exercise of their powers under the Railway Act, gave notice to the claimant of their intention to expropriate, for the purposes of their right of way, a portion of the southern parts of lots 6 and 7, being some of that part of Thorncliffe farm which lies in the northern valley of the Don. The parcel proposed to be taken was 100 feet in width, and en-

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

tered the claimant's property at its junction with the westerly side of the Don Mills road, a highway upon which the eastern and part of the southern side of the farm borders, and proceeded in a westerly direction, for something less than 2,000 feet, across the low lands in the south front of the property, the whole area taken being a little less than 4½ acres.

This proceeding on the contestants' part eventuated in arbitration proceedings before three arbitrators, who, commencing on the 13th February, 1906, ended their task by the publication on the 30th March, 1908, of an award, in which only two of the arbitrators joined, finding the amount of compensation to be paid to the claimant for the land taken, and the damage to the residue of his lands, to be the sum of $30,607.

The appeal was from this award.

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

E. D. Armour, K.C., and R. B. Henderson, for the appellants.

C. H. Ritchie, K.C., and James Pearson, for the claimant.

MOSS, C.J.O. (after setting out the facts as above):—During the proceedings 33 days or parts of days were occupied in hearing the testimony of some 67 witnesses, whose depositions cover 1,305 printed pages of the case.

The questions involved were the usual ones, viz., the value of the land taken and the amount to be paid by the contestants as and for compensation for damages to other parts of the claimant's lands, if any, injuriously affected by reason of the exercise by the contestants of their statutory power.

It is somewhat surprising to find that comparatively simple questions like these were apparently deemed not capable of solution without such an array of witnesses and such an enormous expenditure of time . . .

That the present system may in its workings bring about such a state of things lends additional force to the remarks of Meredith, C.J., concurred in by Lord Macnaghten, speaking for the Judicial Committee, as to the propriety of devising some means of simplifying the procedure and reducing the expense in cases of this kind: Re Armstrong and James Bay R. W. Co., 12 O. L. R. 137, 142; S. C., sub nom. James Bay R. W. Co. v. Armstrong, [1909] A. C. 624.

In dealing upon this appeal with this mass of testimony, we have before us a statement from the non-assenting arbitrator in which he sets forth, amongst other things, his understanding of

the grounds on which his colleagues based their award. But the accuracy of this statement is not admitted by counsel for the claimant, and we have not the benefit of any statement from the other arbitrators. Save one passage in the award . . . we have nothing which we can accept as indicating the principles by which they were guided in coming to their conclusions. While we may look at so much of the statement of the non-assenting arbitrator as appears to indicate his own views, we are not at liberty to pay regard to it as setting forth the opinion of his colleagues. In this state of the case, the only course to be adopted is that commended by the Judicial Committee in Armstrong's case, viz., to go through all the evidence, and—having, of course, due regard to the findings of the arbitrators as far as they can be ascertained—examine into the justice of the award.

Having read, analysed, and carefully considered the whole testimony, keeping in mind the considerations that should govern, I find myself, with all due respect, unable to say that the award is just, or so free from injustice to the contestants as to render it proper and right to sustain it in its entirety.

It is very difficult to understand upon what principle the award is based. No separation has been made between the amount allowed for the land actually taken and the amount awarded as damages for lands injuriously affected. A lump sum is given as compensation for both.

The use to which the claimant puts the farm is as a stock and dairy farm, and it was with the purpose of putting it to such use that he acquired it. In doing this he was not actuated so much by a desire to secure a profitable investment as by the intent to gratify a wish to indulge in the pastime of breeding and owning thoroughbred horses and high-class cattle, and upon a property brought up to the full standard of a high-class stock and dairy farm. In attaining this end he was not governed by any considerations of mere expense. He is a man of wealth, well able to indulge his fancy without counting the cost. . . .

The greater part of the arable land is situate on a high plane, far above the level of the Don valley, and practically cut off from the low parts of the claimant's lands by steep hills. The main buildings, or the greater part of them, are situated in the lower parts. In the working of the uplands before the entrance of the railway, access from the buildings to the uplands was gained by means of a loop-shaped roadway . . leading up a very steep hill . . . In addition to this material obstacle in the practical operation of the farm, there are others caused by the large ravines through which the . . branch of the Don and its tri-

butaries flow. Owing to these the land in that part is broken and rendered difficult of access. . . . The most important and serious drawback was that arising from the necessity to ascend and descend the steep hill road, to and from the uplands, with loaded vehicles, farming implements, and teams. . . .

The road-bed embankment of the railway intersects both of the present roadways at a height of six or seven feet above their present grade. So far as the grade is concerned, there is little difficulty in overcoming it. But the main complaint, and that upon which the greatest stress was laid before the arbitrators, is, that passing to and fro between the buildings and the uplands with horses, cattle, vehicles, and farm implements, now involves crossing the railway twice and opening and closing four gates, together with the delay and risk attendant thereon. . . .

To my mind, it is clearly established by the evidence of competent engineers of undoubted standing and ability—and indeed it is not very strenuously combatted by engineers called on behalf of the claimant—that it is quite feasible, and indeed a comparatively simple matter, to construct a roadway to the west or north-west of the railway right of way which will furnish a convenient and safe means of access to and between the buildings and the uplands, and so put an end to all necessity for crossing the railway in the working of the upland portion of the farm. . . .

The land taken . . comprises about 4½ acres, on which stood two buildings and some 13 or 15 apple trees. The evidence as to the actual value of these items was, of course, conflicting, but, giving the claimant the benefit of the testimony adduced on his behalf, a liberal allowance for them would be: the land itself, $1,100; the buildings, $2,000; the apple trees, $300=$3,400. Deducting this sum from $30,607, the amount of the award, there remains $27,707 as damages allowed. In this, of course, would be included compensation for the double crossing of the railway in the working of the uplands . . . But, if due or any reasonable weight be given to the evidence, the removal of this cause of complaint can be readily affected at an expense of . . . $3,000 . . . an ample allowance in respect of this alleged injury. . . . If it be said that this does not take into account the wear and tear, and that an allowance should be made for up-keep . . . the sum of $1,000 would provide $50 a year—more than ample to cover the cost of up-keep and maintenance. Adding, therefore, $1,000 to the $3,000, and thus allowing $4,000 under these heads, there would still be not less than $23,207 coming to the claimant as compensation for injury or depreciation

by reason of his remaining lands being injuriously affected by the contestants taking and using the 4½ acres . . .

I am unable to discover any principle upon which such a large amount has been arrived at . . .

It would have been more satisfactory if, in making their award, the arbitrators had adopted the convenient, if not the usual, course of stating on its face the amount allowed as the value of the lands actually taken, and the amount awarded as compensation for damage to the residue of the claimant's lands. Section 198 of the Railway Act defines the elements to be considered. . . .

The principle on which the inquiry as to the compensation, when some land is taken and some injuriously affected, should be proceeded with, is, to ascertain the value to the claimant of his property before the taking . . and its value after the part has been taken, having regard, of course, to all the directions of sec. 198 of the Railway Act, and deduct the one sum from the other: James v. Ontario and Quebec R. W. Co., 12 O. R. 624, 15 A. R. 1. . . .

In my opinion, a sum of $20,000 as compensation for the value of the land and buildings and trees, and for all the inconveniences and damages by reason of the taking thereof, is an ample and sufficient, if not liberal, allowance. And I think the award should be reduced to that sum. . . .

The remaining question is as to the allowance of interest upon the amount awarded. The point was not mooted until the argument of the appeal. It appears . . . that the contestants took possession of the land . . on or about the 13th October, 1905; and the arbitrators have awarded interest from that day It was urged that the effect of sec. 153 (2) of 3 Edw. VII. ch. 58, now sec. 192 (2) of the Railway Act, is to restrict the jurisdiction of the arbitrators to the allowance of interest, if any, to the date of depositing the plan, profile, and book of reference.

My view of the object of the sub-section is, that it was enacted for the purpose of fixing the time as of which the value and damage are to be ascertained. The question of interest is not dealt with in terms, and there is nothing in the words to interfere with the operation of the general law which, as between vendor and purchaser, fixes the time at which interest commences as that at which the purchaser takes or may safely take possession. The contestants having served a notice of intention to take the land, the parties thereafter stood to one another in the position of quasi vendor and purchaser. The taking of possession, whether by consent or otherwise, should, in the absence of anything further,

be treated as a lawful taking by the purchaser, and, unless in special circumstances, he should be liable to pay interest on his purchase money from that date. And it has been uniformly held by the Courts of this province that, when some land is taken, and other land is injuriously affected, the amounts awarded in respect of both subjects are to be treated as purchase money: Re Macpherson and City of Toronto, 26 O. R. 558. The rule is different when no land is taken, and the claim is solely for compensation in respect of land injuriously affected: In re Leak and City of Toronto, 26 A. R. 35, 30 S. C. R. 321. The actual decision in the case cited of Re Canadian Northern R. W. Co. and Robinson, 17 Man. L. R. 396, so far as it dealt with the right to interest, turned upon the special facts of the case.

Whether or not it was strictly correct for the arbitrators to award the interest in terms does not seem very material. Perhaps sec. 205 of the Railway Act might, if necessary, be invoked in the claimant's favour.

In any case, it is not the province of this Court to set aside the award on technical grounds, but to hear an appeal from it. And, as the claimant is entitled to the interest, no substantial wrong has been done by stating it in the award.

I would allow the appeal to the extent of reducing the award from $30,607 to $20,000, and there should be no costs of the appeal to either party.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

OSLER, GARROW, and MACLAREN, JJ.A., also agreed.

MARCH 24TH, 1910.

ATTORNEY-GENERAL FOR ONTARIO v. DEVLIN.

Crown Patent—Revocation—False Representation as to Performance of Settlement Duties—Part of Land Cleared—Evidence—Affidavit—Report—Crown Misled by False Statement.

Appeal by the Attorney-General from the judgment of LATCHFORD, J., at the trial, dismissing the action, which was brought to obtain a revocation of a patent from the Crown granting to the defendant the north half of lot 19 in concession B. of the township of Widdifield, in the district of Nipissing, which, it was alleged, had been procured by the defendant by falsely represent-

ing to the Department of Lands, Forests, and Mines that there were at least sixteen acres cleared and under cultivation and crop upon the land, when in fact the actual clearing was substantially less than the sixteen acres.

LATCHFORD, J., found as a fact that the actual clearing did not exceed thirteen and one-half acres, and was probably less. He, however, was of the opinion, upon the evidence, that the Department had not been misled by the false statement as to the clearing, and dismissed the action with costs.

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

G. H. Kilmer, K.C., for the Attorney-General.

J. McCurry, for the defendant.

GARROW, J.A. (after stating the facts as above) :—On considering the appeal, this Court directed that, before it was finally disposed of, further evidence should be given, in the interests of justice, for the purpose of ascertaining, if possible, upon what material the Department had actually acted. And, pursuant to such direction, the evidence of George Kennedy and Aubrey White was taken before us.

George Kennedy stated that he was Law Clerk of the Department, and it was his duty to examine the evidence and indorse the ruling upon an application for a Crown patent such as that in question, and in doing so acted upon the affidavit of settlement duties filed by the defendant, and nothing else.

Aubrey White stated that he was the Deputy Minister of Lands and Forests, and that he adopted and approved of the ruling of Mr. Kennedy without having any evidence before him other than the ruling itself, and apparently in the course of the ordinary routine of his office.

What the defendant relied on, and perhaps what induced the learned Judge to say that the Department had not been misled by the false affidavit, was a report, made some time before the defendant's application, by one Angus, by direction of the Department, on this and other lands in the township of Widdifield, which, although not produced, was referred to at the trial, in which the clearing and other improvements on the lands in question were stated. But the evidence given by Mr. Kennedy and the Deputy Minister leaves no room to doubt that the facts stated in the report were not before them when dealing with the defendant's application, and that in the particular now in question reliance

was solely placed on the affidavit filed by the defendant, which, it is now established, is incorrect as to the clearing.

Both of these witnesses further say that, if the truth as to the clearing had been stated, the patent would not have been issued—that in fact neither of them had power to dispense with a full performance of the settlement duties, such power resting solely with the Minister, upon a special application.

In these circumstances, I do not see how the judgment dismissing the action can be supported.

The Crown asks that the patent be revoked, and such relief should, in my opinion, be granted.

It does not follow that the defendant should lose the land The revocation will simply put the matter where it stood before the patent issued, and the Crown may, I am sure, be trusted to act with justice toward the defendant upon a fresh application upon proper material.

The appeal should, therefore, be allowed, but, having regard to all the circumstances, and especially to the fact that we proceed largely upon evidence which was not before Latchford, J., there should, I think, be no costs of the action or of this appeal.

MOSS, C.J.O., and OSLER and MEREDITH, JJ.A., agreed in the result, each stating reasons in writing.

MACLAREN, J.A., also concurred.

MARCH 24TH, 1910.

SMALL v. CLAFLIN.

Building Contract—Construction—Liability of Architects for Cost of Work beyond Sum Agreed upon—Changes in Specifications —Delay in Completion Caused by Changes — Counterclaim— Value of Extra Work—Evidence—Findings of Fact—Appeal.

Appeal by the defendants from an order of a Divisional Court affirming the judgment of ANGLIN, J., at the trial, awarding the plaintiff $8,750, to be paid by the defendants as damages for breach of contract for the alteration and reconstruction of a building used as a theatre.

The contract in question had been the subject of another action in which the parties to this action were concerned along with others. The nature of that action and the disposition fin-

ally made of it are shewn in Mills v. Small, 9 O. W. R. 499, 11 O. W. R. 1041.

Apparently acting upon the right reserved to him by the order of the Divisional Court, in that case, the plaintiff brought this action to recover damages from the defendant. In the statement of claim the contract was set out in extenso, and, by paragraph 4, the plaintiff alleged that, by breach of the contract set out, he had been obliged to pay out $10,000 or thereabouts to complete the work undertaken by the defendants, and that he had also suffered loss and damage by reason of the fact that the building was not completed until one month or thereabouts after the date stipulated in the agreement. The plaintiff claimed $15,000 damages and other and further relief. By particulars delivered it was stated that the breach alleged was of paragraph 2 of article 10 and of article 2, and the time of the breach was between the 15th May and the 1st October, 1905; that the persons to whom the $10,000 was paid were persons to whom certificates were given by Fuller Claflin, who had the names and addresses of all persons who were paid for services rendered under the agreement. As particulars of the loss and damage suffered by non-completion of the building, the plaintiff stated that he had booked attractions at the theatre from the 25th August till the 10th September, and that, by reason of the non-completion of the building until the 11th September, he lost profits.

The effect of article 2 was to bind the defendants to secure proposals from contractors who would agree to furnish all the materials and perform all the work indicated by the preliminary drawings and descriptive specifications, the aggregate amount of the proposals not to exceed $22,500.

By paragraph 2 of article 10 the defendants bound themselves to keep the total expense of the contractors' work referred to in article 2 within $22,500.

By article 8 the defendants bound themselves to complete the several portions and the whole of the work not later than the 25th August, 1905.

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

J. Bicknell, K.C., and F. R. MacKelcan, for the defendants.

J. L. Counsell, for the plaintiff.

Moss, C.J.O. (after setting out the facts as above):—What is complained of is, that, owing to alleged breaches by the defendants of their contract in that behalf, the plaintiff was obliged to pay

out a large sum in excess of $22,500 to complete the work undertaken by the defendants.

This is a plain issue, turning upon the terms of the contract and the evidence with regard to what was done after it was entered into. If the building which has been completed, and of which the plaintiff has now the benefit, is the work, and nothing but the work, covered by the defendants' covenant and undertaking, then to complete it has cost the plaintiff more than $22,500, and the defendants should make good the difference. But if, as contended on behalf of the defendants, the building as completed is not the building indicated in the drawings and specifications which, under article 1, are part of the contract, but a changed and different structure in material respects, the defendants ought not to be held liable, for they did not covenant or agree to procure for the plaintiff any but the building indicated in the drawings and specifications for the price or sum of $22,500. . . .

One Alexander Loudon . . . was in charge for the plaintiff. . . .

The question is, were the drawings and specifications incorporated in the contract departed from, and did the changes which were made involve further cost and outlay? And of this there can be no doubt. Some at least of these changes were made at Loudon's request and at the plaintiff's instance. And, that being so, how could the plaintiff expect to make the defendants stand to the procuring for him of the altered structure at the original cost? . . . .

The increase in the length of the building led to an increase in the length of the auditorium, with a corresponding increase of seating capacity—a subject about which, as Loudon said, the plaintiff and he were always anxious. . . .

In any view, I am, with all deference, unable to concur in the opinion that, whether it be true or not that the necessity for changes and enlargements originated in the want of care or skill on the part of the defendants, they are to be held liable on the contract for aught beyond that which they there undertook. The plaintiff has not shewn that the defendants ever agreed to procure for him the present building for $22,500. That was the question to be tried, and on that issue I am of opinion that the judgment ought to be in favour of the defendants.

It follows that, the delay in finishing the building having been occasioned by the changes, the claim for damages on this head fails.

As to the counterclaim, the parties seemed to agree at the trial upon the amount to be allowed to the defendants; but, upon a

review of the whole case, and taking into consideration all the circumstances, we have determined to settle that point for ourselves. We think that a fair allowance to the defendants in respect of the additional work and cost would be $500, which, added to the $450 admitted to be due in respect of the original allowance, makes $950, for which the defendants should have judgment on their counterclaim. This appears to be in accord with the finding on this branch of the case at the trial of the former action.

The appeal must be allowed, and the action dismissed, and the defendants' counterclaim allowed to the extent of $950.

The defendants are entitled to their costs throughout.

MACLAREN and MEREDITH, JJ.A., concurred; MEREDITH, J.A., stating reasons in writing.

OSLER and GARROW, JJ.A., dissented, being of opinion, for reasons stated by GARROW, J.A., in writing, that the appeal should be dismissed with costs.

MARCH 24TH, 1910.

GALUSHA v. GRAND TRUNK R. W. CO.

Railway—Injury to Passenger—Breaking of Rail—Negligence—Findings of Jury—Expert Evidence—Statute Limiting Number of Witnesses—Objection by Counsel—Remarks of Trial Judge—Prejudice—New Trial—Excessive Damages—Inspection of Road.

Appeal by the defendants from the judgment of TEETZEL, J., in favour of the plaintiff, upon the findings of a jury, for the recovery of $4,000 damages.

On the 26th February, 1907, the plaintiff, while a passenger upon the defendants' railway, was injured by reason of the car in which he was seated leaving the rails owing to a broken rail.

The jury found the defendants guilty of negligence; that the rail which broke was too light for the "present traffic, and, after carefully examining the rail, think it quite possible that it was broken by an east-bound train earlier in the day." They further answered a question as to whether the defendants had been guilty of any negligence in regard to the inspection of the rails on the day of the accident, "Yes, in not having that part of the road inspected."

In the statement of claim the negligence relied on was stated only in general terms as consisting in the "management, construction, maintenance, and operation" of the railway. No particulars were demanded or delivered.

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

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

A. H. Clarke, K.C., for the plaintiff.

GARROW, J.A. (after stating the facts as above):—At the trial the plaintiff was examined as a witness, and he and a witness named Herbert Ackerson gave evidence of the circumstances accompanying the derailment. He also called two physicians who gave evidence as to the nature of the injuries sustained by the plaintiff. A third physician, appointed by the Court, was also examined. And, relying on the prima facie case thus made (see Canadian Pacific R. W. Co. v. Charlebois, 22 S. C. R. 721), the plaintiff closed his case.

The defendants then called Blaiklock, their engineer of maintenance of way, Ferguson, general roadmaster of the division in which the accident occurred, Wherry, roadmaster of the district of the division, Sosnowski, section foreman, Markey, master mechanic of the division, Gillan, the division superintendent, Thompson, the engine-driver in charge of the engine on the occasion in question, and two civil engineers, experts, Macklin and Holgate.

In reply, the plaintiff called Royce, also a civil engineer expert, and was proposing to call other expert evidence, when he was met with the objection that, having called two medical men and one engineering expert, his right, under 2 Edw. VII. ch. 15, was exhausted.

Teetzel, J., with justifiable reluctance, upheld the objection, and in doing so made remarks, which, at the time, and now again, are complained of by the defendants, from which it might be inferred that, in his opinion, the objection, if within the defendants' strict legal right, was nevertheless unfair in the circumstances, and ought not to have been taken, or, if taken, persevered in.

No further evidence was called. Counsel for the defendants moved for the dismissal of the action, relying on Ferguson v. Canadian Pacific R. W. Co., 12 O. W. R. 943, but the motion was refused, the learned Judge holding that the evidence of the one expert called by the plaintiff was opposed to the evidence of the experts called by the defendants, and that the question was, therefore, for the jury.

And the two points dwelt upon by the learned Judge in his charge were: (1) Were the defendants "guilty of negligence in using the 72-lb. rail with the engines of increased weight which during the last two or three years were placed in service on this section . . going at the speed at which this engine was going at the time the accident happened?" And (2) was it negligent not to have had that portion of the line inspected on the day of the accident (it had been inspected the day before) before the accident, which occurred in the afternoon about three o'clock?

It is not easy to see why the second of these points should have been submitted to the jury, in view of the learned Judge's own well-grounded commentary on the evidence, when he said: "But I am unable to see any evidence here on either side which would suggest that an inspection in the morning would have resulted in the discovery of the defect in the rail, because the evidence all points, it appears to me, to the breaking of this rail at the time this train went over it."

Several trains had passed over the spot during the same day, prior to that in which the plaintiff was a passenger. . . . But the whole evidence seems to point to the fracture having occurred while that train was passing over it. And there is no evidence that any reasonable inspection, made earlier in the day, would have discovered the defect or have enabled the accident to be avoided.

In these circumstances, I am of the opinion that the question as to inspection should not have been submitted, and that the finding of the jury as to it should be set aside.

Upon the other question I have come to the conclusion that there should, in the circumstances, be a new trial. The amount of damages is complained of by the defendants, and they certainly seem large, considering the nature of the injury. This, in itself, would probably have been an unsatisfactory or even an insufficient reason for interfering, since the question is so essentially one for the jury. But added to it there is the fact of the remarks of the learned Judge, made in presence of the jury, when allowing Mr. McCarthy's objections to further expert testimony. The ruling itself upon the construction of the statute is not before us, and I therefore pronounce no opinion on it. But, on the assumption that counsel for the defendants was within his legal right, I, with deference, think that, however much I may incline to sympathise with the learned Judge's point of view, in the circumstances, the remarks themselves were objectionable and calculated to influence adversely the minds of the jury against the defendants. . .

The case, while in some respects like Ferguson v. Canadian Pacific R. W. Co., is not quite the same. The legal duty in both was, of course, alike, but the facts differ, as facts almost always do. There was no question there of the sufficiency of the rail as a rail; here that is the whole question. There the engine was rounding a curve; there was no curve here. The rail there was of 80 lbs. weight, and comparatively new; the rail here, originally 72 lbs., had been reduced by long wear to 67 lbs. The expert testimony there upon the real questions in controversy was practically all one way; that can not, I think, notwithstanding the very cogent evidence given by the defence, be said here, although I say nothing as to whether, in view of all the circumstances, the expert evidence given on the part of the plaintiff would or would not have warranted submitting the case to the jury—expert or opinion evidence standing upon a somewhat different footing from ordinary evidence of facts. See Jackson v. Grand Trunk R. W. Co., 32 S. C. R. 245.

The new trial should, of course, be confined to the points which I have indicated, namely, the sufficiency of the rail and the amount of damages. And the costs of the former trial and of this appeal should be to the successful party.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., was of opinion, for reasons stated in writing, that the appeal should be allowed and the action dismissed, unless the plaintiff elected within a reasonable time to take a new trial.

MARCH 24TH, 1910.

LEITCH v. PERE MARQUETTE R. W. CO.

Railway—Injury to Brakesman—Switch-stand at Side of Track—Body of Brakesman Protruding from Side of Train—Negligence—Dangerous Position of Stand — Source of Danger—Absence of Competent Evidence—New Trial.

Appeal by the defendants from the order of a Divisional Court (22nd September, 1909), setting aside a nonsuit entered by TEETZEL, J., and directing that judgment be entered for the plaintiff for $2,520, the damages assessed by the jury.

The action was to recover damages for personal injuries sustained by the plaintiff, a brakesman in the employment of the defendants, by reason of the negligence of the defendants, as the plaintiff alleged. The plaintiff in the performance of his duties

on a train was struck by the target of a switch-stand while the train was passing it, and was injured.

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

F. Stone, for the defendants.

L. J. Reycraft and H. D. Smith, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.:—

. . . The plaintiff failed, in my opinion, to give any substantial competent evidence upon the main question in issue, though such evidence was as easily procurable as the incompetent evidence which was adduced; and the defendants abstained from giving any evidence at all, although the material facts were within the knowledge of their officers and servants, who, speaking truthfully, could have made quite clear the material facts, which, in my opinion, were, at the trial, quite overlooked or else intentionally disregarded. . . .

The main question was not whether the switch-stand was or was not a source of danger to persons whose heads, arms, or whole bodies protruded beyond the car in or upon which they were. It is impossible to eliminate all danger from the operation of a railway. Passengers, as well as railway servants, know this, and, expressly or tacitly, assume such risks as are not attributable to negligence or misconduct, or are not contracted against. The plaintiff's contract, in that respect, was in writing, in these words: "All persons entering or remaining in the service of this company are warned that their occupation is hazardous; that they do so with the full knowledge of the dangers incident to the operating of railroads; that, in accepting or retaining employment, they must assume the ordinary risks attending it; that they are required to exercise great care in the performance of their duties to prevent accident or injury to themselves and others; and, before using tools or apparatus of any kind, they should know that they are in a safe condition to perform the service required, and report to the superintendent, in writing or by wire, defects in tracks, engines, cars, machinery, and appliances of any kind liable to cause accidents."

The main question, therefore, was, whether the defendants had negligently placed or maintained the switch-stand in such a position as to be dangerous. If its distance from the track were the usual and proper distance, having regard to its efficient operation, and all other circumstances bearing upon the question, then there was no negligence, and no liability.

That question was obviously a technical question: one which no one without some special knowledge upon the subject could properly answer. Many considerations affecting the safety, not only of protruding bodies of individuals, but whole car-loads, as well as the efficient operation of the road, may have been involved; and it may be that, whilst nearness added to the occasional danger of a brakesman, it may have reduced other and much further-reaching dangers. But as to all this we are left in darkness, as far as the evidence goes, by reason of the parties having failed to call even one competent witness.

The clear space between the ladder against which part of the plaintiff's body was and the nearest part of the switch-stand was two feet, ample of course for any ordinary body to pass through in safety, the depth of an ordinary body being about one foot; and there was no necessity for the plaintiff being upon the side of the car, instead of, as the other brakesman was, at the end of the car—other cars, and this car too, according to the testimony of the witness McNeil, being provided with ladders, or standing places at their ends. So that the case is not one in which it can be said, res ipsa loquitur, that there can not be any sort of reason or excuse for placing the switch-stand so near. . . .

[Extracts from the evidence.]

The case, in my opinion, is one in which the plaintiff may have a good cause of action, but has not gone the right way about proving it; and the defendants have done nothing to disprove it, as they easily might if in truth there be no good cause of action; and the result should be a new trial, if the plaintiff choose to take it; otherwise the judgment at the trial should be restored. New trials, in the discretion of the Court, should be very exceptional, but this case seems to me to be one of such exceptions. I do not see how justice can be otherwise done. I would not give to either party against the other the costs of the last trial in any case. Costs in the Divisional Court and Court of Appeal to be costs in the action.

MARCH 24TH, 1910.

*DREWRY v. PERCIVAL.

Appeal to Court of Appeal—Order of Divisional Court Affirming Judgment of District Court — Amount Involved Exceeding $1,000—Right of Appeal—Unorganized Territory Act, secs. 9, 10—Judicature Act, secs. 50, 74, 75, 76, 77.

An appeal by the defendant George Percival from the order of a Divisional Court, 19 O. L. R. 463, dismissing that defendant's

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

appeal from the judgment of the District Court of Rainy River in favour of the plaintiff for the recovery of $1,039.61, after a trial without a jury.

The appeal came on for hearing before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

G. R. Geary, K.C., for the plaintiff, objected that the appeal did not lie.

W. N. Ferguson, K.C., for the appellant, contra.

The appeal was heard subject to the objection.

OSLER, J.A.:— . . . Section 9 of the Unorganized Territory Act, R. S. O. 1897 ch. 109, sub-sec. 3, enacts that after a trial in an action for the recovery of land or in replevin where the value of the goods exceeds $200, or in any other case where the cause of action is beyond the jurisdiction possessed by County Courts, and a verdict or judgment exceeding $200 is obtained, any party entitled to move to set aside such judgment may, instead of moving in the District Court and without removing the cause into the High Court by certiorari or otherwise, move in the High Court for such rule or order as he claims to be entitled to, in the same manner as if the action had been in the High Court and had been tried at a sittings thereof, and the judgment or order of the High Court shall be acted upon as if it were a judgment or order of the District Court.

And sub-sec. 4 enacts that where a party is entitled and desires to move under sub-sec. 3 he shall notify the clerk of the District Court in writing to transmit the record of the pleadings and the exhibits filed at the trial to the Central Office of the High Court, and that, subject to any general Rules, the subsequent practice shall be the same as in case of a trial in the High Court.

Section 10 (2) provides for the transfer of the case to the High Court, enacting that the High Court or a Judge thereof may order the whole proceedings to be transferred to the High Court, and that, on this being done, the action is to be thenceforth continued and prosecuted in that Court as if it had been originally commenced therein; only such cases as involve value or damage to the amount of $1,000, and appear also to be such as ought to be tried in the High Court, can be so removed: sub-sec. (4).

Section 74 of the Judicature Act, as enacted in 1904, 4 Edw. VII. ch. 11, provides that an appeal shall lie to a Divisional

Court of the High Court in the several cases specified, inter alia "(5) as provided in the Unorganized Territory Act."

Section 75 enacts that the judgment, order, or decision of a Divisional Court shall be final, and that there shall be no further appeal, save at the instance of the Crown, and save as provided by secs. 50 and 76.

Section 50 confers jurisdiction on the Court of Appeal to hear and determine appeals from any judgment, order, or decision, "save as in this Act mentioned," of a Divisional Court; and sec. 76 purports to define the several conditions or cases in which such appeal lies with leave or without.

If the sections I have referred to were the only sections dealing with the subject, it is probable that the appeal now in question would lie, the judgment appealed from being the judgment of a Divisional Court, and the matter in controversy on the appeal being more than the sum or value of $1,000 (76 (b)); and appeals from judgments on County Court appeals in certain cases would also be open.

Section 77, however, stands in the way, expressly enacting that nothing in sec. 76 shall be construed so as to permit an appeal to the Court of Appeal from the judgment of a Divisional Court upon an appeal to such a Court in any of the cases mentioned in clauses 2 to 9, both inclusive, of sec. 74, except certain appeals from a Surrogate Court or Judge. Clause 2 declares the jurisdiction of a Divisional Court to hear appeals from County Courts "as provided in the County Courts Act;" and (as already mentioned) clause 5, of a similar Court to hear appeals from a District Court "as provided in the Unorganized Territory Act." Neither of these Acts gives any further appeal.

The provision in sec. 9, sub-sec. 4, of the Unorganized Territory Act, that the "subsequent practice" after motion in the High Court under the preceding sub-section shall be the same as in case of a trial in the High Court, does not extend to confer the right of a further appeal, which must always be expressly given: see Ahrens v. McGilligat, 23 C. P. 171; Sandbach v. North Staffordshire R. W. Co., 3 Q. B. D. 4.

It may well be that, if the case had been removed into the High Court by certiorari, or by order under sec. 10, an appeal to this Court would have lain from the judgment of the Divisional Court, but neither of these courses was adopted.

The case Bank of Minnesota v. Page, 14 A. R. 347, can not assist the appellant. Appeals from the Territories still follow the course of County Court appeals, which is now to the High

Court, instead of, as was the law when that case was decided, to the Court of Appeal.

It is thus plain that the present appeal is not competent, and must be dismissed.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.

Appeal dismissed with costs to the plaintiff as of a motion to quash only.

MARCH 24TH, 1910.

*REX v. HENRY.

Criminal Law—Case Stated by Magistrate—Summary Conviction under Provincial Act — Forum — Court of Appeal or High Court.

Case stated by R. E. Kingsford, one of the police magistrates for the city of Toronto, by whom the defendant was convicted for practising dentistry, he not being a licentiate of the Royal College of Dental Surgeons of Ontario. The case was stated pursuant to a direction of the Court of Appeal. The question submitted was: "Was the defendant properly convicted of an offence against the provisions of sec. 26 of the Act respecting Dentistry, R. S. O. 1897 ch. 178, on the admissions made by him?"

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

E. F. B. Johnston, K.C., and G. Grant, for the defendant.

I. F. Hellmuth, K.C., and W. H. Price, for the Royal College of Dental Surgeons of Ontario.

MEREDITH, J.A.:—It seems to me to be quite plain that this Court has no jurisdiction in such a case as this; and that the reserved case, which the magistrate was required to state, should be remitted to him because of such want of jurisdiction.

The conviction in question was a summary one, under a provincial enactment, and subject to the provisions of the Ontario Summary Convictions Act.

By sec. 8 of that enactment, as amended by 1 Edw. VII. ch. 13, sec. 2, it is provided that the practice and procedure as to the

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

statement of a case for the opinion of the Court, in matters such as this, shall be the same as in like cases under Federal enactment.

Under Federal enactment—the Criminal Code, sec. 764—a police magistrate, among other justices, may be required by "the Court" to state a case upon any question of law arising in any summary prosecution, for hearing and determination by such Court.

Under sec. 705 of the Criminal Code, "the Court" is any "Superior Court of criminal jurisdiction for the province in which the proceedings in respect of which the case is sought to be stated are carried on."

Under sec. 2 of the Criminal Code, "35. 'Superior Court of criminal jurisdiction' means and includes, (a) in the province of Ontario, the High Court of Justice for Ontario."

And under sec. 766 of the Criminal Code, "2. The authority and jurisdiction of the Court for the opinion of which a case is stated may, subject to any rules and orders of Court in relation thereto, be exercised by a Judge of such Court sitting in Chambers, and as well in vacation as in term time."

This is not unfamiliar practice: the only wonder is that the parties should have strayed out of the pretty well-worn way into this Court, as if the case were one of a trial for an indictable offence.

OSLER, J.A., reached the same result, for reasons stated in writing.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.

The Court pronounced no order, there being no jurisdiction to entertain or determine the case reserved.

MARCH 24TH, 1910.

*WRIGHT v. TORONTO R. W. CO.

Damages—Assessment by Jury—Damages for Personal Injuries—Damages for Loss of Future Profits—Severance by Jury—Evidence—Appeal—Verdict Reduced by Amount Allowed for Loss of Profits.

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

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

The action was brought by husband and wife to recover damages arising from an injury to the wife while a passenger on a street car in charge of the defendants' servants.

The appeal was confined to the question of damages, the jury having found $2,500 damages for the wife ($1,900 generally and $600 for loss of business) and $100 for the husband, and judgment having been entered for the plaintiffs for these amounts.

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

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

J. MacGregor, for the plaintiff.

Osler, J.A.:—The only question in this case is, whether the Court can interfere with the judgment as regards the damages, which have been assessed in all at $2,500, of which $1,900 were given for personal injuries and the physical damage and suffering sustained by the plaintiff, and $600 for business loss. This was ascertained by the answer of the jury to a question put to them by the learned Judge before the verdict was recorded, and it was expressly stated to them by him that the reporter would note how the damages were divided by them, so that, if there were any question of law, they—the jury—would assess the damages $1,900 generally and $600 for loss of business to the female plaintiff.

It must be taken that the jury assented to this; and the fact that the Judge entered judgment generally, by adding these two sums, for $2,500, can not affect the right of the defendants to object that as a matter of law upon the evidence the item of damage for loss of business is not recoverable.

In my opinion, that claim is quite unsupported by the evidence. It is purely conjectural, and, as attempted to be supported, too remote to justify the finding.

As to the other head of damage, there was evidence of negligence, hardly combatted, resulting in an accident to the plaintiff which has caused her great pain and suffering. I think, upon the evidence, the jury were quite justified in taking a view of it more serious than that which the defendants pressed upon them and urged again before us on the hearing of the appeal.

It is impossible for us to say that the damages awarded are so large as to shew that the jury neglected their duty or were actuated by any improper motive or did not appreciate the grounds on which they might act in awarding them.

The judgment will, therefore, be varied by deducting the sum of $600 for loss of business, and so reducing the damages to $1,900, for which sum the judgment will stand.

GARROW, J.A., concurred, for reasons stated in writing, in which he referred, on the question of damages for the loss of future profits, to Hovey v. Felton, 11 C. B. N. S. 142; Lancashire and Yorkshire R. W. Co. v. Gidlow, L. R. 7 H. L. 517, at p. 525; Bradshaw v. Lancashire and Yorkshire R. W. Co., L. R. 10 C. P. 185, at p. 195; Wilson v. Newport Dock Co., L. R. 1 Ex. 177; Masterton v. Mount Vernon, 58 N. Y. 391.

MOSS, C.J.O., and MACLAREN, J.A., also concurred.

Appeal allowed in part, and damages reduced to $1,900. No costs of appeal.

MARCH 24TH, 1910.

*RE CORNWALL FURNITURE CO.

Company—Winding-up—Contributories—"Bonus Shares"—Issue of, as Paid up, to Persons already Shareholders—Absence of Subscription and Allotment—Acceptance—Stock Certificates—No Money Paid or Value Given—Liability—Application of Moneys Paid by Town Corporation to Aid Company—By-law—Contract—Construction.

Appeal by James E. Wilder and ten other persons who were held by the Local Master at Cornwall to be liable as contributories (in the winding-up of the company) in respect of certain shares of the capital stock, from the order of BRITTON, J., 14 O. W. R. 352, affirming the Local Master's order.

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

W. E. Middleton, K.C., and G. A. Stiles, for the appellants.

C. H. Cline, for the liquidator.

MOSS, C.J.O.:—The shares in question appear entered in the company's books under the distinguishing name "bonus" . . . The evidence establishes that certificates for these "bonus shares" were issued to the respective persons therein named as the holders thereof, and that they received the same with full knowledge of the

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

circumstances. With that knowledge, they accepted and gave receipts for the certificates shewing them to be holders of the number of shares allotted to them respectively, and in this way and in other ways they assented to their names being on the register in respect of them. They were paid and received dividends in respect of them; some hypothecated, others transferred, and all treated and dealt with, their respective shares, as their property. In the circumstances appearing, they must be held to have accepted these shares and to have become shareholders in respect of them.

The question then is, have the shares been paid for in money or money's worth so as to discharge the holders from liability as contributories under the liquidation proceedings?

It is clear that the parties did not themselves pay for these shares. The only plausible contention put forward is, that they were paid for by the application to that purpose of the $15,000 paid by the town of Cornwall under the agreement between Messrs. Aspinall, Edwards, and Wilder and the town corporation, and the by-law of the corporation in relation thereto, approved by vote of the ratepayers, and finally passed by the council on the 19th August, 1902. But by no fair construction of the agreement and by-law can it be made to appear that the $15,000 was to be received otherwise than as the money of the company, to payment of which it was entitled, and when paid to form part of its assets. . . . It is sufficiently apparent on the face of the instruments that the $15,000 was to become the property of the company. . . . There is nothing sanctioning the notion that, when received, it was to be applied in any form for the private or personal benefit of promoters or any other persons taking part in the formation of the company.

And when the shareholders present at their first meeting, acting, no doubt, in good faith, assumed to treat the $15,000 as granted to Messrs. Aspinall, Edwards, and Wilder, and those associated with them, and proceeded to devote it to purchasing paid up shares in the company to be given to the shareholders for the first $25,000 of shares, they were in effect assuming to make a gift to those persons of the company's money, under the guise of paid up shares in the company's capital stock, without any equivalent to the company therefor. There can be no valid pretence that the shares were paid for, and that the persons to whom they were issued were entitled to hold them as fully paid up.

It is now too late for these persons to ask to be relieved from their position as holders of the shares which they thus acquired. No doubt, they acted under a mistaken belief, but that fact does not suffice to entitle them to be relieved. . . .

There does not seem to be any legal ground upon which it can be held that they are not liable to pay whatever sums it may be necessary in the winding-up proceedings to demand in respect of these unpaid shares.

The appeal fails and must be dismissed.

OSLER, J.A., agreed in the result, for reasons to be stated in writing.

GARROW and MACLAREN, JJ.A., also agreed.

MARCH 24TH, 1910.

FOSTER v. RADFORD.

Contract—Exchange of Lands—Improvements to Building—Work not Completed by Vendor and Taken over by Vendee—Allowance for Money Expended—Rents—Interest—Accounts—Reference—Report—Variance on Appeal.

Appeal by the defendant from the order of BOYD, C., 14 O. W. R. 224, on an appeal from the report of George Kappele, an Official Referee.

The action was brought to recover damages for breaches of an agreement in writing respecting the purchase by the plaintiff from the defendant of the premises in the city of Toronto known as "St. James Chambers."

A reference was directed to Mr. Kappele to make all necessary inquiries and take all necessary accounts. He made his report in which he dealt with a large number of items. The appeal was confined to three, namely, (1) the papering, (2) damages for not completing as agreed, (3) rental of the Carlton street property. The Chancellor reduced (1) and (2) by one-half of the amounts allowed by the Referee, and dismissed the appeal as to (3).

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

J. R. Roaf, for the defendant.

W. E. Middleton, K.C., and R. G. Hunter, for the plaintiff.

The judgment of the Court was delivered by GARROW, J.A.:—As to item (1) there seems to be no doubt on the evidence that Weeks did the work or some part of the work that was to have been done by the defendant, and that he was paid by the plaintiff $507. The defendant's contention that Woods, employed by him, had done the same work, is not, I think, established, although he probably was employed to do and actually did part of it, which latter

fact, no doubt, accounts for the reduction in the item made by the Chancellor, whose judgment as to it should, in my opinion, stand.

Nor is there any sufficient reason for disturbing his finding upon item (2). Mr. Roaf admits that there was some damage. . . . There was a breach, and damages of a very substantial character ensued. And I am not prepared to say that the sum finally allowed is at all excessive.

As to the remaining item, the rent of the lot on Carlton street taken by the defendant in exchange or part payment, and continued to be occupied by the plaintiff; . . . the rental charged and allowed by the Referee was at the rate of $780 per annum. The defendant's complaint is that this rate is much too low, and the complaint is, I think, well-founded. . . . Upon the whole, while unable to agree with Mr. Roaf's argument that the plaintiff is chargeable as a trustee with the rents which he received from the rooms while in use by him as a private hospital, I think the rental allowed is, upon the whole evidence, distinctly too low, and should be increased to at least $1,000 per annum. The lack of repair was during the plaintiff's own occupation. And the absence of the necessary heating apparatus cannot have been very serious, because it did not prevent him from carrying on a profitable business, in which, one would think, sufficient heating would be a necessity. And, while the plaintiff so continued to occupy, the defendant was kept out of possession, and was prevented from making the changes and repairs which, as the evidence indicates, would, at a comparatively trifling expense, have at once assured a considerably increased rental, beyond even that with which, in my opinion, the plaintiff should now be charged.

To this extent the appeal should . . . be allowed, and in other respects dismissed. . . . No costs of the appeal.

MARCH 24TH, 1910.

* RATHBONE v. MICHAEL.

Evidence—Fresh Evidence Admitted by Divisional Court on Appeal—Mechanics' Liens—Preservation of Lien for Materials—Last Materials Delivered Charged by Mistake as "Extras"—Materials Actually Delivered under Contract—Mistake of Bookkeeper — Alteration of Judgment Pronounced, before being Drawn up—Con. Rule 498—Rule as to Admission of Fresh Evidence.

An appeal by the defendants the owners, the trustees of the Annette Street Methodist Church, Toronto Junction, from the

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

judgment of a Divisional Court, 19 O. L. R. 428, dismissing an appeal from the judgment of an Official Referee in favour of the plaintiff in an action to enforce a mechanics' lien.

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

G. F. Shepley, K.C., for the appellants.

J. Bicknell, K.C., and G. M. Gardner, for the plaintiff.

OSLER, J.A.:—The action was commenced on the 3rd or 4th November, 1908. The claim for the lien was not registered. It appeared that the defendant Michael had entered into a contract with the defendants the trustees . . . for the erection of a building on the land sought to be charged, and that on the 8th April, 1908, the plaintiff had contracted with Michael to furnish him with a quantity of specific material to be used in its construction, for $1,700. The statement of claim in the action set forth the particulars of the claim for lien as the amount of the contract price and of a "bill of extras" amounting to $75.17 furnished between the 1st August and the 8th October, 1908. The sum of $700 had been paid on account, and the demand in the action was for the balance of the contract price and the extras. The last two items of the latter, amounting to $4.75, consisted of a charge for three doors, of described dimensions, the date of furnishing which was given as the 8th October, 1908.

The amount of the claim was really not disputed, being proved in a merely informal way by reference to the plaintiff's book; and the contest before the Referee appears to have turned wholly upon the question whether the plaintiff had 30 days from the furnishing and delivery to the defendant Michael of the last material to be used in the building, namely, the extras, as distinguished from the last delivery of materials under his contract, within which to commence proceedings for the enforcement of a lien for the balance of the contract price and the extras furnished under separate orders. The Referee held that the 30 days ran from the 8th October, when, as stated in the particulars, the last extra had been furnished, and declared the plaintiff entitled to a lien for the whole balance of his claim.

On appeal the Divisional Court was of opinion that as to the balance of the contract price the time ran from the delivery of the last material to be supplied under the contract—found in the books to have been the 16th (or the 8th) September, and that the lien was therefore enforceable to the amount of the extras only.

Before the order of the Court was drawn up, the plaintiff applied for leave to give further evidence for the purpose of shewing that the last two items in the bill of extras, for the doors delivered on the 8th October, had been entered in his books and charged as extras in error, whereas they were in fact part of the material to be supplied on the $1,700 contract, and had been so supplied in completion of that contract. The Court admitted the evidence, and, being satisfied of its truth, recalled the opinion formerly given, and, with a slight variation, affirmed the judgment of the Referee, holding as to the whole claim that the action had been duly brought within the time prescribed by sec. 22 of the Act.

The defendants the trustees appeal from this judgment, contending that no proper case for the admission of the new evidence was made out; that it could, with reasonable diligence, have been discovered before the trial; and that the plaintiff, by his own negligence and by the manner in which his case was presented on the pleadings and at the trial, was precluded from opening it and from being allowed to adduce the evidence proposed.

It is unnecessary to cite authorities to shew that, the order on the appeal not having been issued, the appeal was still pending and within the control of the Court, and that the Court was at liberty, of its own motion, or on application, to recall the opinion which had been pronounced, and on a proper case to admit further evidence for the purpose of the appeal under Con. Rule 498, which Rule, and not Rule 642, was the one applicable to the case. . . .

There is no doubt that the rule which governs the admission of new or further evidence is rightly fenced round with strict limitations. The parties should come to the trial prepared with the evidence upon the issues to be tried; and to open the door wide to enable them to make good a case defectively presented would lead to abuses such as the prolonging of litigation and opportunities for fraud.

In Dinsmore v. Shackleton, 26 C. P. 604 (C. A.), Murray v. Canada Central R. W. Co., 7 A. R. 646, and Trumble v. Hortin, 22 A. R. 51, this Court has spoken on the subject with no uncertain sound, and the practice has been more recently stated in such cases as Turnbull v. Duval, [1902] A. C. 429, and Young v. Kershaw, 81 L. T. R. 557 (C. A.) There must have been, as is said in the last case, no remissness in adducing all possible evidence at the trial, and "as to the class of evidence, it must be such that, if adduced, it would be practically conclusive—that is, evidence of such a class as to render it probable, almost beyond doubt, that the verdict would be different." Merely corroborative evidence—evidence to admit which would be merely setting oath against oath

—evidence obtained under suspicious circumstances or evidence which might enable an opponent's witness to be cross-examined more effectively, will not do. . . .

In the present case the only difficulty I have felt arises out of the first branch of the rule, viz., whether the plaintiff had not been guilty of such default or remissness in the conduct of his case as to disentitle him to relief, the evidence he sought to adduce having always been in his possession. But I think that as to this the issue which was really presented for trial must be considered. The plaintiff, not unnaturally, stated and put forward his claim as it appeared in his books. There was no inquiry into or dispute as to items, and the only witness—the bookkeeper—testified merely to the book entries. From these it was assumed or would appear that the contract had been completed on the 8th or 16th September, and the only question considered was whether, upon the proper construction of the Act, the 30 days within which the action should have been brought to establish the lien ran from the delivery of the last items of the extras (as they were then supposed to be) for materials supplied for use in the building so as to draw in the claim for the balance due on the contract.

On this question the Divisional Court differed from the Referee, but there was nothing at the trial to suggest the question whether the items referred to were not part of the contract so as to make the date of their delivery important in fixing the date of the commencement of the time-limit. The Divisional Court was of opinion that the delay and default were excused, and admitted the subsequently discovered evidence of error in charging the contract items of the 8th October as extras. I do not see how we can hold that the Court was wrong in doing so and in allowing the plaintiff to make the necessary amendments, assuming that the evidence itself was of such character as to make it admissible within the rule I have referred to. As to this, the affidavits, supported by the documentary evidence, shew—and the deponents were not cross-examined—that the items in question were in fact furnished on the $1,700 contract, and that the error in charging them as extras, instead of to the contract, was that of the plaintiff's clerk or bookkeeper. Even suspicion of bad faith is absent—indeed is not suggested—and for myself I can not see that there is room for doubt that, if this evidence had been before the Referee, the issue would have taken quite a different shape, and must have been decided in favour of the plaintiff.

The position of no one has been altered. In my opinion, no more than justice has been done, and the appeal should be dismissed with costs.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.

MARCH 24TH, 1910.

* TOWNSHIP OF EAST GWILLIMBURY v. TOWNSHIP OF KING.

Municipal Corporations—Agreement between Municipalities as to Building and Maintenance of Road—Enforcement—Agreement not Legally Binding—Resolution—Absence of By-law and Seal—Payment of Money—Executed Contract—Recovery of Money Paid as upon Failure of Consideration.

Appeal by the plaintiffs from the judgment of MACMAHON, J., 14 O. W. R. 122, dismissing without costs an action brought to enforce an alleged agreement to build and maintain a portion of a highway. The plaintiffs claimed specific performance, a mandamus, or damages.

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

McGregor Young, K.C., and T. H. Lennox, K.C., for the plaintiffs.

H. L. Drayton, K.C., and A. B. Armstrong, for the defendants.

The judgment of the Court was delivered by GARROW, J.A. (after stating the facts):—It is not disputed that no by-law to acquire or open the new road or to authorise an agreement to be made concerning it was ever passed by the defendants' council; the resolutions . . . covering the formal corporate action, so far as appears. To overcome the legal objections of no by-law and no corporate seal, counsel for the plaintiffs contend that the contract has been fully executed by the plaintiffs, of which the defendants have had the benefit, and that, therefore, the defendants should either be compelled to a performance of their part, or made to pay damages for non-performance, on the authority of such cases as Bernardin v. Municipality of North Dufferin, 19 S. C. R. 581; Canadian Pacific R. W. Co. v. Township of Chatham, 25 S. C. R. 608; and Lawford v. Billericay Rural District Council, [1903] 1 K. B. 772.

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

Canadian Pacific R. W. Co. v. Township of Chatham has, I think, no bearing upon the question, because there was in that case an agreement under seal, and the real question was as to the authority of the council to make such an agreement in a drainage matter. Bernardin v. Municipality of North Dufferin in effect affirms what had been declared to be the law in this province in Pim v. County of Ontario, 9 C. P. 304, by the then Court of Appeal, since followed in a number of cases. While Lawford v. Billericay Rural District Council finally resolves a long conflict in the English decisions by adopting the opinion of Wightman, J., in Clarke v. Cuckfield Union, 21 L. J. Q. B. 349, and Blackburn, J., in Nicholson v. Bradfield Union, L. R. 1 Q. B. 620, thus bringing the law as laid down in the English Court of Appeal practically in line with that of our own Court of Appeal and of the Supreme Court of Canada in the Bernardin case. And what the law upon the subject, both in England and in this province, seems to be, is very well and with great precision summarised in the head-note to the Billericay case, thus: "When the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry these purposes into effect, and orders are given by the corporation in relation to work to be done or goods to be supplied to carry into effect those purposes, if the work done or goods supplied are accepted by the corporation and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the corporation, and the absence of a contract under the seal of the corporation is no answer to an action brought in respect of the work done or the goods supplied."

The claim now made by these plaintiffs is not for work done or goods supplied to the defendants. What the defendants did was to build a road in their own township, useful as far as it goes to the inhabitants of that township, but which would have been more useful if it had been continued as contemplated through the defendants' township. The remedy by mandamus could not, on the facts, be applied. Nor is the remedy by specific performance, on the ground of part performance, applicable: see the remarks of Strong, J., in the Bernardin case, 19 S. C. R. at pp. 586, 587, and the authorities to which he refers.

The action is really one to recover damages from the defendants for their breach of the agreement said to be evidenced by their resolution of the 28th September, 1907, to construct such continuation. And, assuming everything else in the plaintiffs' favour, such as that an agreement, although not complying in form with the statute, was proved, that such agreement was in its nature within the proper competence of the defendants' council, and a perform-

ance, to the extent alleged, by the plaintiffs on their part, I am of opinion that the case is clearly not one within the exception defined and laid down in these cases, and for this reason that the appeal fails.

The plaintiffs are, however, entitled to recover from the defendants the sum of $100 which they paid or allowed in account under the resolution . . . , as upon a consideration which failed. And there should, in the circumstances, be no costs of the appeal.

HIGH COURT OF JUSTICE.

BOYD, C., IN CHAMBERS MARCH 23RD, 1910.

RE McCANN KNOX MILLING CO.

Company—Winding-up—Sale of Land by Liquidator—Reference—Approval of Referee—Application to Court to Confirm Sale—Unnecessary Proceeding—Winding-up Act, R. S. C. 1906 ch. 144, sec. 34.

Motion by the liquidator of the company, in a winding-up proceeding, for an order confirming a sale of land of the company made by the liquidator, with the approval of the Referee to whom the winding-up was delegated.

W. R. Smyth, K.C., for the liquidator.

W. H. Wallbridge, for Cavanagh, a creditor.

BOYD, C.:—By order of MacMahon, J., dated the 22nd October, 1909, this matter was referred to Official Referee Kappele, under the Winding-up Act, to take all necessary proceedings for the winding-up of the company, and all such powers as are conferred upon the Court by that Act as may be necessary for the winding-up were delegated to the said officer. This is now the usual form of order, under which everything may be carried out without referring to the Court except by way of appeal: Re Cornwall Furniture Co., 18 O. L. R. 101.

Under the Winding-up Act, R. S. C. 1906 ch. 144, sec. 34 (c), (d), the liquidator may, with the approval of the Court (in this case the Official Referee), proceed to sell the real and personal estate by public auction or private contract, and transfer the whole thereof to any person or company, or sell the same in parcels . . . and do all acts and use, when necessary, the seal of the company.

Proceedings for sale of the land were conducted in the usual way by the liquidator, and the sale ultimately made was carried into effect by the order of the Official Referee of the 5th March, 1010, vesting the land in the purchasers.

Thereafter a motion was made on behalf of the liquidator to confirm this sale by the Judge in Chambers—and of this motion notice was directed to be given to the creditor. The creditor now files an affidavit objecting to the sale on various grounds. It is stated and not denied that the sale has been effectuated to the last degree, conveyances executed, registered, and price paid over. All is done that can be done, and it is superfluous to ask an order to confirm. I know of no such practice in winding-up, where plenary power has been conferred upon the Official Referee. He has approved, and, if there is no appeal from that, the sale must stand approved—but not by virtue of any confirmatory order made by the Court: Re Oriental Bank, 56 L. T. N. S. 868. This sale has been made and carried out under the supervision of the Court after notice being given to all the creditors (sec. 34), and this application to confirm is an unnecessary proceeding. I make no order.

BOYD, C., IN CHAMBERS. MARCH 23RD, 1910.

BROWN v. CITY OF TORONTO.

Jury Notice — Action against Municipal Corporation—Personal Injury to Pedestrian—Bad Condition of Sidewalk—Nonfeasance or Misfeasance—Judicature Act, sec. 104.

Appeal by the plaintiff from the order of the Master in Chambers, ante 526, striking out the plaintiff's jury notice.

S. H. Bradford, K.C., for the plaintiff.

H. Howitt, for the defendants.

BOYD, C.:—"The plaintiff tripped by reason of a hole in the boulevard caused by the negligence of the defendants taking up the old sidewalk and not filling in." This is the cause of action stated by the plaintiff in the second paragraph of the statement of claim, but whether it is based on non-repair of the sidewalk or on misfeasance in removing an old sidewalk, so as negligently to make a hole, may be argued very persuasively either way, on the bald statement. The learned Master has read it as implying a plain case of non-repair, and cases may be found to justify this gloss. I incline rather to read it as alleging that the status quo was disturbed by the action of the defendants so as to render the place unsafe; and there are cases to sustain this view. This is perhaps one of the cases, as the facts may be developed in evidence, where nonfeasance may be equivalent to misfeasance, as pointed out by the Lord Chancellor in Bull v. Mayor of Shoreditch, 20

Times L. R. 254. The ultimate decision may be that this case falls within what was held in Keech v. Town of Smiths Falls, 15 O. L. R. 300, to be the doing of a lawful act in such a way as to endanger the safety of pedestrians. I do not now say that the decision of the Master is erroneous; but I am averse to decide at the outset that this is a case which must be tried without a jury. Not only the method of trial, but the right to recover at all, by reason of the statutory limit of time for suing being disregarded, is involved in the consideration of the nature of the case, and I prefer to suspend these matters to a later stage, by restoring the jury notice. This is distinctly to be without prejudice to the subsequent prosecution of the case when the stage of trial is reached.

Costs will be in the cause.

DIVISIONAL COURT. MARCH 23RD, 1910.

*HOUGH LITHOGRAPHING CO. v. MORLEY.

Contract—Joint Liability—Promissory Note Given by one Person Liable—Unsatisfied Judgment on Note—Remedy against another Joint Contractor—Promise to Pay—Want of Knowledge of Judgment—Consideration—Partnership.

Appeal by the plaintiffs from the judgment of the County Court of York dismissing the action.

The plaintiffs claimed to recover from the defendant, as a partner in a firm known as the "Non-alcoholic Beverage Company," $238.47, alleged to be the balance due for lithographing work done for the firm.

The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ.

C. C. Robinson, for the plaintiffs.

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

The judgment of the Court was delivered by BOYD, C.:—I do not see how the defendant can escape from the payment of this liability. He is primarily liable, as he ordered and procured delivery of the goods sued for. Taking his own version of the case, he did this in the name of the Non-alcoholic Beverage Co., and for the purposes of the company, which was then about to be formed by the junction of three others with himself. But, according to the defendant, this company never came into existence, though a form of dissolution was gone through and papers signed to that

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

effect, transferring all assets and liabilities to one of the four named, Craigie, who then on the 9th July first established and registered a partnership under the above name, of which he was the sole partner. In pursuance of this form of dissolution, Craigie gave a note for the amount, signed by the company and himself, at three months, which has not been paid, but on which judgment was recovered on the 13th November, 1908. The plaintiffs called on the defendant to pay the claim, and upon an interview between them in May, 1909, the defendant admitted his liability, but sought forbearance, promising to pay it if time was given to him. The defendant sets up that he was discharged because of the note given by Craigie and accepted in satisfaction of the debt; and, secondly, as to the new promise in May, that he is not bound by it, because he was not told that judgment had theretofore been obtained on the note.

The judgment below has proceeded upon this ground as being an effective defence.

There was, as I judge, no concealment or want of knowledge of any material fact on the part of the defendant when he promised to pay his claim on being allowed some forbearance. He knew that the note had been given by Craigie in the name of the company, and, according to his evidence, he knew that was given in payment and he knew that he had requested or urged that it should be collected when overdue. . . . I think the promise is binding upon the defendant, and it was made for good consideration. The same result follows if it be the fact that the plaintiffs knew, at the time the note was taken, that the defendant was not then and never had been a partner. . . .

I should be disposed to hold on all the evidence, and especially the documentary, that there was in fact a partnership as to these goods at the time they were purchased, and that all the firm were jointly liable. But, apart from the fact of partnership, the goods were ordered and purchased originally on the joint account of the intending partners, and all would be equally and jointly liable: Young v. Hunter, 4 Taunt. 696. Being a joint liability, the judgment obtained on the note of the partnership represented by Craigie alone could only be a judgment against one of the joint debtors, and would work no detriment to the legal right of the plaintiffs to recover on the original liability as against Morley, the defendant. The learned Judge seems to have been misled by placing his judgment on the doctrine of merger as expounded in Toronto Dental Manufacturing Co. v. McLaren, 14 P. R. 89, 92. That case turned on merger, not on election, and was decided in 1890. The law was then as stated in Cambefort v. Chapman, 19 Q. B. D. 229

(a case much like this on the facts), and the doctrine of res judicata there maintained was, that an unsatisfied judgment against one joint contractor on a bill of exchange given by him alone for the joint debt is a bar to an action against the other joint contractor on the original contract. But this was reversed in 1894 by the case of Wegg Prosser v. Payne, [1894] 2 Q. B. 105, and affirmed, [1895] 1 Q. B. 108, where it was held that an unsatisfied judgment against one joint contractor on a cheque given by him for the joint debt is not a bar to an action against the other joint contractor on the original contract. I cannot agree to the view that the original claim was in any sense affected as against the defendant by a judgment on the note against another also jointly liable.

The right to recovery may also well rest on the new promise to pay. . . .

The judgment should be reversed and entered for the plaintiffs with costs below and in appeal.

BOYD, C., IN CHAMBERS. MARCH 24TH, 1910.

HARRISON v. MADILL.

Slander — Pleading—Statement of Defence—Privilege—Belief in Truth—Grounds of Belief—Apology—Agreement to Accept—Mitigation of Damages.

Appeal by the defendant from an order of HUYCKE, Local Judge at Peterborough, requiring the defendant to give particulars of the 6th and 7th paragraphs of the statement of defence in an action of slander.

H. S. White, for the defendant.

M. Lockhart Gordon, for the plaintiff.

BOYD, C.:—In Murphy v. Kellett (1862), 13 Ir. C. L. R. 488, the Irish Court held that it was a good defence in slander to plead by way of privilege and as a part of the plea that the defendant "acted without malice and that he spoke the words bona fide believing them to be true;" and that, though before the jury the defendant would have to shew the grounds of his statement, it was not necessary to set forth in pleading the grounds of his belief.

The Court in a later case, Fitzgerald v. Campbell (1866), 15 L. T. R. 74, expressed the opinion that perhaps they went too far in Murphy v. Kellett, and held that where in pleading privilege it

was alleged that the defendant had reasonable and probable grounds for his belief that the charges were true, it was incumbent on the defendant either to strike out that averment or give particulars setting forth the grounds of belief.

In 1886 a similar point arose in England and resulted in a curious diversity of opinion, Cave v. Torre, 54 L. T. N. S. 87, where in an action of libel the defendant pleaded a privileged occasion and said that he had reasonable and probable cause for believing the plaintiff to have been a lunatic. Field, J., ordered particulars to be given of the reasonable and probable cause, and was affirmed by a divided Court, Stephen, J., agreeing with him, and Grove, J., dissenting. On a further appeal the case was decided on the ground that the averment was immaterial, and for that reason particulars should not be ordered: p. 516. In a later English case, a directors' liability case, where the plea was that the defendants believed bona fide the statements to be true, and that they had reasonable grounds for their belief, particulars were ordered, and the form in which the particulars might be given was specially pointed out: Alman v. Oppert, [1901] 2 K. B., by Williams, L.J., and Stirling, L.J., reversing Day, J.

In a later case, McKergow v. Comstock (1906), 11 O. L. R. 637, it was held by a Divisional Court that in examination for discovery in an action of libel the plaintiff may be required to answer questions tending to shew a lack of honest belief on his part, and, by parity of reason, the defendant may be required to answer questions impugning his statement of honest belief.

I think the weight of authority is in favour of the conclusion that, if the defendant will not eliminate the statement as to his full belief of the truth, he should give particulars of the grounds of his belief. If he pleads simply privilege without allegation as to bona fides and truth, Cave v. Torre goes to shew that particulars will not be ordered; but I doubt whether that course would be followed under recent decisions.

As to the plea of apology, there is no need for the defendant to add words qualifying the written apology which he has pleaded. The statute cited, 9 Edw. VII. ch. 40, sec. 4, does not warrant pleading an apology per se. The plea is one by way of accord and satisfaction, in that, by agreement, if the apology was given, it should be accepted as an atonement for the slanders. Even in this shape, the plea is a novelty; it may, however, be sustained in evidence, though I do not find that any such plea has been judicially passed upon except in cases of libel, and that newspaper libel. But there has been a drift in the course of pleading in actions of slander, which has led a well-known text-writer to say that it is open

to a defendant, if he thinks fit, to state, in pleading, facts which are no defence, but which go in mitigation of damages: Odgers on Libel and Slander, 4th ed., p. 597.

The judgment in appeal is reversed as to the 7th and affirmed as to the 6th ground of defence. Costs in the cause.

BOYD, C., IN CHAMBERS. MARCH 26TH, 1910.

REX v. AKERS.

Liquor License Act—Conviction—Imprisonment—Period of Detention—Blank in Summons—Direction as to Payment of Costs—Sufficiency — Information Taken by Police Magistrate—Summons Returnable before himself or other Justices—Jurisdiction—Request of Police Magistrate—R. S. O. 1897 ch. 87, sec. 22.

Motion by the defendant for a habeas corpus with a view to an application for discharge from custody under a warrant of commitment issued pursuant to a conviction for an offence against the Liquor License Act.

J. B. Mackenzie, for the defendant.

BOYD, C.:—1. The objection that no period of detention is mentioned applies only to the first part of the conviction where "three ———" is mentioned, but that is cured by the later statement that the term of imprisonment is to be three months.

2. There is a sufficient adjurat as to the payment of $2.40 costs, etc., in directing payment to the keeper of the gaol. The applicant need not concern himself as to the ultimate destination of the money.

3. The information is taken by the police magistrate of Belleville, who is also one of the justices for the county, who made the summons to answer the charge returnable before himself or before such other justices of the peace having jurisdiction as may be there—i.e., at Stirling, where the alleged violation of the liquor law occurred. This form of summons is given by the Code for summary proceedings (as well as other): see secs. 658, 711, and Form 5. This is to require the appearance and presence of the accused in order to proceeding in a summary way, and the alternative form is sanctioned by the Act. The objection is, that, the ex parte information being taken by the police magistrate, he is without jurisdiction to make the summons returnable before a justice of the peace for the locality; and R. S. O. 1897 ch. 87, sec. 22, is cited.

That provides that no justice of the peace shall adjudicate or otherwise act until after judgment in any case prosecuted under any statute of Ontario where the initiatory proceedings were taken by or before a police magistrate except . . . at the request of the police magistrate.

The conviction by two justices of the peace shews that the defendant was convicted of the offence charged in the information and the summons as taking place at Stirling on the 20th January; the whole, read together, shews plainly that the convicting magistrates were acting at the request of the police magistrate who made the summons returnable before them, not by name, it is true, but by virtue of their office. No case has been cited shewing that this is not a sufficient request within the meaning of the statute, and I will not begin such a course of practice.

The application for habeas corpus is refused.

LATCHFORD, J. MARCH 26TH, 1910.

LEE v. IANSON.

Damages — Wrongful Distress—Seizure of Goods — Replevin—Measure of Damages.

Action for wrongful distress, to replevy goods seized, and for damages.

G. H. Pettit, for the plaintiffs.

W. M. German, K.C., and H. R. Morwood, for the defendants.

LATCHFORD, J.:—The only question to be determined in this case is the quantum of the damages to which the plaintiffs are entitled. It was admitted at the trial that the distress was not merely irregular but absolutely unwarranted, and that the plaintiffs were entitled to maintain their action of replevin. On behalf of the plaintiffs it is contended that the measure of damages is not the loss sustained—liberally estimated by the jury at $50—but the value of the things distrained, found by the jury to be $392. There are expressions in the text-books on damages which may appear at first sight to support this contention. A careful perusal of the authorities will, however, shew that this measure of damages is applied only in actions of conversion or trover. In these the measure of damages for the trespass is the actual value of the goods seized and eloigned or sold: Attack v. Bramwell, 3 B. & S. 520. "Where a party is a trespasser ab initio the statute (as to distress)

does not apply, and the matter remains as at common law:" Blackburn, J., at p. 530. The principle of Attack v. Bramwell was recognised in Grunnell v. Welch, [1905] 2 K. B. 650, and [1906] 2 K. B. 555. If the plaintiffs had not replevied what was seized, the measure of their damages would be as they now contend; but their recovery in replevin is a bar to proceedings for damages beyond the amount fixed by the jury: Graham v. O'Callaghan, 14 A. R. 477, 480.

Judgment should be entered for the plaintiffs declaring them entitled to the goods replevied, $50 damages, and costs.

BOYD, C. MARCH 26TH, 1910.

TITCHMARSH v. CRAWFORD.

Slander—Pleading—Statement of Claim — Innuendo — Words Charging Criminal Offence—Disobedience of Subpœna—Police Magistrate—Words Uttered in Exercise of Magisterial Functions—Reasonable Cause of Action not Disclosed—Con. Rule 261.

Motion by the defendant under Con. Rule 261 to strike out the statement of claim in an action for slander, as disclosing no reasonable cause of action.

W. H. McFadden, K.C., for the defendant.

J. B. Mackenzie, for the plaintiff.

BOYD, C.:—By what is stated in the innuendo, the plaintiff was prosecutor of an information and complaint against one Graham for perjury and a witness for himself before the defendant, as police magistrate at Brampton, and the plaintiff, being in attendance as a witness under a subpœna issued by the defendant, which by due service compelled his attendance, was charged with wilfully and unjustifiably omitting to fulfil the requirements of said subpœna by absenting himself from the room where the prosecution was pending, whereby the plaintiff was "judged" by the defendant to have forfeited the witness fees to which he would otherwise have been entitled.

The words used, which are said to embody all this, were, "You cannot get your expenses, you ran away."

It is manifest on this statement that this was a continuation of the judicial proceeding before the magistrate, and the plain-

tiff, not being present to give evidence, was adjudged not entitled to receive any witness fees. The plaintiff himself calls it a judgment by the magistrate.

The magistrate did not elect to proceed against the defaulting prosecutor in his character of witness, but simply forfeited the fees.

If the prosecutor was served with a subpœna, as he says, that seems to be an unwarrantable proceeding under the Criminal Code. The case was argued as if the proceedings were under sec. 788 of the Code. That, however, applies only to cases where a person is charged under the provisions of Part XVI., relating to the summary trial of indictable offences, sec. 771; and by sec. 773 no jurisdiction is possessed by the magistrate in cases of perjury. In this charge the preliminary proceeding before the magistrate and the procuring attendance of witnesses within the jurisdiction are regulated by secs. 671-673—by way of summons to the witness. A subpœna can be issued only where the required witness is outside of the province: sec. 676. That being so, this witness would have a good defence to any proceeding to enforce a subpœna, as being ibproperly issued. But take it that a subpœna was permissible, the enforcement of it rests with the investigating magistrate, and, if he determines not to proceed against the witness for contempt, there is no possible criminal jeopardy impending over the defaulting witness. The magistrate may have reasonably concluded that, as the prosecutor did not attend, there was no object in further investigation of the charge, and simply let it drop. But he may well have adjudged that the absent prosecutor should not collect any fees as for a witness.

Taking the innuendo as stated by the plaintiff, I cannot read into the words used any imputation that the plaintiff had committed a crime.

And it also appears from the innuendo that the words were used in the discharge of the defendant's judicial functions in disposing of the witness fees proper to be paid in respect of the abortive investigation. As put by Romer, L.J., in Law v. Llewellyn, [1906] 1 K. B. 498, "the observations were made in the course of the one transaction."

This case is an authority to set aside the statement of claim as disclosing no cause of action.

Such will be my order, with costs to the defendant.

DIVISIONAL COURT. MARCH 26TH, 1910.

VILLAGE OF LAKEFIELD v. BROWN.

Highway—Obstruction—Encroachment — Reservation in Crown Patents—Evidence—Surveys—Field-notes — Road Allowance Following Sinuosities of River—Injunction — Suspension — Time to Abate Nuisance.

Appeal by the defendant from the judgment of BRITTON, J., at the trial, in favour of the plaintiffs in an action for trespass upon and obstruction of Water street, in the village of Lakefield, by a boat-house 67 feet long and encroaching upon the street 4 feet at the northerly end and 11½ feet at the southerly end.

The defendant denied the encroachment, and asserted that the boat-house was on the foreshore of the river Otonabee by permission of the local superintendent of the canal.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

D. W. Dumble, K.C., for the defendant.

O. A. Langley and H. S. White, for the plaintiffs.

CLUTE, J.:—The question turns largely upon reservations contained in the original grants from the Crown. The first is dated the 17th November, 1836, to Samuel Strickland, of "the east half and the west part of lot No. 18 in the 8th concession . . . reserving one chain for a road allowance along the water front of said land, together with free access to the beach for all vessels, boats, and persons." The other is the broken lot No. 17 in the 8th concession, dated the 1st July, 1830, reserving "one chain for a road on the top of the bank and free access to the beach for all vessels, boats, and persons."

The division line between lots 17 and 18 . . . projects to the water's edge and passes through the boat-house, which covers a portion of the land on either side of the division line between the lots.

The first survey of lot 17 was made by John Reid in 1849, and the plan called "plan No. 1 Lakefield," duly registered . . shews this survey.

The plaintiffs' witness Crawford, a provincial land surveyor, produced the original field-notes made by Reid on this survey, and these notes shew the line between lots 17 and 18. They were

objected to by the defendant's counsel, but admitted by the trial Judge.

If these notes are admissible, it is quite clear that they afford strong evidence of actual work on the ground at the point of land covered by the boat-house. Crawford says that he verified these notes on the ground and found them correct, and, if these notes may be looked at, there can be no reasonable doubt that the boat-house does encroach upon Water street to the extent alleged.

. . . .

[Reference to McGregor v. Keiler, 9 O. R. 680; O'Connor v. Dunn, 2 A. R. 247; the Surveys Act, R. S. O. 1897 ch. 181, sec. 40; Mellor v. Walmesley, [1905] 2 Ch. 164.]

It was clearly the duty of the surveyor to make the survey which he did from which to prepare the plan. It was the original plan of the particular lot. . . . A portion of the village was laid out in pursuance of that plan. The field-notes form an essential part of the work which was necessary to be done to make the plan available. . . .

I am strongly inclined to the view that . . . the notes were admissible. But, whether they were or not, the evidence of Crawford and other witnesses called for the plaintiffs is quite sufficient, in my opinion, to establish the fact that the boat-house encroached upon the reservation contained in the original patents of lots 17 and 18. . . .

It was urged that the actual roadway did not include the portion alleged to be obstructed, because the roadway did not follow the sinuosities of the river bank, and the new road thus subsequently laid down and used by the municipality would leave a portion of land beyond Water street to which the plaintiffs would have no claim.

I cannot accede to this view. In the first place, it does not appear to be established that any such portion of land did exist between River street and the bank of the river. But, even supposing it did, that would be simply an enlargement . . . of the highway, and would not affect the original reservation.

C. S. U. C. 1859 ch. 39, sec. 36, provides that "no lot of land shall be so laid out as to interfere with, obstruct, shut up, or be composed of any part of any allowances for road . . . which were surveyed and reserved in the original survey of the township wherein such towns or villages may be situate." This section is re-enacted in R. S. O. 1897 ch. 181, sec. 39, sub-sec. 2. It will be noticed that the reservations expressly provide for access to the beach for all vessels, boats, and persons.

It appears to me clear that the plaintiffs have established an encroachment by the defendant, and are entitled to the relief asked.

The appeal should be dismissed with costs.

MEREDITH, C.J.:—This case may, in my opinion, be decided adversely to the appellant on the short ground that his boat-house is shewn to encroach on the road allowance one chain in width reserved in the patents of the west part of lot 18 and the broken front lot 17 . . . .

I agree with my brother Clute that this road allowance follows the sinuosities of the river Otonabee; and the testimony of the surveyor Crawford shews that he was able to determine by actual observation the position of the top of the bank on which the road allowance ran at the point in dispute; and the fact that the appellant's boat-house encroaches on the road allowance, measuring its width of one chain from the top of the bank, is fatal to the appellant's contention.

The appellant is restrained by the judgment from continuing to obstruct the road allowance with his boat-house, and, if the injunction goes into effect immediately, it will work a hardship on the appellant; he should be allowed time to abate the nuisance, and, in order to give him time to do so, the judgment should be varied by suspending the operation of the injunction for three months.

With this variation, I would . . . dismiss the appeal with costs.

TEETZEL, J., agreed with MEREDITH, C.J.

DIVISIONAL COURT. MARCH 26TH, 1910.

MALCOLM v. DOMINION FRUIT EXCHANGE.

Principal and Agent—Agent for Sale of Goods—Duty of Agent—Failure to Inform Principal of Market Conditions—Sale at Low Price—Evidence as to Higher Price Obtainable—Conflict of Testimony—Findings of Jury—Weight of Evidence.

Appeal by the defendants from the judgment of the County Court of Brant in favour of the plaintiff, upon the findings of a jury, in an action by a farmer and dealer in onions in the county of Brant against commission agents carrying on business at Ottawa, for damages for breach of the defendants' duty as agents of the plaintiff in disposing of a car-load of yellow onions. The jury found for the plaintiff and assessed his damages at

$191.22, and judgment was directed to be entered for that sum with costs.

There was some correspondence between the plaintiff and defendants, and on the 14th November, 1908, the plaintiff shipped the onions—one car-load of 550 bags—to the defendants. On the 16th January, 1909, the defendants sold the onions to one Hart in Montreal for 65 cents a bag. Before the shipment the defendants had written that they were getting about $1 a bag for yellow onions, which was not true, according to the evidence adduced by the defendants at the trial.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ.

Featherston Aylesworth, for the defendants.

W. S. Brewster, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J. (after setting out the facts):—The duty of the agent to his principal requires that he make known to his principal every material fact concerning the subject-matter of his agency that comes to his knowledge, or is in his memory in the course of his agency, and if he fails to do so he is liable in damages to his principal for any injury occasioned or loss suffered in consequence of such failure: 31 Cyc. 1450-1. The plaintiff's case might, I think, have been rested on a breach by the defendants of that duty. Though the duty of an agent to sell, unless limited by instructions from his principal, is discharged if the agent acts fairly and uses his best judgment, in the circumstances of this case the defendants can not rely upon this as an answer to the plaintiff's claim. They induced him to consign the onions to them by an untrue statement of the condition of the market, especially as to the price at which onions were then selling at Ottawa, and, if it were the fact that prices dropped after the consignment reached them, it was, I think, in view of the representations they had made, incumbent on them to inform the plaintiff of the condition of the market and to ask for instructions. Their failure to do this from the 13th November to the 15th January, it is reasonable to conclude, occasioned loss to the plaintiff, for, had he been informed of the state of the Ottawa market, he might and probably would have found a purchaser elsewhere at a higher price. It was also, I think, incumbent on the defendants not to sell the onions until a reasonable time after the 15th January (when they wrote to the plaintiff that they did not expect to get rid of them for some time, but sold them the next day) had been given

to the plaintiff to instruct them; and I can not avoid coming to the conclusion that, even assuming their contention as to the condition of the market to be well-founded, their failure to discharge their duty in the respects I have mentioned occasioned serious loss to the plaintiff.

The case was not, however, dealt with in that aspect of it, but upon the ground that the defendants could and ought to have sold the onions at a higher price than that at which they were sold.

There was a conflict of evidence as to this, and the jury have preferred the testimony of the plaintiff and his witnesses to that of the defendants' witnesses. There was, no doubt, some force in Mr. Aylesworth's argument as to the indefiniteness as to time, and in some cases as to place, of the testimony of some of the witnesses called by the plaintiff to shew that a higher price than 65 cents a bag could have been got for the onions, if reasonable care had been exercised by the defendants; and it may be that the jury were influenced in reaching the conclusion to which they came on the case presented by the defendants, on the issue which went to them, by their view of the conduct of the defendants in the matters to which I have referred; but I can not say that their verdict is one which, according to the well-established principle applicable when it is sought to set aside the verdict of a jury as being against the weight of evidence, the Court would be warranted in setting aside.

The appeal should, in my opinion, be dismissed with costs.

MEREDITH, C.J.C.P. MARCH 30TH, 1910.

IMPERIAL BANK OF CANADA v. HOLMAN.

Money Lent—Advance by Bank "on Call"—Action to Recover—Pleading—No "Call" Alleged—Demand not Necessary—Alternative Claim to Collateral Securities—Judgment—Election—Reference.

Motion by the plaintiffs for judgment upon the statement of claim in default of defence.

Action to recover a sum of money advanced by the plaintiffs to the defendant on the 31st December, 1903, which, according to the terms of a memorandum of agreement, bearing that date, and signed by the defendant, he promised to repay "on call," with interest from the same date at the rate of 6 per cent. or such

other rate as might from time to time be agreed on. The defendant at the same time transferred to the plaintiffs 26 bonds of $1,000 each of the Levis County Railway Company, which by the terms of the agreement were to be held by the plaintiffs as collateral security for the advance and the interest.

Proceedings were subsequently taken which resulted in the undertaking and property of the railway company being sold, and the share of the purchase money attribuatble to these bonds was $2,010.59, less some expenses incurred by the plaintiffs in connection with the proceedings.

The purchase was made by a committee of the bondholders, which offered to the other bondholders the privilege of joining in a scheme for the reorganisation of the company, and this offer was submitted by the plaintiffs to the defendant for his refusal, but he did nothing to signify what action he desired the plaintiffs to take with reference to the offer.

According to the allegations of the statement of claim, the plaintiffs afterwards purchased from the committee of bondholders bonds and securities of the reorganised company for a sum equal to the amount they would have cost had the plaintiffs joined in the scheme of reorganisation, and the amount thus expended, including the incidental expenses, exceeded $7,000.

Under this arrangement the plaintiffs received, and, at the time the motion was made, held, bonds and shares of the reorganised company of the face value of $52,100, and these the plaintiffs, by their pleading, expressed their willingness to deliver to the defendant on payment of $31,868.07, which included the $7,000 and some expenses incurred by them in connection with the reorganisation of the company.

The plaintiffs gave credit to the defendant for the $2,010.59, and for $650, representing coupons for interest paid by the railway company, and claimed to be paid $22,261.13, the residue of the advance and interest after deducting these credits, with interest on $18,264.78 from the 31st December, 1909, to judgment, with costs, and a declaration that they were entitled to the bonds and shares, amounting to $52,100, absolutely and free from any right or claim or equity of the defendant in them, or, in the alternative, that an account be taken of the amount due to the plaintiffs on foot of these securities, and payment of the amount which shall be found due, and in default that the bonds and shares be sold and the proceeds applied in payment of what may be found to be due to them, and that the defendant might be ordered to pay the deficiency.

M. Lockhart Gordon, for the plaintiffs.

The defendant did not appear.

MEREDITH, C.J. (after stating the facts as above):—If "a call" by the plaintiffs for payment of their advance be, according to the true construction of the agreement, a condition precedent to their right to payment, the plaintiffs are not entitled to judgment, as the statement of claim does not contain an allegation that a call was made.

The making of a call is not, I think, in this case, a condition precedent to bringing an action. The law applicable to bills of exchange payable on demand, that a demand is not necessary before bringing an action, was held by Chitty, J., in In re Brown's Estate, [1893] 2 Ch. 300, to apply "where there is a present debt and a promise to pay on demand."

The plaintiffs are, therefore, entitled to judgment.

The form of the judgment must be adapted to meet the alternative case made by the pleadings, and the defendant should have a reasonable time, say one month, in which to elect whether he will take the shares and the new bonds on the terms on which the plaintiffs offer to give him the benefit of them, and the judgment will provide, if he does not within that time elect to accept the offer, for the relief claimed in the first of the alternative claims made by them, and will provide, if he does so elect, for the relief claimed in the second alternative; the judgment in either case to be with costs. The notice will be settled by one of the Registrars, and may be served by sending it by registered post to the defendant's last known address. The reference will be to the Master in Ordinary.

BOYD, C. MARCH 30TH, 1910.

*RE CLINTON THRESHER CO.

Company—Winding-up — Contributories —Distribution of Shares as Fully Paid up among Existing Shareholders — Shares not Actually Paid up—Acceptance—Notice or Knowledge—Annual Return to Government — Liability at Date of Winding-up Order.

Appeal by three directors and two shareholders of the company from an order of the Local Judge at Goderich, upon a reference for the winding-up of the company, placing the appellants' names on

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

the list of contributories; and an appeal by the liquidator from an order of the Local Master refusing to place the names of other persons on the list.

W. Proudfoot, K.C., for the three directors.

W. M. Douglas K.C., for the shareholders Gunn and Jackson.

W. J. Boland, for the liquidator.

W. Brydone, for other shareholders.

BOYD, C.:—After the argument I desired information on some facts: (1) as to the solvency of the company at the time the paid up shares issued; (2) as to the creditors existing at that date and still creditors; (3) the value of the assets at that time. But further consideration has led to the conclusion that these points were not material, and that the appeals may properly be disposed of on the present state of facts.

By the terms of the Ontario statute under which this company was incorporated it is provided that each shareholder until the whole amount of his shares of stock has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon: R. S. O. 1897 ch. 191, sec 37 (1). And by the terms of the Winding-up Act, under which the liquidation is going on, it is enacted that every shareholder shall be liable to contribute the amount unpaid on his shares of the capital or on his liability to the company or to its creditors, etc., and the amount which he is liable to contribute shall be deemed an asset of the company: R. S. C. 1906 ch. 129, sec. 440. . . .

The evidence, as condensed by the Judge, shews a hard case upon the shareholders who have by their signatures accepted certificates representing them as holders of paid up stock, which is in fact not paid up stock. The transaction was, no doubt, engaged in by the directors under the belief that they were acting for the best, in view of the pending negotiations with the American company. They may have thought that the assets of the company were worth $7,500 more than the $15,000 which was the paid up capital stock represented by the plant and property purchased from the prior partnership. Upon a dissolution of the company and the payment of creditors, there may have been a surplus of assets worth the joint sums of $15,000 and $7,500, but the transaction must be dealt with as it stands after the winding-up order has been made. The directors, of their own motion, made a ratable distribution of treasury or company stock to be treated as paid up to the extent of $7,500 among the existing shareholders. For this

nothing was given either to the company or by the shareholders or by any one. It was a gift, pure and simple, of stock to be held as paid up stock, and all parties taking it knew, or must be taken to have known, that it had not been in fact paid up. As put by Cotton, L.J., in Re London Celluloid Co., 39 Ch. D. 198, they, knowing the shares not to have been paid up in cash or otherwise, agree to take the shares on that footing.

This issue of the unissued stock belonging to the company, to the extent of $7,500, as fully paid up stock, was in violation of the statute and ultra vires. All the shareholders must be affected with notice or knowledge of this. . . . They shared in the distribution, and were represented to the world as so many holders of so many shares paid up, in the annual return to the Government, made under oath in January, 1907. This was a representation, such as was also made by the books of the company, that there had been a further payment on account of stock of $7,500 in the year 1906. Whatever might be the right of redress or remedy for any shareholder prior to the winding-up order, he has now no right against the liquidator, representing creditors, to say that these last shares he holds are fully paid up.

The situation may be tersely described by adaptation of the language of Lord Macnaghten in Welton v. Saffery, [1897] A. C. at p. 321. . . . The company, however, placed the names of the shareholders on the register; they allowed their names to remain there until their remedy against the company was gone by the issue of the winding-up order, and now they can not be heard to say that they were not shareholders in respect of these last-issued shares, upon which nothing has been paid.

The company was organised under the Joint Stock Companies Act, pursuant to a system by which the shareholder's liability is to be limited by the amount unpaid upon his shares. The company is not allowed to depart from that requirement so as to arrange with shareholders that they shall not be liable for the amount unpaid on the shares. There can be no valid stipulation that in case the company is wound up, the shareholders are to be exempt from liability to contribute to the extent unpaid on the shares they hold, for the benefit of creditors: Ooregum Gold Mining Co. v. Roper, [1892] A. C. pp. 133 and 143.

I cannot distinguish between the directors who did the wrong at first and the shareholders who participated in it by accepting the shares; all are alike liable to contribute, as far as necessary, upon and under the liquidation.

The only Canadian case I have seen approaching this is Re Owen Sound Dry Dock Co., 21 O. R. 349. It is not on all fours with this case, but as to some of the positions advanced, I doubt whether they would now be sustained by the Court. An English case much like the present, where all the proceedings were honestly and bona fide done, yet the Court, after the winding-up order, could not give relief, is Re Eddystone Co., [1893] 3 Ch. 9. . . .

The learned Judge has exculpated some of the shareholders on the authority of McDonald's case, [1894] 1 Ch. 99. But the distinctions are well marked between that case and the present. The applicants there received certificates relating to paid up shares, and merely retained them. They had no reason to believe the shares referred to were not paid up, being strangers to the company. Their names were not entered on the register, nor was there any such publication of the amount of paid up stock held by each as is afforded by the annual return in this case; and when the winding-up order was made their names did not appear on the list, but were put on afterwards. More like the present case is Re Niagara Falls Heating and Supply Co., ante 439.

I would affirm the order appealed from as to D. A. Forrester, Rance, and the representatives of Farran, with costs, but I would reverse the order as to those who signed the certificate and are on the register, viz., Hooey, Gunn, Jackson, Taylor, with costs of cross-appeal pro tanto.

As to Robb and Brickenden, the Judge has not passed upon the question as to whether their signatures of acceptance were warranted to be made by the persons who acted as their attorneys (i.e., Rance and Taylor). If the attorneys were authorised, their names also should be added to the list of contributories. As to them no costs of appeal.

As to Marion McPherson, there is no evidence that she knew anything of the transaction or has sanctioned or accepted it, and the order is affirmed as to her with proportionate costs, to be determined by the taxing Master.

MAGEE, J. MARCH 30TH, 1910.

*BIGELOW v. POWERS.

Partnership—Syndicate Operating Engine for Threshing—Injury to Property of Member by Operation of Engine — Defective Condition—Negligence of Servant of Syndicate—Contract or Tort—Regulation of Syndicate as to Threshing for Members—Right of Member to Recover against Syndicate and Co-members—Judicature Act and Rules—Contribution—Costs.

The defendants were 26 individuals composing (with the plaintiff) the Pioneer Threshing Syndicate of Clarke Township, and the Syndicate.

The plaintiff sued for damages for the burning of his hay, grain, produce, and other chattels, through sparks emitted owing to negligent management or condition of a portable engine forming part of a threshing outfit owned by the defendant Syndicate, which was not incorporated, and of which the plaintiff and the 26 individual defendants were members, the Syndicate having, through their agent, one Dowson, who was in charge of the threshing outfit, contracted with the plaintiff to thresh his grain at his barn, at the ordinary rates charged by the Syndicate to other persons.

The action was tried with a jury.

At the conclusion of the evidence for the plaintiff, a motion was made for a nonsuit, which stood over until after the jury's findings. No evidence was offered for any of the defendants.

The jury made certain findings of fact, in answer to questions submitted to them, as follows:—

"1. Were the plaintiff and individual defendants, members of the Syndicate, in co-partnership in the business of threshing grain, under the name of the Pioneer Threshing Syndicate of Clarke Township? A. Yes.

"2. Were the barn and goods of the plaintiff burned by fire caused by sparks from the engine owned by the members of the Syndicate? A. Yes.

"3. If so, did the sparks which caused such fire escape from the engine by reason of any defective condition of the engine? A. Yes.

"4. If so, did such defective condition arise after the purchase of the engine by members of the Syndicate? A. Could not say.

"5. If such defective condition then existed, did Dowson, the engineer in charge, or James L. Powers or Arthur A. Powers

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

or the plaintiff or any of the defendants . . . have notice of the existence at that time of such defective condition? A. Yes; Dowson and Arthur Powers.

"6. If such defective condition did then exist, was its existence at that time owing to any negligence on the part of the said Dowson or the plaintiff or James L. Powers or Arthur A. Powers or any of the defendants . . . . A. Dowson.

"7. Was Dowson the agent of the members of the Syndicate to make contracts with persons, including members, for the threshing of their grain with the engine and separator of the Syndicate? A. Yes, subject to the rules and prices laid down by the executive.

"8. Did Dowson, assuming to act as agent for the members of the Syndicate, contract with the plaintiff on their behalf for the threshing of grain of the plaintiff with the said engine and separator? A. Yes.

"9. Was Dowson then in charge of the engine with the knowledge and consent of all the members of the syndicate . . . ? A. Yes.

"10. Did the defendant James L. Powers or Arthur A. Powers or directors John Bigelow, John S. Robertson, and I. T. Chapman, or any of them, assume, as between the members of the Syndicate, any duty or liability of seeing to the condition of the engine, beyond placing a competent man in charge of it, and attending to any repairs he might report to them as necessary? A. No. . . .

"12. Could the plaintiff by exercise of reasonable care have avoided the loss? A. No. . . .

"14. At what sum do you assess the plaintiff's loss by fire . . . ? A. . . . $3,601."

The plaintiff and defendants both moved for judgment on those findings, and the defendants renewed their motion for a nonsuit.

D. B. Simpson, K.C., for the plaintiff, contended that, although he was a member of the Syndicate, the Syndicate as a body should pay his damages just as between strangers, and he should at most only bear his proportion of the loss, like other members.

H. F. Holland, for the defendants, contended that, the loss having arisen through the negligence of the common servant Dowson, or the defective condition of the common property, the plaintiff himself was equally at fault with the defendants, and could not ask for either indemnity or contribution, and in any case he could not be both plaintiff and in fact defendant.

MAGEE, J. (after stating the facts as above):—During the trial it was admitted that the only assets of the Syndicate or joint assets of its members were the engine and boiler, originally valued at $1,700, a separator, which was subject to a vendor's lien for its full price, $800, a waggon and tank, costing together $88, about $200 of accounts owing, $84 cash, and the earnings for 1909, about $430, less expenses. These assets may be taken to be of less value than the plaintiff's total damages assessed by the jury.

It also appeared by the printed regulations of the Syndicate that the same prices for threshing were to be charged to members as to non-members. . . .

The first question that occurs to one is, whether, assuming that the plaintiff were not a member of the Syndicate, the loss he sustained would have been attributable to breach of contract or purely tort. Generally speaking, a mere duty can not be turned into a contract: Riley v. Baxendale, 6 H. & N. 445, per Pollock, C.B.

As regards the grain which was to be threshed, there was clearly a contract to take due care, properly to thresh it, and not to injure it.

As regards the barn and the plaintiff's other property, the case falls, I think, within the principle of Brass v. Maitland, 6 E. & B. 470. . . . The mere fact that the damage is or may be caused to other property than that which is the subject of the contract between the parties manifestly does not make the duty to guard against it less a matter of contract. And see also Randall v. Newson, 2 Q. B. D. 102; Jackson v. Watson, [1909] 2 K. B. 193; Addison on Contracts, 9th ed., p. 272; . . Heaven v. Pender, 11 Q. B. D. 508.

If then, as regards a non-member, there would have been a contract, is it less a matter of contract when the transaction is with a member, and, by the regulations of the company, such transactions are, by the common consent, to be entered into with members as well as others? . . .

[Reference to Neale v. Turton, 4 Bing. 149; De Tastet v. Shaw, 1 B. & Ald. 664; Boice v. Edbooke, [1903] 1 Ch. 836; Rex v. Leach, 3 Stark; Collyer on Partnership, 6th ed. (1878), p. 322 et seq.; Lindley on Partnership, 7th ed., pp. 413, 415, 592, 596, 598; 30 Cyc. 422, 455.]

The difficulties which formerly may have existed in the way of procedure are now, since the Judicature Act, removed. . . .

[Reference to Con. Rules 222, 230, and sec. 57 of the Act.]

If a stranger were here the plaintiff, he would be entitled to judgment against the Syndicate and its members. . . . If the present plaintiff, as a member, were compelled to pay to the stranger the whole amount of the loss, he would be entitled to be reimbursed out of the partnership funds, or to have his fellow-members contribute their share, the loss having been occasioned by no one member of the firm, but by the failure of their common servant to perform their implied contract.

By judgment for this plaintiff, the defendant members would be put in no worse position than if the loss had accrued to a stranger; and, inasmuch as all the members authorised a contract with each member at the same rates as with a stranger, there is no good reason, outside of any technical rules, why they should now be in a better position, and the plaintiff be put to bear all the loss which by the common act, without negligence of his own, has been inflicted on him. . . .

[Reference to Richardson v. Bank of England, 4 My. & Cr. 165; Walworth v. Holt, ib. 619; Lindley on Partnership, 7th ed., p. 303.]

Having in view the existence of a contract by the firm with the plaintiff, and the changes introduced by the Judicature Act and our Rules of Court, I have come to the conclusion that the plaintiff should have judgment against the defendant Syndicate for the full amount of damages assessed and costs of action, and a declaration as against the other defendants that, in case the judgment be not realised out of the assets of the Syndicate, the deficiency shall be borne by them and the plaintiff in proportion to the number of their respective shares in the Syndicate, and that he is entitled to have contribution from those defendants in respect thereof, and that, in taking accounts between the parties at any time, they shall be so taken that the defendants shall not be entitled to credit for, and the plaintiff will not be chargeable with or loser in respect of, any moneys paid or payable by the defendant Syndicate or any of the defendants for costs of defence or costs paid the plaintiff in this action. Under Con. Rule 228, execution will first issue against the property of the Syndicate. In case the full amount of the plaintiff's damages and costs shall not be realised, there will be a reference to the Master at Cobourg to ascertain the amounts and proportions in which the deficiency shall be borne and paid by the other defendants and the plaintiff. The costs of the reference and further directions are reserved.

DIVISIONAL COURT. MARCH 30TH, 1910.

*OTTAWA YOUNG MEN'S CHRISTIAN ASSOCIATION v. CITY OF OTTAWA.

Assessment and Taxes—Exemption—Building of Benevolent Association—63 Vict. ch. 140 (O.)—Construction—"Purposes"—"Object"—Bed-rooms Rented to Members.

Appeal by the plaintiffs and cross-appeal by the defendants from the judgment of CLUTE, J., at the trial.

The plaintiffs were incorporated in 1900 by 63 Vict. ch. 140 (O.) About 1906 they bought certain land in Ottawa for the purpose of erecting thereon a building for their use; in or about June, 1907, they began to build; and in 1908 finished the building. In June, 1909, the plaintiffs moved in, having sold their own building. The defendants did not assess the property for 1908, as it was considered exempt, but did assess for 1909 part of the building, that is, all but the ground floor and the first and part of the second floor. The part assessed was occupied as bed-rooms, 97 or 98 in number, "bed-rooms for the sleeping accommodation of the members of the association who choose to rent these rooms for that purpose." These rooms produced a revenue of some $11,000 per annum. The defendants claimed the right to assess in the same way for 1910 and all subsequent years.

The action was brought for a declaration that the defendants were not entitled to impose any taxes upon the property for 1909 or 1910, and for consequent relief.

CLUTE, J., held that the defendants had no right to levy taxes for 1909, but had the right thereafter.

Both parties appealed, the plaintiffs contending that their property was wholly exempt, and the defendants that taxes were properly leviable for 1909.

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

J. F. Orde, K.C., for the plaintiffs.

Taylor McVeity, for the defendants.

RIDDELL, J.:—Section 11 of the incorporating Act . . . reads: "11. The buildings of the Young Men's Christian Association of the City of Ottawa and the land whereon the same are erected shall, so long as the same are occupied by and used for

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

the purposes of the association, be and the same are hereby declared to be exempt from taxation." The expression "purposes of the association" is employed no where else in the Act, and much of the argument proceeded upon the assumption that "purposes" must be synonymous with "object" as used in the preamble and in sec. 3. " . . . Having for its object the improvement of the spiritual, intellectual, and social condition of young men . . ." "3. The object . . . shall be the spiritual, mental, social, and physical improvement of young men by the maintenance and support of meetings, lectures, classes, reading-rooms, library, gymnasiums, and such other means as may from time to time be determined upon."

The determination of at least the cross-appeal will, in any view, depend upon the correctness of this assumption. . . .

The plaintiffs are given by sec. 1 of their Act power "to acquire and hold real estate in . . Ottawa, provided the annual value of the real estate so held and not actually used for the work of the . . association shall not exceed at any one time $10,000, and the same or any part thereof to alienate, exchange, mortgage, lease, or otherwise charge or dispose of, as occasion may require; and may also acquire any other real estate or interest therein (so long as the annual value of the same shall not at any one time exceed $5,000) by gift, devise, or bequest . . . ; and may hold such estate or interest therein for a period of not more than seven years, and may within that time alienate or dispose of the same, and the proceeds of such estate or interest therein as shall have been so disposed of shall be invested in public securities for the use of the said corporation." . . .

It seems to me that the expression "the work of the . . . association" must mean anything done in furtherance of the object of the association;" and consequently the plaintiffs have power to hold real estate to a considerable extent beyond what is necessary or even convenient for the achievement of their object.

The words "object" and "purpose" are not . . . . synonyms, and they are not terms of art. I see no reason for holding that the phrase in sec. 11 "for the purposes" means the same as "in furtherance of the object" or "for the work." There is no case that I can find which restricts the meaning of "purposes," while such cases as Inverarity v. Forfarshire, etc., 41 Sc. L. R. 673, affirmed [1906] A. C. 354, shew how far the meaning of the word may extend. In re Sutton, [1901] 2 Ch 640, may also be looked at.

In the ordinary acceptation of the words, anything done for or by a corporation in the interest of the corporation is done

for the purposes of the corporation, and I do not think that the meaning here is any more restricted. . . .

If this view be correct, the cross-appeal must fail.

Whether the plaintiffs were to sell and dispose of the building when finished or not, the land, and building also, during the construction, were occupied by and used for the purposes of the association. . . .

There is nothing to restrict the use by the association of the land which they acquire—and the renting of those bed-rooms does not take that part of their building out of their occupancy. . . . The Queen v. St. Pancras, 2 Q. B. D. 581, 588, decides nothing to this effect.

Had the conclusion been come to that "purposes" in sec. 11 was synonymous with "object" in sec. 3, it would, I think, have followed that the cross-appeal should be allowed. Granting, as must be granted, that there was nothing to prevent the plaintiffs from selling the building before actually using it for the improvement of young men, I do not think that, before actual occupation and use, it could be said to be "used for the" object of the association named in sec. 3.

But the same interpretation would not, in my view, have prevented the main appeal from succeeding. . . . It may well be a very valuable means for the social and physical improvement of young men to supply them with clean and well-ventilated bed-rooms—mental improvement will probably follow, if not spiritual improvement. . . . Nor does the ejusdem generis doctrine assist. The various classes mentioned, the species in the enumeration, are not ejusdem generis themselves. They are really genera, and the general words following, "such other means," must be understood as referring to other genera: Regina v. Payne, L. R. 1 C. C. R. 27; Maxwell on Statutes, 4th ed., p. 510. We have in Fraser v. Pere Marquette R. W. Co., 18 O. L. R. 589, at p. 602 et seq., discussed this principle, and the cases cited there may also be referred to.

In any view of the meaning of the word "purposes," the main appeal should be allowed; and I think, for the reasons given, the cross-appeal should be dismissed; in each case with costs.

BRITTON, J., agreed in the result, for reasons stated in writing.

FALCONBRIDGE, C.J., also agreed in the result.

DIVISIONAL COURT. MARCH 31ST, 1910.

*SHARPE v. WHITE.

Appeal to Privy Council—Order Staying Reference Directed by Judgment—Discretion—Con. Rules 831-835 — Judgment for Payment of Money.

Appeal by the plaintiff from an order of FALCONBRIDGE, C.J. K.B., staying proceedings on the reference directed by the judgment, pending the determination of an appeal by the defendant to the Judicial Committee of the Privy Council from that judgment, and allowing an appeal from the ruling of the Official Referee to whom the reference was made, who directed that, notwithstanding the appeal, the reference should be proceeded with.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

Featherston Aylesworth, for the plaintiff.

R. B. Henderson, for the defendant.

The judgment of the Court was delivered by MEREDITH, C.J., who said that, if the appeal were from the High Court to the Court of Appeal, the proceedings would be stayed, but it was argued that a different rule applied where the appeal was to the Judicial Committee. Though Con. Rules 831 to 835, regulating the practice with regard to the latter class of appeals, differed in some respects from Rules 826 to 829, as to appeals to the Court of Appeal, City of Toronto v. Toronto Street R. W. Co., 12 P. R. 361, was conclusive against the plaintiff, and the Court was bound to follow it.

The order appeared to have been made by Falconbridge, C.J., in the exercise of his discretion, and the Court has full power, notwithstanding the provisions of the Rules, to suspend the operation of its decree: Cotton v. Corby, 5 U. C. L. J. 67. . . .

[Remarks on the difference in the English practice occasioned by the difference in the Rules.]

It could not be said that the discretion of the Chief Justice was wrongly exercised.

It was further contended that the judgment appealed from was one which directed the payment of money within the meaning of Rule 832 (d). and that execution was therefore not stayed upon the perfecting of the security; but this contention was not well

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

founded. By the judgment it was adjudged that the plaintiff was entitled to damages, an inquiry as to them was directed, and further directions were reserved; but there was no direction for the payment of money.

Appeal dismissed; costs in the appeal to the Judicial Committee.

McCABE v. NATIONAL MANUFACTURING CO.—RIDDELL, J.—MARCH 26.

Master and Servant—Wages — Contract in Writing—Alleged Change in Amount — Onus—Conflicting Testimony — Counterclaim—Trover—Equitable Assignment—Acceptance of Order.]—Action for arrears of salary of the plaintiff as a salesman for the defendants. In 1907 the defendants employed the plaintiff, and by a written contract agreed to pay him $240 per month and expenses for 12 months from the 4th February, 1907. The plaintiff at first worked in Ontario, but was afterwards sent to Nova Scotia, where he made profits for the defendants. In the autumn of 1907 he desired to return to Ontario. He said that he was allowed to return, still in the defendants' service, without any change in salary. The defendants said he left their service and terminated the contract, they intending, and so telling him, to find a job for him in Ontario, but only at $30 per week and expenses. He came to Ontario, and, after a short delay, worked for the defendants till April, 1908, receiving on account from time to time sums much less than he had received while in Nova Scotia. Held, the oral testimony being conflicting, and it being admitted that the written contract had been entered into, that the onus was on the defendants, desiring to get rid of the contract, to prove that it was terminated. This onus the defendants had failed to satisfy, and the plaintiff was entitled to remuneration at the contract rate up to the 4th February, 1908, deducting pay for a month and a half during which he did not work for the defendants; and to a quantum meruit for the period after the 4th February, 1908, fixed at $30 a week and expenses; the defendants to pay the plaintiff's fare from Nova Scotia to Ontario. The defendants' counterclaim against the plaintiff as in trover for the value of a separator is dismissed. The defendants were held liable to the plaintiff for the amount of an order in the plaintiff's favour given by one Bell and accepted by the defendants, the facts differing this claim from Rodick v. Gandell, 1 D. M. & G. 763, and Hall v. Prittie, 17 A. R. 306, and bringing it within Lane v. Dun-

gannon Driving Park Association, 32 O. R. 264, and Elgie v. Edgar, 9 O. W. R. 614. No costs except costs of the trial, which the defendants must pay. J. C. Makins and W. H. Gregory, for the plaintiff. G. Delahaye, for the defendants.

STANDARD CONSTRUCTION CO. v. WALLBERG—FALCONBRIDGE, C.J. K.B., IN CHAMBERS—MARCH 30.

Conditional Appearance—Defendant Residing out of the Jurisdiction—Joint Liability.]—An appeal by the defendant Wallberg from the order of the Master in Chambers, ante 527, dismissing the appellant's motion for leave to enter a conditional appearance, was dismissed with costs to the plaintiffs in any event. Time for moving for leave to appeal to a Divisional Court extended for two days. M. Lockhart Gordon, for the appellant. G. F. McFarland, for the plaintiffs.

BROWN v. CITY OF TORONTO—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—MARCH 30.

Leave to Appeal to Divisional Court—Jury Notice—Action against Municipal Corporation—Misfeasance or Nonfeasance.]—Motion by the defendants for leave to appeal to a Divisional Court from the order of BOYD, C., ante 580, allowing an appeal from the order of the Master in Chambers, ante 526, and restoring the plaintiff's jury notice. The Chief Justice said that he should give the leave—impelled to some extent by the chaotic condition of the practice, but more particularly animated by the hope that the plaintiff may, in the discussion in and judgment of the Court above, get some light as to whether he can hope to bring his action to trial with any reasonable prospect of success. Costs of this application to be costs in the cause. H. Howitt, for the defendants. S. H. Bradford, K.C., for the plaintiff.

CORRECTION.

On p. 545, ante, lines 20 and 21: for "ought to or might not" read "ought or ought not to."