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DECEMBER 19TH, 1904.

WEEKLY COURT.

URQUHART v. AIRD.

Security for Costs — Two Defendants — Separate Order for Security — Payment of $200 into Court to Answer both Orders—Sufficient Compliance with further Order.

Motion by plaintiff to continue interim injunction granted by a local Judge restraining defendants other than John Aird from disposing of chattels and an interest in land which John Aird had transferred to them in trust, being his share of his father's estate.

H. M. Mowat, K.C., for defendants other than John Aird, and Grayson Smith, for defendant John Aird, contended that the motion should not proceed until plaintiff had complied with orders for security for costs.

W. H. Blake, K.C., for plaintiff, contended that, although the two sets of defendants had taken out separate orders for security for costs, the payment of $200 into Court was a sufficient compliance with both orders, without an order declaring it a sufficient compliance, which was a mere form; referring to Syracuse Smelting Works v. Stevens, 2 O. L. R. 141; Fuller v. Appleton, 2 O. W. R. 424.

FALCONBRIDGE, C.J., held that the practice adopted by plaintiff was reasonable and convenient, and the motion should be heard.

DECEMBER 19TH, 1904

DIVISIONAL COURT.

WARD v. LOWTHIAN.

GREEN v. MARR.

Public Health Act — Contagious Disease — Proceedings taken by Local Board of Health to Prevent Spread of Infection — Converting Hotel into Hospital — Action by Owner of Hotel — Illegality — Malice — Reasonable and Probable Cause — — Members of Board — Board Sued as a Corporation — — Violation of Provision of Act — Conversion of Goods — Confinement of Person in Hospital — Exposure to Infection.

Appeals by plaintiffs from judgment of FALCONBRIDGE, C.J., 3 O. W. R. 362, dismissing these actions.

M. Wilson, K.C., and W. A. F. Campbell, Ridgetown, for plaintiffs.

W. Mills, Ridgetown, for defendants.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A., TEETZEL, J.), was delivered by

MEREDITH, C.J.—Ward's action is against the 5 members of the local board of health of the town of Ridgetown individually, F. B. Marr and John Golden, two members of the medical profession who are alleged to have been medical health officers for the town, and against the local board of health as a corporation.

Ward's complaint . . . is against defendants other than Marr and Golden for their neglect to provide a hospital, hospital tent, or other place of reception for the sick and infected upon the happening on 9th February, 1903, of an outbreak of smallpox in the town, and then causing the sick and infected to be confined in his hotel in the town, which, it is alleged, they converted into a smallpox pest-house or isolation hospital, and for 5 days used the hotel for that purpose, and confined the sick and infected in it; that the same defendants neglected to provide any other building or tent in which to place the guests of and boarders at the hotel, and servants and members of Ward's household, who had been exposed to contagion, but kept them in the hotel during the 5 days and for 17 days afterwards, without effectually isolating the sick and infected; and all these acts are alleged to have been done illegally, maliciously, and without reasonable and probable cause. Ward complains as against defendant Marr that during all this time he (Marr), as medical

health officer, remained in the hotel. Ward makes the further complaint against all the defendants that they placed upon the hotel, in the front and rear, placards stating that there was smallpox within the hotel; these acts are also alleged to have been done illegally, maliciously, and without reasonable and probable cause; and Ward complains also that after the persons exposed to contagion who had been kept in the hotel had been released, it was necessary to cleanse and disinfect the hotel, and that the doing of this occupied two weeks, and he claims damages for this as well as the other before mentioned alleged wrongs, and also for the alleged conversion of a quantity of supplies, fuel, and material which were in the hotel, for the value of mattresses, clothing, and other articles belonging to him, which, as he alleges, were destroyed by fire by defendants, and for the value of other bedding and clothing belonging to him, which, as he also alleges, defendants converted to their own use.

I am of opinion that the action of Ward was rightly dismissed.

As regards defendants the local board of health, apart from other insuperable difficulties in the way of Ward's recovering, the action necessarily fails because the board is not a corporation and cannot be sued as such or as a legal entity: Township of Logan v. Hurlburt, 23 A. R. 628, 659; Sellars x. Village of Dutton, 7 O. L. R. 646, 3 O. W. R. 664; Kingston v. Salvation Army, 7 O. L. R. 781, 3 O. W. R. 556.

The substance of the claim against defendants other than Marr and Golden as to the use of the hotel is that they made use of it as a smallpox pest hospital or hospital for 5 days, and after that, for 17 days longer, they used it as a place of confinement for the persons who had been exposed to contagion, and during that time prevented Ward from carrying on his business there.

I am of opinion that this claim failed as well against the board as the individuals who composed it, and this for several reasons.

For the mere neglect of the board, in case of an outbreak of smallpox, to comply with sec. 106 of the Public Health Act, R. S. O. ch. 248, in my opinion no action by Ward lies. I am also of opinion that the proper conclusion on the evidence is that the board was not guilty of any violation of the section, but that the members of it acted with reasonable care and promptness in providing a hospital in which to place the sick and infected, and, so far from having improperly or

unnecessarily delayed the removal of these persons from the hotel, in their anxiety to prevent the spread of the disease they caused them to be removed from the hotel to the hospital before, in the opinion of their medical adviser, it was, having regard to their condition, prudent to do so.

Section 88 prohibits the removal of any sick person except by permission and under direction of the board or the medical health officer or the attending physician, and it would be a most extraordinary condition of things, if a board, acting in good faith, as this board beyond question did, were answerable in damages because its members, acting under the advice of its medical officer, had delayed the removal of the sick and infected until it was safe to remove them without danger to their lives, especially when, as in this case, the sick and infected were members of the family of the occupant of the house in which they were lying sick, or servants of his, and included among their number the occupant himself.

The placarding of the hotel was also a necessary thing to be done, and it was the duty of the board and the health officer to have it done by Ward or to do it themselves: secs. 88, 90.

I find no evidence that defendants or any of them took possession of the hotel or that they excluded Ward or his employees or the public from entering it, except in so far as the placarding of the hotel operated to deter them from doing so.

It may be that under the 3rd regulation of the provincial board of health, which is by the Act given the force of law, it was the duty of the board of health to have provided another place in which to put the persons who had been exposed to contagion, and, if so, the board undoubtedly did not fulfil that duty. There are, however, I think, several answers to this branch of Ward's claim. For the mere breach of that duty no action lies, and if, as I think is the proper conclusion upon the evidence, whatever may have been the attitude of the persons who had been exposed to contagion, as to their being confined in the hotel, Ward either consented to or acquiesced in their being placed and kept there, he is not entitled to complain. . . .

But, assuming that they were kept in the hotel against his will, I fail to see what injury was done to Ward; there was, at most, but a technical invasion of his rights, for the hotel would not have been fit for the reception of guests any sooner than it was, even if the persons who had been exposed to contagion had not been confined there; it was fit for the

reception of guests on 2nd March; there was no unreasonable or unnecessary delay in removing the quarantine, and any delay there was after the 2nd March in the opening of the hotel for business was the result of the act of Ward himself, and not of defendants; this is shewn by the testimony of Dr. Marr, to which there is no reason for not giving full credit.

There is no ground for finding that defendants or any of them were guilty of a conversion of any of Ward's property; there was no interference by any of them with the supplies that were in the hotel when it was first placarded, and such of them as were consumed appear to have been used under the direction of Ward's own employees and servants, and indeed partly at all events by members of his own family, and most probably partly by himself.

The claim for the value of the articles destroyed is untenable; they had been exposed to infection, and the board had authority, by sec. 100, to direct the destruction of them, and was not bound to compensate Ward for the loss of them; whether it should do so or not is, by sec. 100, left to the discretion of the board. There was also on this branch of the case evidence sufficient to warrant a finding that what was done was done with the consent of Ward.

The claim for the value of the articles taken to the hospital appears to me a preposterous one. These were blankets and other articles in which the sick persons were wrapped when being taken to the hospital. The sick persons were members of Ward's household, and the blankets and most, if not all, of the other articles had been in use about the bodies of the sick persons while they were at the hotel, and after they had been disinfected Ward was notified that they were ready for him, and he might take them away, but he appears to have chosen not to go or to send for them.

There remains . . the ground . . that defendants were not shewn to have acted maliciously and without reasonable and probable cause. I agree with the Chief Justice that this also is a complete answer to most, if not the whole, of Ward's claim. It may be that it would not afford any answer to the claim for using the hotel as a place for the persons who had been exposed to contagion; and it would not, I think, if that were a thing which defendants had no right to do; and if defendants were without any defence to that branch of the claim, I would, for the reasons I have already mentioned, assess Ward's damages at 25 cents and direct judgment to be entered for him against defendants the members of the board for that sum without costs.

As to the alleged conversion also, it was not necessary to prove malice and want of reasonable or probable cause, but this is unimportant, as, in my opinion, as I have said, no conversion was proved.

Ward's appeal should, in my opinion, be dismissed with costs.

The case of the other plaintiffs differs in its facts. The case is that the infant plaintiff Green, though he was not sick or infected, was taken to the temporary hospital, and kept there for several days; that he was afterwards brought from the hospital to and placed in an office building on the premises of his father, and kept there for several days longer; that he contracted smallpox while in the hospital, owing to his being brought into contact with the smallpox patients who were there; and he claims damages for these wrongs. The other plaintiff Green, his father, claims damages for loss of business owing to his house, in which the boy lived with him when he was sent to the hospital, having been placarded with a smallpox card.

This action also was, I think, rightly dismissed. The case failed on the facts. The proper conclusion on the evidence, in my opinion, is, that the boy was suffering from smallpox when he was taken to the hospital; that he went there voluntarily; that he did not contract the disease owing to his having gone to the hospital; and that the house was rightly placarded.

I am also of opinion that, malice and want of reasonable and probable cause not having been shewn, as they were not, plaintiffs Green would not have been entitled to succeed in their action even if defendants had been mistaken as to the boy being sick or infected with smallpox.

In any case the same reason which prevents Ward from recovering against the board of health, as such, is a complete answer to the Greens' claim to recover against the board.

Appeal dismissed with costs.

DECEMBER 19TH, 1904.

DIVISIONAL COURT.

O'REILLY v. THOMPSON.

Sale of Goods—Action for Price—Combination of Dealers—Agreement—Construction—Course of Dealing—Company.

Appeal by defendant from judgment of Judge of County Court of Carleton, in an action upon an account for the price of coal, in favour of plaintiff for $167.49 with costs.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

R. J. Sims, Ottawa, for defendant.

G. E. Kidd, Ottawa, for plaintiff.

STREET, J.—Plaintiff and defendant were both members of the Ottawa Coal Co., an incorporated company, having for its object the regulation of the price of coal in the city of Ottawa. Each dealer was a holder of shares in the company, the number of shares being fixed apparently by the extent of his dealings. The dealers made their own bargains for coal at the mines, but the coal became the property of the company when it reached Ottawa, at a price fixed by the company and based upon what is called the "circular" price of the shippers from the mines. The stock, however, which each dealer had bought at the mines was delivered on his own premises, and he accounted for his sales to the Ottawa Coal Co., at prices fixed by them from time to time. The difference between these prices and the prices at which the company had nominally taken it over from the dealers was the company's profit, and was paid out as dividends. The company made no profit on sales of coal from one dealer to another, because such sales did not in any way affect the actual consumption of coal; they only had the effect of transferring the coal from one dealer to another, that is to say, from one of the company's selling agents to another. But, as each dealer was bound to account at the end of the season for the coal he had received into his sheds, he was charged, upon transferring to another dealer a portion of his coal, a nominal price, which was adjusted at the end of the season. . . . The price charged the selling dealer by the company at the time of the transfer, therefore, did not mean that he was ultimately charged that price by the company, because it was adjusted at the end of the season so as to correspond with the amount he would have been credited with at the end of the season for so much coal on hand. The interim price charged was merely nominal, and the dealer who transferred coal to another neither lost nor gained, in the final result, whether this nominal price was $2 a ton or $10 a ton.

The only way in which, under this system, a dealer could make money, apart from the dividends on his stock, was by making his purchases at the mines at a price lower than the "circular" price; in that event he was able to realize and keep for himself the difference between what he paid for the coal delivered in Ottawa and what the Ottawa Coal Co. allowed him for it.

Plaintiff and defendant, both being shareholders in the Ottawa Coal Co. and dealers in coal there, must be taken to have understood the principles and rules upon which it was conducted. The only prices actually fixed by the Ottawa Coal Co. from time to time were those at which coal brought to Ottawa should be taken over by the company, and those at which dealers were to sell to consumers.

Defendant went to plaintiff to obtain coal, and plaintiff agreed to let him have it. Plaintiff says that when the price was discussed he told defendant that he did not wish to make anything out of him; that he would charge defendant only what the company charged him, plaintiff, and that, as he could not say what that would be until the company settled the price, he would charge defendant approximate prices in the meantime. Defendant contradicts this and says that plaintiff agreed to sell him the coal at the cost price to himself from the mines, with an added allowance for screenings; that both he and plaintiff knew what the cost price was from the shippers' circulars; that he agreed to pay and plaintiff agreed to sell for that price; and that the Ottawa Coal Co. prices did not enter into the bargain; that the accounts made out from time to time by plaintiff and handed to him, set forth the actual prices at which he bought; that they were subject to no alteration; and that he paid these accounts in full settlement of each delivery referred to in them.

There is, therefore, a clear and direct conflict of testimony between plaintiff and defendant.

I am unable to see how plaintiff can succeed upon the claim he has made, upon the evidence before us. He says the price paid him by defendant is less than that charged him by the Ottawa Coal Co. for the coal he sold defendant, and he claims the difference; but the uncontradicted evidence shewing the manner in which the company dealt, proves that plaintiff was entitled to transfer coal to another dealer without being charged for it any profit to the company, and that this was carried out in settling up accounts between plaintiff and the company at the end of the year. In theory the coal in plaintiff's yard belonged to the company; in practice it was his own; when he sold to a consumer he accounted for the profit to the company; when he sold to a dealer he did not. The profit for which he had to account to the company on sales to consumers was the difference between the two prices, one being that at which the company was supposed to buy from the dealer, and the other being that paid by the consumer to the dealer. The company was supposed to pay the dealer the actual cost price to him of the coal delivered at

Ottawa, and there is no evidence here that the price paid was any greater than the actual cost to him of the coal.

Supposing, therefore, plaintiff's story of the bargain to be the true one, and that he said to defendant . . . "Remember, I will charge you no more than the company charges me," that was equivalent to saying, "I will charge you the price at which the company bought my coal from me," because that was the price charged by the company to him, when he sold to another dealer, upon the final adjustment at the end of the season, no matter what the nominal price might be meantime.

Now, if plaintiff had shewn that he sold his coal to the company at a greater price than it cost him, there would be some shew of reason in his claiming that defendant should pay him the established price between dealers, that is, the price paid by the company to dealers for the coal they brought in. It would not have been unreasonable for plaintiff to have stipulated for that established price when he let defendant have his coal. But the trouble in his way is that the price paid by the company, according to the evidence, was supposed to be the actual cost to the dealer at "circular" rates, and he has not shewn that there was any difference of profit to him between the two rates.

Apart, therefore, from the other evidence . . . plaintiff seems to me to have failed to make out a case. But when we find, as we do here, that plaintiff rendered regular accounts from time to time to defendant for the coal delivered to him, charging in each account a certain price per ton, which was paid him by defendant, and that thereupon he signed receipts for these accounts in full, without a hint upon one of them that any further sum was to be claimed, we have an immensely strong mass of documentary evidence which entirely supports the testimony of defendant. And when we find, further, that no claim was made for the additional sums for which this action is brought until two years had elapsed from the payment of the last account, and that no explanation of the delay is given, the evidence afforded by the oath of defendant and the production of the receipts becomes so strong as absolutely to outweigh the statements of plaintiff unsupported by any other evidence that the price charged in his accounts rendered was not the price at which the coal was sold.

Appeal allowed with costs, and action dismissed with costs, but without prejudice to plaintiff bringing an action in a Division Court upon a small part of his claim, being for coal obtained by one Skead.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., concurred.

DECEMBER 20TH, 1904.

DIVISIONAL COURT.

BURRISS v. PERE MARQUETE R. W. CO.

Railway — Injury to Passenger — Negligence — Overcrowding Train—Proximate Cause—Necessity for Being on Outside Platform.

Appeal by defendants from judgment of ANGLIN, J., in favour of plaintiff, upon the findings of a jury, in an action for damages for injuries sustained by plaintiff owing to the alleged negligence of defendants.

The appeal was heard by BOYD, C., MEREDITH, J., MAGEE, J.

H. E. Rose, for defendants.

P. H. Bartlett, London, for plaintiff.

BOYD, C.—The accident happened on an excursion train engaged by the Irish Protestant Benevolent Society to convey a picnic party from London to Port Stanley by the Pere Marquette system in August, 1903. The train was made up, to the limit fixed for excursions, of 11 passenger coaches, and the evidence appears uncontradicted that these were crowded from London to St. Thomas, and overcrowded from St. Thomas to Port Stanley. Plaintiff's evidence is that he was invited to get on these cars at London, and was unable to find a seat, and was crowded out to the platform. At St. Thomas he was crowded so much that he sat down for better protection on the second step of the outside platform, and while so sitting was thrust out by a swerve of the train, which made the persons standing on the platform press up against him suddenly. This caused him to lose his balance—one of his legs protruded and was struck by some fixture on the track, probably a fence, and he himself would have fallen off, if he had not been grasped by a companion. His companion gives much the same account, and it is corroborated by a third witness, Crawford, as to the dense crowd on the train and the passengers having to stand in the passages and on the platforms.

The American cases cited vary somewhat, but I think the result of their holding is, that where the passenger goes on the platform and rides there as of necessity and not of choice, he is not without right of action for injuries sustained from overcrowding or as the result of overcrowding. In such a conjunction of circumstances, the question of negligence or no negligence is for the jury. The cases are all collected in Am. and Eng. Encyc. of Law, 2nd ed., vol. 5, pp. 678-681. I may refer specially to cases like this of Chicago v. Fisher, 141 Ill. 614, and Marvin v. Manhattan, 113 N. Y. 659.

We need not expect to find cases of this kind in England, where the method of car construction for railways is different. But the authorities affirm the doctrine here applicable.

. . .

[Reference to Metropolitan R. W. Co. v. Jackson, 3 App. Cas. 193; Cobb v. Great Western R. W. Co., [1893] 1 Q. B. 465; Hogan v. South Eastern R. W. Co., 28 L. J. N. S. 271.]

There was ample evidence to go to the jury—no objection is made to the charge—and the result in plaintiff's favour ought not to be disturbed.

We disposed during argument of the objection that defendants were not the parties liable for the safe conduct of the excursionists. The contract was made with their chief officer, and to all fair intents with them, and, in the absence of any contradictory evidence, the jury might well find as they did.

Appeal dismissed with costs.

MEREDITH, J., and MAGEE, J., each gave reasons in writing for the same conclusion.

DECEMBER 20TH, 1904.

C.A.

POTVIN v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to Child Playing on Track—Death—Negligence—Excessive Speed in City—Unfenced Track—Findings of Jury—Contributory Negligence of Child—Inference from Facts—Rule 817.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., upon the answers of a jury to questions, in favour of plaintiff for the recovery of $300 damages.

W. H. Curle, Ottawa, for appellants.

O. E. Culbert, Ottawa, for plaintiff.

The judgment of the Court (Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.), was delivered by

Osler, J.A.—A branch or line of defendants' railway between the town of Prescott and the city of Ottawa passes through a portion of the city of Ottawa near its easterly limit. The line of the railway enters the city from the south, and in its course crosses Carling avenue, a public highway. Proceeding northward it next crosses Young street, distant about 2,000 feet from Carling avenue. To the east of the line of railway and in the tract between these two highways there is a number of residences, and there are also some streets which abut on but do not cross the line. Along the east side of the line there is a wire fence between Carling avenue and Young street. The first street to the east of the railway and running parallel to it is Preston street, on which is a number of dwelling houses, but the lots on which they stand are not fenced in the rear, so that there is a large open space of common between the rear of the houses on the west side of Preston street and the fence on the east side of the railway. Plaintiff's house is situate on the west side of Preston street about 385 feet south of Young street and 125 feet south of George street, a highway which abuts on but does not cross the railway.

On 23rd May, 1903, plaintiff's son, aged 8 years and 7 months, while engaged in play with some companions of about his own age, went with them through one of the openings in the fence of the railway, and, getting upon the line, was struck and killed by a train coming from Prescott. Plaintiff thereupon brought this action under the Fatal Injuries Act. Besides alleging negligence in the operation and management of the train, plaintiff alleged that the locality through which the train was passing at the time of the accident was a thickly peopled portion of the city of Ottawa, and that defendants' train was allowed to pass through it at a speed exceeding 6 miles an hour, although it was not fenced in manner required by the provisions of the Railway Act. Defendants admitted that the boy was struck by their train, but alleged that he was a trespasser on their private property, and that his death was occasioned by his own negligence and want of reasonable care.

At the trial it was shewn beyond reasonable doubt that for some years before and at the time of the accident the condition of the fence was such that it could not be treated as answering the requirements of sec. 194 of the Railway Act. And, having regard to the locality, unless the track was fenced as prescribed by that section, it was unlawful for

defendants to run their train through the locality in question at a speed greater than 6 miles an hour. As pointed out in Tabb v. Grand Trunk R. W. Co., 8 O. L. R. 203, 3 O. W. R. 885, while there is in sec. 259 of the Railway Act, as enacted by 55 & 56 Vict. ch. 27, sec. 8, no express direction to fence, there is a clear prohibition against maintaining a speed exceeding 6 miles an hour unless the track is fenced as prescribed by the Act.

The engine driver in charge of the locomotive swore that the train was running at the rate of 25 miles an hour, and this was not disputed by defendants. The jury in answer to questions found that the death was due to negligence or breach of duty on the part of defendants, consisting of the poor condition of the fence which permitted the boy to get on the track.

They also found that the death was not due to the boy's own negligence, and that he was not capable of reasonable thought in the matter, and that they could not consider him a trespasser owing to the condition of the fence. They did not make any express finding as to the rate of speed, but, considering that no question was raised as to it, and having regard to the charge, it may properly be inferred that the finding of excessive speed is involved in the finding that the death was due to the condition of the fence. In any case Rule 817, which enables the Court to draw inferences of fact not inconsistent with the findings of the jury, applies, and it is proper to find that the negligence or breach of duty leading to the boy's death was allowing their train to pass through a thickly peopled portion of the city without the track being properly fenced.

Upon such a finding it follows upon what has been said in Tabb v. Grand Trunk R. W. Co., supra, that there was a failure properly to protect the public in a thickly peopled portion of the city.

It was for the jury to say, upon the testimony, whether the deceased boy was chargeable with having brought about or contributed to his own death, or whether he had displayed such reasonable care as was to have been expected from him, having regard to his youth and general intelligence.

Upon these questions the jury have found unfavourably to the defence. It was conceded by Mr. Curle that if defendants were liable for the death, there was evidence to sustain the award of damages.

The judgment should be affirmed and the appeal dismissed with costs.

FALCONBRIDGE, C.J. DECEMBER 21ST, 1904.

WEEKLY COURT.

RE TINNING AND WEBER.

Vendor and Purchaser—Title to Land—Conditional Devise over to Children of a Named Woman—Conveyance by Existing Children — Possibility of Birth of more Children — Presumption from Age of Woman.

Motion by Samuel Weber, purchaser, under the Vendors and Purchasers Act, for an order declaring that the objection to the title of the vendor, Bessie Jane Tinning, that she had not obtained a title in fee simple to the lands in question under the will of her mother, Charlotte Hornibrooke, and conveyance to her of the interests of John B. Tinning, Charlotte W., J. R. H. W., R. L. W., and Mabel W., had not been satisfactorily answered by the vendor, and that it was a valid objection to the title.

By the will of Charlotte Hornibrooke, the land in question was devised to the husband of the testatrix for life, and then to a daughter (the vendor), for life, with remainder to that daughter's son John B. Tinning, in fee, subject to a devise over to the children of Mary L. W. in the event of John B. Tinning dying without issue. The husband of the testatrix was dead. John B. Tinning had had issue, and he and the existing children of Mary L. W. had conveyed to the vendor. Mary L. W. was a widow, 54 years of age, and her children were all of full age.

J. T. Richardson, for purchaser.

N. F. Davidson, for vendor.

FALCONBRIDGE, C.J.—The interests of the existing children (all being of age) of Mary L. W. have been conveyed to the vendor, and the only question is whether the Court ought to act on the presumption that there will be no further issue of her body. There is no medical evidence nor any statement of her physical condition.

She was born on 7th August, 1850, and there was an interval of several years between the birth of her last child and the death of her husband.

Under these circumstances, it is clear on the authorities that the vendor is entitled to judgment. In Browne v. Warnock, 7 L. R. Ir. 3, the title was forced on an unwilling purchaser, and that decision is approved of in Dart, 6th ed., vol. 1, p. 391. Mr. Armour (Titles, 3rd ed., p. 144) thinks that as title has been registered upon a presumption of no

further issue under the Land Titles Act (Re G., 21 O. R. 109), it should also be forced on an unwilling purchaser. In Edwards v. Tuck, 23 Beav. 268, the earlier cases are collected. In In re Widdow's Trusts, L. R. 11 Eq. 408, In re Millner's Estate, L. R. 14 Eq. 245, Davidson v. Kimpton, 18 Ch. D. 213, the presumption was acted on. In Re G., supra, there was medical evidence, but Dart says the vendee is entitled only to a moral and not a mathematical certainty of title, and I do not think such evidence is necessary in this case.

MAGEE, J. DECEMBER 22ND, 1904.

CHAMBERS.

RE REDPATH MOTOR VEHICLE CO.

Company — Winding-up — Petition — Affidavits — Insufficient Facts—Leave to Supplement.

Petition for order winding up the company under the Dominion Act. The petition alleged insolvency generally and also gave certain details, but the application was based on clauses (b), (d), (e), and (g) of sec. 5 of the Act. The subscribed capital was $16,500, with $14,300 alleged to be paid up, and the company continued active business only for about 6 months. The assets had dwindled to a comparatively small amount apparently, while two directors were alleged to be liable on unpaid stock.

W. C. McKay, for the petitioner.

W. Davidson, for the company.

MAGEE, J.—The facts given in the affidavits do not make out clearly that the company is brought under the clauses mentioned, and on some important points the affidavits do not comply with the Rules as to giving the source of information and belief. No idea is given as to the outstanding liabilities, and it is not ascertained whether they exceed the remaining assets. Sufficient is shewn to make it desirable that the company should be wound up. It was alleged that the petitioner was unable to procure the examination of the secretary, who is absent. Petitioner should have leave to amend the petition and offer such additional evidence as he may be advised, and again present it within 3 weeks, excluding vacation. Costs of this application can then be disposed of. If not again presented, the petition will be dismissed without costs.

FALCONBRIDGE, C.J. DECEMBER 23RD, 1904.

WEEKLY COURT.

ATTORNEY-GENERAL FOR ONTARIO v. LEE.

Revenue—Succession Duty—"Aggregate Value" of Property—Meaning of—R. S. O. 1897 ch. 24, secs. 2, 3—1 Edw. VII. ch. 8, sec. 3 (O.)

Action to recover succession duty upon the estate of Walter S. Lee, deceased.

Upon the pleadings a question of law was raised as to the construction of the Succession Duty Act and amendments.

The will of the deceased gave all his property to defendants in trust for the benefit of his wife and children, and in certain events of his grandchildren.

The defendants submitted that upon the true construction of the Acts the "aggregate value" of the property of the testator was less than $100,000.

By sec. 3 of the principal Act, R. S. O. 1897 ch. 24, the Act shall not apply (3) to property passing under a will "to or for the use of the father, mother, husband, wife, child, grandchild . . . of the deceased, where the aggregate value of the property of the deceased does not exceed $100,000 in value."

By sec. 2, the word "property" includes real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

By the Succession Duty Amendment Act, 1901, 1 Edw. VII. ch. 8, sec. 3, the 2nd section of the principal Act was amended by adding thereto certain sub-sections, the first of which is as follows: (2) The phrase "aggregate value" means the value of the property before any debts or other allowances or exemptions are deducted therefrom.

The question raised was as to the meaning of the words "aggregate value," where the property owned by the deceased was incumbered.

Frank Ford, for plaintiff.

W. R. Riddell, K.C., for defendants.

FALCONBRIDGE, C.J., held that upon the true construction of the above statutory provisions, and having regard to the other provisions of the Acts, the "aggregate value" meant the value of the property, and not merely the value of the deceased's equity of redemption therein.

IDINGTON, J. DECEMBER 23RD, 1904.

TRIAL.

THOMAS v. TOWNSHIP OF NORTH NORWICH.

Way—Non-repair — Injury to Person — Proximate Cause—Repair of Road—Obstacle—Warning—Liability.

Action by William H. Thomas, an infant, by George H. Thomas, his father and next friend, against a township corporation to recover damages for injuries sustained by plaintiff owing to the alleged negligence of defendants in not keeping a highway in repair.

S. G. McKay, Woodstock, for plaintiff, relied upon Rowan v. Toronto R. W. Co., 29 S. C. R. 717; Sherwood v. City of Hamilton, 37 U. C. R. 410; Ferguson v. Township of Southwold, 27 O. R. 66; Am. and Eng. Encyc. of Law, 2nd ed., vol. 15, pp. 467, 474; Thomson v. Ridgeway, 7 Pick. 188; Connell v. Town of Prescott, 22 S. C. R. 147; Homewood v. City of Hamilton, 1 O. L. R. 266; Toms v. Corporation of Whitby, 35 U. C. R. 195.

J. P. Mabee, K.C., for defendants, cited Atkinson v. City of Chatham, 26 A. R. 521; S. C., sub nom. Bell Telephone Co. v. City of Chatham, 31 S. C. R. 61; Foley v. Township of Flamborough, 26 A. R. 42; Castor v. Township of Uxbridge, 39 U. C. R. 113.

IDINGTON, J.—Defendants were at the time of the accident in question admittedly responsible for keeping in repair the highway whereon plaintiff, with his father, was travelling when he received the injuries complained of.

Defendants' council, by their committee, on 29th April, 1904, inspected a culvert on this highway, and, finding it in such a condition as to be dangerous, if further used, determined to let a contract for its re-construction, and meantime to close it by a barrier erected to prevent travellers using it.

Steps were taken within a reasonable time to have the work done. When the contract was let, the committee in charge of the work directed the contractor to place a stick of timber across the travelled part of the highway for the purpose of turning the travel off that to a side road that led alongside it, and crossed the little stream on the east side of the place where the culvert had been and was to be reconstructed. This stick of timber was 10 by 12 inches in thickness and 24 feet long. It was placed obliquely across the road.

The actual travelled roadway had been formed by an embankment that raised it above the road allowance on both sides. This elevation began at the hill down which plaintiff came, and increased gradually in its height above the adjacent road allowance till it reached the culvert, where it was 7 feet 2 inches above the level of the water in the stream. At a distance of 65 feet from the culvert it was 3 feet 8 inches in height, and that I find to be the point at or about which the accident took place. . . . It is not possible, from the evidence, to be mathematically correct. A few but only a few feet either way from this point, 65 feet from the culvert, I have no doubt, and so find, was the point where plaintiff's father turned aside.

Defendants' engineer made a measurement and gave in evidence a cross-section of this embankment at the point where he was, as I think erroneously, shewn, shortly before the trial, that the stick of timber had been placed. That point was 94 feet from the culvert, and the grade given there to be passed over in turning off from the travelled road shews a gradual slope. I infer as a fact that this gradual slope obtained all the way along the side, in question, of this embankment, and that with such a slope the 3 feet 8 inches in height could, if attempted slowly and with care, have been descended from the travelled road to the temporary side road without serious results. This descent could not, however, have been made in safety travelling down it at "a nice trot."

I find that the stick of timber was thrown across the road at this point, and that the travelled part of the road there was 18 feet wide. The stick, being 24 feet long, was placed obliquely for the purpose of preventing the ends extending over the edge of the embankment. . . .

Defendants were discharging their duty in clearing this part of the highway, and I find that the divergent side road intended for temporary use was sufficient for that purpose. It was an old beaten path that was, to any one keeping a look-out, plainly discernible. The obstruction that was furnished by the stick of timber was, in daylight, quite sufficient to turn aside safely all careful travellers going at a moderate rate of speed. It was quite inadequate for such a purpose at night, and defendants for that reason ought not to have relied upon it.

Now, what happened to plaintiff, who was an infant about 3 years of age, is told by his father. The father, having this boy with him, drove in a light waggon, to which was attached a pair of shafts and a whiffletree that appeared, when starting, to be in good order, though not closely inspected at the part that afterwards gave way. The conveyance was loaded

with 12 bags of potatoes. The father and son were sitting upon a spring seat thereon, and the father says they were going along at a "nice trot." They came to a hill that he guessed was about 10 or 12 feet high, but actual measurement shews twice that height, and rather steep for a bit. This hill sloped down towards the culvert in question, and, as they were making the descent, the fastening attached to the right end of the whiffletree, to which the trace was hooked, came off, and the horse started up at a greater rate of speed and pulled the keepers of the harness over the ends of the shafts, so that they dropped to within about a foot of the ground. The only things that then held the shafts up at all were the hold-back straps buckled to the breaching. This so disturbed the mind of the father, who was driving, that he did not observe, till just up to it, the stick of timber already referred to, and then, thinking it a sign of danger ahead, drew the horse suddenly by the left rein, and he turned, when thus drawn aside, and went over the embankment I have spoken of, before quite reaching the timber. The result was the upsetting of the waggon, the escape of the horse, and the injury to plaintiff. . . .

I am unable to find that this accident, which took place on 7th June last about 1 o'clock in the afternoon, when a prudent driver could easily have seen the obstruction in his way, and the side road that shewed a beaten path where travellers for over a month before had been going in safety, and he should have gone, was the natural result of anything defendants had improperly done or neglected to have done.

It was caused, I find, proximately by the unfortunate condition of the harness and its attachments, and the latter coming loose when descending the hill and so disturbing horse and man that the horse was not guided as he otherwise would have been either at the spot in question, or a few steps back, into the divergent road he should have taken.

The cases cited in support of plaintiff's claim are either clearly not in point or distinguishable from this.

I have not found any case exactly like this. Bell Telephone Co. v. City of Chatham, 31 S. C. R. 60, is in many respects like it, yet not exactly it. The principle upon which the Court acted is, however, exactly that which I desire to apply here, and so applied, the plaintiff cannot recover. The American cases to which I was referred by the Am. and Eng. Encyc., pp. 467 and 474, citation, are rather against than for plaintiff.

The case of Anderson v. Sath, 42 Maine 346, which was upon a statute similar in terms to our Municipal Act, imposing upon the municipal authorities the absolute duty to

repair and keep in repair the public highway, is, if good law here, conclusively against plaintiff. See also Little v. Brockton, 123 Mass. 511. The fact that defendants in doing what they did were acting in the line of their duty, distinguishes this from many cases referred to or that might profitably be looked at under slightly different facts.

The reasoning of the Chancellor in the case of Minns v. Village of Omemee, 2 O. L. R. at p. 581, as far as it goes, applies to this phase of the case in hand.

It may be, however, said that defendants in neglecting when about the business to erect an adequate barrier that was suitable for all possible emergencies, failed to become entitled to claim that they acted within the law.

It does not so strike me, and if this barrier had been four or five feet high, and thus probably complete for all reasonable requirements, I do not think it would have served to help plaintiff under the circumstances he was placed in.

It was urged that there should have been a warning put up along the road. That might have been a praiseworthy thing to do, but I cannot find in any place law binding them to adopt that particular course. It would not have helped the stranger in the dark.

It was also urged that there should have been a railing along the embankment in question. It would hardly do to lay it down that every bank 3 feet 8 inches high, sloping gently down, must be protected by a railing.

The case may go further, and should my finding on the law and facts be reversed, I assess provisionally the damages plaintiff would be entitled to at $400. . . .

I think defendants' failure to complete a proper barrier serviceable for all purposes and at all times by night and by day invited litigation such as this. I therefore refuse them costs. . . .

Action dismissed without costs.