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HIGH COURT OF JUSTICE.

DIVISIONAL COURT. NOVEMBER 17TH, 1910.

WATSON v. PHILLIPS.

Will—Construction—Devise to One for Life and to Issue after Decease—Estate Tail—Rule in Shelley's Case—"Without Making a Will."

Appeal by the plaintiff from the judgment of LATCHFORD, J., ante 120.

The appeal was heard by BOYD, C., SUTHERLAND and MIDDLETON, JJ.

E. D. Armour, K.C., for the plaintiff.

J. R. Meredith, for the defendants.

The judgment of the Court was delivered by BOYD, C.:—By the third clause of the will, the 100 acres in Oro is given to the testator's granddaughter during the term of her natural life, and to her issue after her decease. That, by the application of the rule in Shelley's case, amounts to an estate tail. The intention is that the granddaughter shall enjoy the property during her life, and that it shall go thereafter to her lineal descendants. That is, I think, the primary and controlling intention of the testator.

Then, in the fifth paragraph, it is provided that, if the granddaughter dies without issue and without making a will, the said lot is bequeathed in equal shares to others named (nephews, nieces, and an adopted son of the testator.) The effect of the words "without making a will" is not of such force as to change the meaning of the word "issue" and reduce it to "children."

and thereby to cut down the estate tail to a life estate in the granddaughter. The power to make a will is inoperative in regard to an estate tail as such, but the use of the words merely shews that the testator was not aware that effect could not be given to that provision (as to testamentary disposition) without destroying that which appears to be the primary and controlling intention.

I would reverse the decision and declare that the land vests by way of estate tail in the granddaughter. The old case of Frank v. Stovin, 3 East 548, is in point, following Roe v. Grew, 2 Wils. 322, and approved of in Pelham Clinton v. Duke of Newcastle, [1902] 1 Ch. 3, affirmed in the Lords, [1903] A. C. 111. See also Bell v. Carey, 8 C. B. 876. I also refer to Papillon v. Voice, 2 P. Wms. 471, where the Master of the Rolls thought that the words "without impeachment of waste" were enough to change what would otherwise have been an estate tail in the first taker—but he was reversed on appeal by King, L.C.

Costs here and below out of estate.

RIDDELL, J. NOVEMBER 18TH, 1910.

*YOUNG v. TOWN OF GRAVENHURST.

Negligence — Personal Injuries — Electric Current Supplied by Municipal Corporation for Lighting Houses — Municipal Light and Heat Act—Municipal Waterworks Act—Electrical Plant in Charge of Board of Commissioners—Statutory Agents —Liability of Corporation — Supply of Electricity Obtained from Distant Place—Powers of Commissioners—Effect of Going beyond—Defective System — Dangerous Defects—Person Injured in House—High Tension Current—Care not Exercised—Construction, Inspection, and Repair—Absence of Contributory Negligence—Damages—Elements Considered in Assessing.

Action for damages for personal injuries sustained by the plaintiff John Young, a boy of eleven, who was burned by a current of electricity from the town supply, and for the expense and loss occasioned to his mother and co-plaintiff by reason thereof.

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

The action was tried before RIDDELL, J., without a jury, at Barrie, on the 14th and 15th November, 1910.

Wallace Nesbitt, K.C., and F. R. MacKelcan, for the plaintiff.

N. F. Davidson, K.C., for the defendants.

RIDDELL, J.:—In 1903 the Town of Gravenhurst acquired the electric light plant of the town and vicinity, which, having been initiated by one Fletcher, had become the property of one Fielding. The town corporation had made an offer under the provisions of what is now the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 566, which offer was declined. Arbitrators were appointed and made their award, whereupon Fielding conveyed the plant to the town corporation, including two lots, machinery, transformers, dynamos, etc. He also transferred the contracts he had for the supply of light or electricity. In 1904 the town council passed a by-law constituting a Board of Commissioners under the Municipal Light and Heat Act and the Municipal Waterworks Act, R. S. O. 1897 chs. 234 and 235; and the Board in and after 1905 took charge of the electrical plant, etc., of the town.

On the 8th March, 1910, the plaintiff John Young, a lad of eleven years of age, lying in bed about seven o'clock in the morning, was terribly burned by a current of electricity from the town supply — his left hand was so injured that it had to be amputated, and his skull was literally burned through to the brain in two places. . . .

Every point was most strenuously and ably contested by counsel for the defendants; and the only doubt which I have entertained since the close of the evidence is due to his ingenious and learned argument. . . .

I take up the legal objections which go to the very root of the action. Mr. Davidson contends that this action does not lie against the town corporation at all, but that, if any one be liable, it can only be the Commissioners.

By reference, secs. 40 to 47 of R. S. O. 1897 ch. 235 are made part of R. S. O. 1897 ch. 234 (R. S. O. 1897 ch. 234, sec. 14). . . . The whole effect of sec. 40 of R. S. O. 1897 ch. 235 is to permit the council, instead of acting for the "corporation," i.e., the "body corporate" themselves, to delegate this agency to officers appointed by the council or to Commissioners. The Commissioners then become the body which acts for the corporation—and so "statutory agents." . . .

[Reference to McDougall v. Windsor Water Commissioners, 27 A. R. 566, 31 S. C. R. 326; Ridgeway v. City of Toronto, 28 C. P. 579; Mayor, etc., of New York v. Bailey, 2 Denio 433, 3 Hill 531; Trotter v. City of Toronto, 28 C. P. 574, 29 C. P. 365; Graham v. Commissioners of Niagara Falls Park, 28 O. R. 1; Gibbs v. Trustees of Liverpool Docks, 1 H. & N. 439, 3 H. & N. 164; Mersey Docks Trustees v. Gibbs, L. R. 1 H. L. 93; Sanitary Commissioners of Gibraltar v. Orfila, 15 App. Cas. at pp. 408, 409.]

The property and its income is that of the corporation; the profits are the property of the corporation; and all that the Board is to do might have been done by another agent of the corporation, i.e., the council. It is impossible to consider the Board either as principal or servants or agents of the council. The result is, that it is the corporation of the town which is the principal, and the Board of Commissioners but the agent; and, unless there be more in the case, the corporation is properly sued. This is the conclusion arrived at by my brother Latchford on an application to compel Briddick to submit to examination as an officer of the defendants: ante 118 (affirmed ante 167.) I have thought it right to consider the question anew, the decision of my learned brother being in an interlocutory matter,

The Mersey Docks case also decides that the principle upon which a private person or a company is liable for damages occasioned by the act of a servant applies to a corporation which has been intrusted by statute to perform certain works and to receive tolls for the use of these works. This is the position of the defendants here: R. S. O. 1897 ch. 235, sec. 47.

Then it is contended that the corporation cannot be liable for the Commissioners' acts, because they got their supply of electricity from a point eight miles distant, which, it is contended, is ultra vires the Commissioners. Even if this were ultra vires the Commissioners, the defendants knew all about it and adopted it, and consequently the defence is not open to them: Ridgeway v. City of Toronto, 28 C. P. 574. And, even if this manner of procuring power were ultra vires the corporation, the corporation could not set up this as an answer to the negligence of their servants. In some cases a corporation is protected from liability upon a contract ultra vires made by itself or its agents, but never from the results of negligence by its servants in a business carried on by them for the benefit and with the knowledge of the corporation. . . .

[Reference to Brice on Ultra Vires, 3rd ed., p. 435; Doolan v. Midland R. W. Co., 2 App. Cas. 792, 806.]

And, in any case, the wrong in the present instance was done within the limits of the municipality; and the causative negligence was within the municipality.

Then as to the facts. There was much evidence given of more or less value, including considerable expert evidence. Taking the evidence as given, with the weight which, I think, from having seen the witnesses, should be attached to it, I find the following facts:—

The system of the defendants is a very defective system and suffering from want of money to put it into and keep it in proper condition. . . .

On the evening of the 7th March a current of high tension manifested its presence in the house of Mrs. Young by unmistakable phenomena; and that this current came from the secondary wires is, to my mind, clear. At that time there can be no doubt there was connection between the primary and secondary wires, as well as connection between the earth and its primaries.

It is manifest that there was in this badly built system an intermittent communication between the earth and the primary wires; and that this is exceedingly dangerous no one doubts or can doubt.

That it was the guy wire at E. (a point on a plan filed) which was the cause of the trouble, I think is certain, and I so find.

That it was the duty of Wright at the power-house to report the existence of a leak to the manager (Briddick), and that of the manager to locate the leak and remedy the defect immediately, equally admits of no kind of doubt.

It may be true, as he says, that Briddick was short of men; but that is no excuse for the defendants—if they run a dangerous business at all, it is their duty to have a sufficient number of men to detect and guard against danger.

There is no duty cast upon the municipality to conduct an electric light plant or even to light the streets: Randall v. Eastern R. Co., 106 Mass. 276, 8 Am. Rep. 327, and cases cited, especially Macomber v. Taunton, 100 Mass. 255, and Lynn v. Cambridge, 136 Mass. 419. But, if the municipality does take it upon itself so to conduct an electric light plant, it must conduct it without negligence: Freeport v. Isbell, 83 Ill. 440, 25 Am. Rep. 407; Canavan v. Oil City, 183 Pa. 611; McHugh v. St. Paul, 67 Minn.

441; Gaskins v. Atlanta, 73 Ga. 746. This duty is owed not only to the public using the streets, but also to persons not on the highway.

The stage, then, was all set for a tragedy—the plaintiff John Young, lying in his bed about seven in the morning of the 8th March, with the light which hung over his bed for reading purposes turned on, noticed a sparkling which indicated, as he thought, that the lamp was going out: he then took hold of the oscillating lamp with his left hand, and knew no more till some time after. His mother came into his room and saw his hand blazing and also his head where it came in contact with the iron bedstead—then his hand dropped from the lamp, and the blazing ceased. Medical aid was sought at once. Dr. Parfitt was in attendance without delay, and other surgeons were sent for. Mrs. Parfitt saw about 7.35 a.m. the guy wire at E. steaming, and at about 7.45 the tree (C. on the plan) smoking or steaming—throwing off a white vapour. At this time . . . Briddick had not cut the guy wire E.; this he did later, and the danger was over.

Experts called for the defence gave evidence that the injuries to the plaintiff John Young were, in their opinion, caused by a low tension current of 110 volts. . . . In addition to the evidence of the electrical experts called for the plaintiff, whose evidence I believe, and who testified that the current causing the injuries was not a low tension current of about 110 volts, and consequently a current which, without negligence on the part of the defendants, might have been looked for, but that it was a current of high tension which should not have been in the house at all, the plaintiffs called Dr. Parfitt, who testified that the condition of the lad indicated and would prove that the current was of high tension. The heart of the patient was beating full and regularly immediately after the shock, but his breathing had been temporarily suspended. The witness said that high tension currents (when they do not kill) arrest the breathing, but do not stop the heart. I accept this evidence. If I am to be permitted to use knowledge obtained from scientific and medical treatises—as to which Wigmore on Evidence, secs. 1690, 1700, 2566, may be consulted—the evidence of Dr. Parfitt will be found to be supported by authority. . . .

[Quotations from Tousey's Medical Electricity (Phila. and London, 1910), p. 346; H. Lewis Jones's Medical Electricity, 4th ed. (1904), p. 251.]

On all grounds, then, I find the contention of the defendants that the current which did the mischief was the ordinary 110 volt current, disproved.

It may be that the doctrine of Fletcher v. Rylands, L. R. 1 Ex. 265, L. R. 3 H. L. 330, will be considered to apply in all its stringency to electricity. . . . If and when the point comes up for decision, it may become necessary to consider the effect of such cases as National Telephone Co. v. Baker, [1893] 2 Ch. 186; Eastern and S. A. T. Co. v. Cape Town T. Co., [1902] A. C. 454; Hinman v. Winnipeg Electric Street R. W. Co., 16 Man. L. R. 16. Mr. Justice Davies does not accede to the proposition: Royal Electric Co. v. Hévé, 32 S. C. R. 462, at p. 470; but Taschereau, J., at p. 465, and apparently Sedgewick, J., were of the contrary opinion.

Much may be said for the view that a corporation undertaking to furnish electricity of a voltage of 110 must at all hazards keep from the building supplied, and from the wires intended to carry only 110 volts, their electricity of a higher voltage, if that is dangerous. . . .

In the present case, however, I do not need to consider whether the defendants were bound at all hazards to keep their high tension current from entering the house in which the plaintiffs were —the fact of the case shew that they did not take the high degree of care that the law demands from a corporation trading in so dangerous an element as electricity (32 S. C. R. at p. 466); and that is sufficient to saddle them with responsibility for the disastrous consequences. . . .

[Reference to 10 Am. & Eng. Encyc. of Law, 2nd ed., pp. 872, 873; Royal Electric Co. v. Hévé, 32 S. C. R. 462.]

The defendants were not careful in construction . . .; they failed in inspection . . .; in repair . . .; the evil should have been guarded against.

And there was no contributory negligence. It is true that the bed upon which the boy lay was an iron bedstead, and the bedstead itself in contact with a radiator, the radiator being in contact electrically with the earth, but there was nothing to indicate that such a state of affairs could be dangerous—it was usual and common, and the plaintiff had not been warned of any danger to be anticipated from such an arrangement of the furniture.

Without, then, calling in the doctrine of Fletcher v. Rylands, and without appealing to the principle of res ipsa loquitur, I am of opinion that the defendants are liable as for negligence.

I do not think it necessary to consider the case in the light of contract. . . . The case is best put, in my view, on tort.

As to damages, Mrs. Young has already disbursed or become liable for $1,724.90; she will require to supply several artificial

arms; . . . in cash she will be out . . . $1,919.90. Then the trouble and inconvenience to which she has been and must necessarily be put must be considered—$330 is not much, but probably far too little, to allow. She will have a verdict, then, for $2,250.

Her son is bereft of a hand . . . he must at all times feel the loss. His skull can never fill up the holes burned through it. . . . He cannot join in the usual athletic sports of the average student. . . . Then the necessarily somewhat solitary and non-social life the lad is doomed to lead is itself an evil. . . . As to his mind, I have never seen a boy of his age more intelligent. . . . But there is the danger of the brain being incapable of protracted and continued effort. . . .

I know of no rule to assist me in assessing the damages except the time-honoured rule that where the injury is not wilfully inflicted the damages must be reasonable. In view of the serious extent of the injuries, the pain already suffered, and the long time this boy of eleven is to be expected to lie under the handicap of these terrible wounds and that terrible maiming, I think $7,500 a reasonable sum to allow.

The very alarming state of the plant, etc., of the defendants is said to be not at all unusual. If that be the case, thousands are in daily peril of death or maiming—a state of affairs which loudly calls for legislative interference. The most ordinary regard for human life or limb would seem to necessitate some measure of governmental supervision and the most strict and searching of official inspection.

MEREDITH, C.J.C.P., in CHAMBERS. NOVEMBER 18TH, 1910.
RIDDELL, J., in CHAMBERS. NOVEMBER 19TH, 1910.

NATIONAL TRUST CO. v. TRUSTS AND GUARANTEE CO.

Conditional Appearance — Refusal to Allow — Action against Liquidators of Company — Winding-up Act, sec. 133 — Jurisdiction of Courts of Ontario—Question, how Raised—Leave to Appeal to Divisional Court—Con. Rule 777 (3) (b).

Appeal by the defendants from the order of the Master in Chambers, ante 222, refusing a motion by the defendants for leave to enter a conditional appearance.

W. Laidlaw, K.C., for the defendants.

R. C. H. Cassels, for the plaintiffs.

MEREDITH, C.J., dismissed the appeal, with costs to the plaintiffs in any event, but extended for three weeks the time for entering an appearance, with leave to the defendants to move to set aside the writ of summons and the order made in winding-up proceedings allowing the plaintiffs to bring the action against the defendants as liquidators of the Raven Lake Portland Cement Co.

The defendants then moved before RIDDELL, J., in Chambers, for leave to appeal from the order of MEREDITH, C.J., to a Divisional Court.

The motion was argued by the same counsel.

RIDDELL, J.:—The Raven Lake Portland Cement Co. was ordered (20th September, 1907,) to be wound up under R. S. C. 1906 ch. 144, and the defendants were appointed liquidators. The liquidators paid into the bank a considerable sum of money, which was (October, 1909) claimed by the plaintiffs under the provisions of a bond mortgage deed. Objections were filed to the claim by liquidators and creditors, but the matter was not adjudicated upon.

In September, 1910, the Official Referee granted leave to the plaintiffs to issue a writ of summons and prosecute an action against the liquidators in respect of the property of the insolvent company.

On the 1st October, 1910, the writ of summons in this action was issued, claiming an account of the moneys received by the Trusts and Guarantee Co. from the sale of the assets of the insolvent company, and, in the alternative, damages for conversion of the said property. No statement appears on the writ that the defendants are liquidators or that they are sued as such.

A motion was made by the defendants before the Master in Chambers for leave to enter a conditional appearance, but the Master refused.

An appeal from this refusal was dismissed by Meredith, C.J.C.P.

The defendants now move before me for leave to appeal from this order to a Divisional Court, under the provisions of Con. Rule 777.

It is not contended that there are conflicting decisions so as to justify the order sought for under Con. Rule 777 (3) (a); but it is argued that Con. Rule 777 (3) (b) applies. It will be necessary for me only to consider whether there is good reason to

doubt the correctness of the order from which it is desired to appeal; as the appeal would involve matters of such importance that leave should be given to appeal if such were the case.

What the defendants contend is that the jurisdiction of the Court is ousted by sec. 133 of the Winding-up Act, R. S. C. 1906 ch. 144—they fear that, if they entered an unconditional appearance, they would be held to have waived all objection to the jurisdiction of the Court; and further that, unless they do enter an appearance, judgment will be signed against them by default.

Their fears are quite without foundation.

"When the defendant entered an appearance, he waived any irregularities in the writ, copy, and service; nay, even the total want of a writ. Moreover, in doing so, he submitted himself to the jurisdiction of the Court in which he appeared, no matter where the cause of action arose: Harrison's C. L. P. Act, 2nd ed., p. 56, note *l*, citing Forbes v. Smith, 10 Ex. 717, also Humble v. Bland, 6 T. R. 255. 'An appearance entered by the defendant waives all irregularities in the process, and even the total want of it:' Chitty's Archbold, 12th ed., p. 218:" per Rose, J., in Sears v. Meyers, 15 P. R. 381, at p. 385.

"The jurisdiction of the . . . High Court is a personal jurisdiction, which can be exercised against a defendant who is within the jurisdiction, or is properly served outside the jurisdiction and submits to the jurisdiction:" per Jessel, M.R., in Re Orr Ewing, 22 Ch. D. 456, at p. 464. But that "must not be understood as going the length of saying . . . that if the Court has no jurisdiction over the subject-matter of the action at all, the defendant's consent by appearing would give jurisdiction:" per Brett, J., in Oulton v. Radcliffe, L. R. 9 C. P. 189, at p. 195. "If the defendant appears, that gives the Court jurisdiction to proceed, provided the subject-matter of the action is one over which the Court has jurisdiction:" per Denman, J., S. C. at p. 195. The judgment of Honeyman, J., at p. 196, is to the same effect. See also per Cave, J., in Moore v. Gamgee, 25 Q. B. D. 244, at pp. 246, 247.

A defendant by appearing waives all objections that can be waived: Maisonneuve v. Township of Roxborough, 30 O. R. 127.

But no defendant can give jurisdiction over the subject-matter by consent; waiver is a form of consent; and no defendant can, by waiver, give a Court jurisdiction over a subject-matter which the statute or the law excludes from its jurisdiction.

In Wilmott v. McFarlane, 32 C. L. J. 129, 16 C. L. T. Occ. N. 83, a Divisional Court held that an unconditional appearance did

not prevent the defendant raising a defence that the Courts of Ontario had no power to grant the relief sought. That case is clear law; and the application of the defendants must be refused.

I can see no objection to the defendants being allowed to move to set aside the writ if so advised, in which case the effect of the section of the Winding-up Act may be considered; or upon an unconditional appearance they may set up in defence that they are liquidators and received the property as such, etc.—the Court will not proceed with the action if and when it appears that there is no jurisdiction.

The motion should be refused with costs payable by the defendants in any event.

MEREDITH, C.J.C.P., IN CHAMBERS. NOVEMBER 19TH, 1910.

REX v. WISHART.

Criminal Law—Fugitive Offenders Act—Arrest of Person Charged with Offence in another Part of His Majesty's Dominions—Warrant not Indorsed as Provided by secs. 8, 21—Committal of Accused to Await Return—Jurisdiction of Police Magistrate—Secs. 9, 10, 11, 12—Habeas Corpus—Lawful Detention.

The prisoner was arrested in Toronto, on a charge of embezzlement, under a warrant for his apprehension issued by a Justice of the Peace for the County of Down, in Ireland, where the offence was alleged to have been committed, and, after an inquiry before the Police Magistrate for the City of Toronto, was committed to prison, to await his return to Ireland under the provisions of the Fugitive Offenders Act, R. S. C. 1906 ch. 154.

The prisoner was apprehended and brought before the Police Magistrate without the warrant having been indorsed as provided by sec. 8 of the Act, which is as follows: "8. Whenever a warrant has been issued in a part of His Majesty's Dominions for the apprehension of a fugitive from that part who is or is suspected to be in or on the way to Canada, the Governor-General or a Judge of a Court, if satisfied that the warrant was issued by some person having lawful authority to issue the same, may indorse such warrant in manner provided by this Act, and the warrant so indorsed shall be a sufficient authority to apprehend the fugitive and bring him before a magistrate."

The manner of indorsing the warrant is provided for by sec. 21, which is as follows: "21. An indorsement of a warrant in pursuance of this Act shall be signed by the authority indorsing the same, and shall authorise all or any of the persons named in the indorsement and of the persons to whom the warrant was originally directed and also every constable to execute the warrant within Canada by apprehending the person named in it and bringing him before a magistrate in Canada, whether he is the magistrate named in the indorsement or some other."

A writ of habeas corpus and certiorari in aid having been issued and returned, and it appearing from the return that the prisoner was detained under the authority of the warrant of the Police Magistrate, the prisoner moved for his discharge, on the ground that his detention is unlawful, because: (1) the warrant for his apprehension not having been indorsed pursuant to sec. 8, his arrest was unlawful; (2) it is a condition precedent to the exercise of the jurisdiction conferred by sec. 12 that the warrant shall be indorsed pursuant to sec. 8, and, not having been so indorsed, the Police Magistrate had no jurisdiction to enter upon the inquiry mentioned in sec. 12 or to commit the prisoner.

T. J. W. O'Connor, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

MEREDITH, C.J.:—It is clear that, had the prisoner been charged with an offence against the criminal law of Canada and been committed for trial for the offence, the fact that he had been apprehended without lawful authority, or even that he had been unlawfully brought back to Canada from a foreign country, would afford no ground for his discharge from custody: Rex v. Whitesides, 8 O. L. R. 622, and cases there cited.

I see no reason why the rule enunciated and applied in these cases should not obtain where proceedings are taken under the Fugitive Offenders Act.

Section 11 provides that "a fugitive when apprehended shall be brought before a magistrate, who, subject to the provisions of this Act, shall hear the case in the same manner and have the same jurisdiction and powers as nearly as may be, including the power to remand and admit to bail, as if the fugitive was charged with an offence committed within his jurisdiction."

Now, it is clear from the cases that have been referred to that a magistrate would have jurisdiction to commit for trial a person brought before him charged with an indictable offence, notwith-

standing that the person charged had been unlawfully apprehended; and, unless the qualification "subject to the provisions of this Act" makes it a condition precedent to the exercise by the magistrate of the jurisdiction conferred by the Act that the warrant mentioned in sec. 8 has been indorsed as provided by that section, the detention of the prisoner is not unlawful.

In my opinion, the qualification has no such effect. The purpose of it is manifestly to make the exercise of the jurisdiction and powers conferred by the section subject to what is provided in sec. 12, viz., that there is a warrant such as is mentioned in sec. 8; that it is duly authenticated; that the offence is one to which the Act applies; and that the evidence is of the character mentioned in sec. 12.

The provision of sec. 12 is not, "if the warrant be indorsed and duly authenticated," but "if the indorsed warrant . . . is duly authenticated," and the reference to it as an "indorsed warrant" is, I think, merely for the purpose of distinguishing it from the provisional warrant mentioned in secs. 9 and 10.

The result is that, in my opinion, the prisoner is lawfully detained, and he must be remanded.

It may be well, however, to say that a departure from the procedure prescribed by the Act may render the person who apprehends under a warrant which has not been indorsed, if it is not a provisional warrant, liable to an action for taking an illegal arrest, and it would be well, I think, if the attention of the police authorities were called to this.

DIVISIONAL COURT. NOVEMBER 21ST, 1910.

*RE HENDERSON ROLLER BEARINGS LIMITED.

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

Assignments and Preferences—Assignment for Benefit of Creditors—Goods Seized by Sheriff but not Sold—Interpleader—Claim of Assignee—Rights of Execution Creditors—Assignments and Preferences Act, 10 Edw. VII. ch. 64, sec. 14—Creditors' Relief Act, 9 Edw. VII. ch. 48, sec. 6, sub-sec. 4—Priorities—Lien of Interpleading Creditors.

Appeal by N. L. Martin, the claimant, as assignee for the benefit of creditors, from the order of CLUTE, J., ante 162.

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

A. H. F. Lefroy, K.C., for the appellant.

Grayson Smith, for Fowler and Eckardt.

J. G. O'Donoghue, for the Queen City Foundry Co.

L. F. Heyd, K.C., for Gregson.

R. J. Maclennan, for the Sheriff of Toronto.

MIDDLETON, J., referred to the Creditors' Relief Act, as passed in 1880, which contained no such provision as that now found in sec. 6, sub-secs. 4 and 5, of the revised Act of 1909. He next referred to the amendment made in 1887 (by 50 Vict. ch. 8, schedule), after the decisions in Reid v. Gowans, 13 A. R. 501, and Levy v. Davis, 12 P. R. 93. Then, to the amendment made in 1888 (by 51 Vict. ch. 11, sec. 1), which seemed to be in conflict with the earlier amendment. These amendments came before the Court of Appeal in Durrell v. Bank of Hamilton, 15 A. R. 500. He then referred to the amendment of 1893 (56 Vict. ch. 5, sec. 12), by which 51 Vict. ch. 11, sec. 1, was repealed, and in lieu thereof it was provided that sec. 4 (1) and (2) of R. S. O. 1887 ch. 65, the section providing for distribution among all creditors, should not apply to moneys realised upon the sale of property under an interpleader order, but, upon the determination of the interpleader issue in favour of the execution creditors, the money, whether in the sheriff's hands or in Court, should be distributed among the creditors contesting the adverse claim. . . .

These provisions were carried without material change into the revision of 1897; . . . and the right of the interpleading creditors now enmeshed in the provisions of the Act of 1909 (9 Edw. VII. ch. 48) is found to have its real origin in the amendment of 1893.

This right so conferred upon those by whose exertions the fund is made exigible must not be defeated by some other general provision, unless this can be said to be the will of the legislature clearly expressed.

I think that the special provisions in favour of interpleading creditors may well be regarded as an exception to the general law regarding the distribution of assets either under the Creditors' Relief Act or the Assignments Act.

The legislature, in view of the division of opinion in the Court of Appeal upon the question whether goods when sold under an interpleader order were really sold under the execution, or whether, when once an interpleader application was heard, some new and

independent jurisdiction attached, may well be assumed to have solved the question by this enactment, and can hardly be assumed to have intended to have merely added another factor to a problem which had been found incapable of solution.

The same result is reached by another process of reasoning. The sale to the American company was, as between the two concerns, valid. Atkinson's title as against the debtor's was perfectly good. Certain creditors, by the result of the interpleader, have been declared entitled to take this property in Atkinson's hands to answer their executions, and these executions have so attached, and, in language not strictly accurate, may be said to have so become a lien upon the goods.

When the company assigned to Martin, they had no title whatever to the goods, and, apart from the statutory right to be mentioned, he acquired no greater right than his assignors had. He cannot take from these execution creditors the right to follow these goods into the hands of Atkinson, the fraudulent grantee. The right of preference given by sec. 14 is a right to take the goods of the debtor free from the claim of the execution creditors against such goods.

The assignee has also had conferred upon him the statutory right, which the debtor could not give, of attacking transfers made by the debtor in fraud of creditors; but this does not enable him to take from creditors who had already obtained an advantage by an attack which had been carried on to completion, and had resulted in a judgment in their favour, carrying with it the right to exclude all creditors who had failed to come in and participate in the risk and expense.

If any point can be made of the fact that the sale directed by the interpleader order had, by consent of the creditors, and at the request of the claimant and debtors, been delayed till after the issue had been tried (I do not think it can), then the principle of Re Lake Superior Copper Co., Plummer's Case, 9 O. R. 277, may well be applied.

The appeal fails and should be dismissed with costs.

BOYD, C., agreed in the result, for reasons stated in writing.

LATCHFORD, J., also concurred.

BOYD, C. NOVEMBER 23RD, 1910.

* FARQUHARSON v. BARNARD ARGUE ROTH STEARNS OIL AND GAS CO.

Deed—Construction—Conveyance of Land in Fee Simple—Reservation—"Mines of Minerals"—"Springs of Oil"—Rock or Coal Oil—Natural Gas—Powers of Canada Company—Mining Powers—License—Right of Entry—Statute of Limitations—Evidence—Trespass—Costs.

An action for trespass to land.

C. H. Ritchie, K.C., for the plaintiff.

I. F. Hellmuth, K.C., for the defendants the Canada Company.

M. Wilson, K.C., and J. F. Edgar, for the other defendants.

BOYD, C.:—This is a test case to determine as between the Canada Company and the purchasers from that company what rights were reserved under a standard form of conveyance adopted by the company in disposing of lands in the oil region of Western Ontario. A typical instance has been selected in which the purchaser was Charles Farquharson (now dead and represented by the plaintiff), and the lands were the south half of lot 6 in the 8th concession of Tilbury East (100 acres), in the county of Kent. By deed of bargain and sale dated the 22nd January, 1867, and at the price of £112 10 0, this was conveyed in fee simple, with the reservation expressed and punctuated as follows: "Excepting and reserving to the said company all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress," etc., to the said company to search for, work, win or carry away the same and for this purpose to make and use all needful roads and other works doing no other unnecessary damage and making reasonable compensation for all damage actually occasioned.

By admissions it appears that the purchaser entered into possession and occupation, and he and those claiming under him have since occupied and cultivated the land.

In December, 1905, the Canada Company granted a license to the Alexandra Oil and Development Co., conferring power to pro-

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

spect and bore for mineral oil and natural gas upon the land in question and other adjoining lands. By the terms of the agreement it was provided that, in the event of oil or gas being found on the premises, a lease was to be issued by the Canada Company to the oil company or to those claiming under the last named company.

In the latter part of July, 1907, the oil company obtained oil in the north-west half of lot 6 in the 8th of Tilbury (being the north-west half of the lot of which the land in question forms the south-east half), and thereupon the Canada Company leased the whole of lot 6 to the oil company on the 3rd August, 1907, embracing all the mineral oil and natural gas, whether already discovered or not, lying or being in or under the lot, with liberty to enter, etc., and providing for a royalty to be paid to the Canada Company, and pursuant thereto the defendants entered upon the plaintiff's land against his will, and began to operate for oil and gas and to remove the same therefrom. This alleged trespass began on the 10th August, 1907, and subsequently continued, forming the present cause of action.

When the grant was made to Farquharson in 1867, there was no oil issuing from the ground on this lot, and between 1867 and the 10th August, 1907, there was no entry on the land by the Canada Company, or those claiming under that company, for the purpose of searching or boring for oil or gas—and the first drilling or mining of any kind done on the land was on the said 10th August, 1907. This closes the list of material facts admitted.

Some issues were raised and disposed of during the argument, and I now adhere to those rulings.

The first was that, as the Canada Company obtained its charter for the expressed purpose of purchasing, holding, improving, clearing, settling, and disposing of waste and other lands in the province of Upper Canada (granted in October, 1841), the company was not empowered to engage in the business of searching for, winning, and carrying away, selling or trafficking in, minerals, and that the exception and reservation contained in the Farquharson deed was inconsistent with the powers of the company, and is, therefore, null and void.

I thought it was not open to the purchaser, claiming under the grant of the company and having his locus standi in Court based thereon, to make this direct attack, whatever might be the rights of the Crown to intervene. But I thought, further, that there was no inconsistency, as the plaintiff had occupied, farmed, and cultivated the property without molestation for forty years, and that the exercise of the mining rights did not destroy the *solum*, though

it might somewhat impair the value—a consequence provided for by compensation. It also appeared to me proper enough for the company to reserve the mineral rights under the surface with a view of disposing of that part of what the company possessed to the best advantage, and at the same time disposing of the surface rights for agricultural purposes.

The record also raises the question of the right to enter for mineral exploration and excavation being barred by the Statutes of Limitations; but I regard this kind of subterranean property as not within the purview of those statutes—as the possession of the surface owner is not adverse to or inconsistent with the possession in law of the subjacent proprietor. See Hodgkinson v. Fletcher, 3 Douglas 31.

This clears the way to deal with the matters more strenuously argued, viz.: (1) whether the defendants have any rights to deal with oil not exposed in surface openings and to go below in search of it; and (2) whether the defendants have any right or claim in respect to natural gas.

This falls to be determined by the ascertainment of the real meaning of the language used in the reservation and exception, as understood by the parties at the time. The language is to be constructed according to its primary and natural signification, assisted by the light of co-existing circumstances, and also by oral or other testimony in the case of ambiguous or technical terms.

The punctuation in the printed form of deed is not to be neglected. It may be indicated thus:—

"All mines and quarries of metals and minerals,"
"And all springs of oil in and under the said land," } "whether already discovered or not"

The first clause may be abbreviated to "all mines of minerals." And the two kinds of things reserved are: (1) all mines of minerals; (2) all springs of oil. These "springs of oil," however, are expressed to be "in and under the land." "Mines of minerals" would per se imply that they were under the surface and to be got at by discovery or search before being worked or carried away. The same right of discovery and search, etc., would seem to apply also to the "springs of oil."

The parties manifestly intended to reserve something—what they did reserve is expressed by "mines of minerals" and "springs of oil."

And now the difficulty confronts us, what is meant by "mines of minerals" and by "springs of oil?" All that has been found

of mineral character under the land (so far as the evidence shews) is the rock oil and petroleum gas. . . .

[Reference to MacSwinney on Mines, 3rd ed. (1907), p. 10; Lord Halsbury's Laws of England (1908), vol. 3, p. 177; Lord Provost and Magistrates of Glasgow v. Farie, 13 App. Cas. 657, at p. 675; Encyc. of the Laws of England, 2nd ed. (1908), vol. 9, p. 237; Midland R. W. Co. v. Robinson, 15 App. Cas. 19, 26, 27.]

There is no doubt that these extensive beds or chambers containing rock oil and natural gas may be regarded as "mines of minerals," in the comprehensive sense of that term. . . .

[References to the testimony at the trial, the correspondence of the Canada Company, the history of the oil and gas development in Western Ontario, etc.]

The evidence given before me justifies the adoption of the excellent description of operating given in the judgment in Wettengel v. Gormley, 160 Pa. St. at p. 567: "It is well understood among oil operators that the fluid is found deposited in a porous sand-rock, at a distance ranging from 500 to 3,000 feet below the surface. This rock is saturated throughout its extent with oil, and when the hard stratum overlying it is pierced by the drill the oil and gas find vent, and are forced, by the pressure to which they are subject, into and through the well to the surface. After this pressure is relieved by the outflow, the wells become less active. The movement of the oil in the sand-rock grows sluggish, and it becomes necessary to pump the wells in order both to quicken the movement of oil from the surrounding rock, and to lift it from the chamber at the bottom of the well to the surface. An oil or gas well may thus draw its product from an indefinite distance, and in time exhaust a large space. Exact knowledge on the subject is not at present (1894) attainable, but the vagrant character of the mineral and the porous sand-rock in which it is found, and through which it moves, fully justify the general conclusion . . and have led to its general adoption by practical operators."

In the first stage of exploiting the petroleum fields, oil was the primary and indeed the sole object of search, and the gas with which it was charged was a negligible concomitant. The gas when liberated became the expansive power which raised the oil up to or towards the surface, and, having rendered that service, it was disregarded as undesirable and unmanageable. . . .

[Further references to the evidence, correspondence, etc.; also reference to Lewis v. Fothergill, L. R. 5 Ch. 111; Lord Rokeby v.

Elliot, 13 Ch. D. 277, 279; Thornton on Oil and Gas, p. 10; Genesis, ch. xxvi., v. 9; Tomlinson's Cyclopædia of Useful Arts (1886), vol. 3, p. 495; Brande and Cox's Dictionary of Science, new ed. (1866), p. 710; North British R. W. Co. v. Budhill Coal and Sandstone Co., [1910] A. C. 116, 126; Hext v. Gill, L. R. 7 Ch. 699, 719; MacSwinney on Mines (1907), pp. 16, 17.]

The present case will turn, not on the chemical or mineralogical signification of the terms used in the reservation, but on the meaning of them at the time as used by ordinary persons concerned with the subject, and especially as to the meaning understood and accepted by the parties. . . .

[Reference to the testimony of witnesses at the trial; also to Murray's Oxford Dict., "mine," "mineral;" Lord Provost and Magistrates of Glasgow v. Farie, 13 App. Cas. 657, 683, 689.]

The evidence in this case leads to the conclusion that neither oil nor gas in the petroleum beds was regarded as a mineral by the parties when the deed was executed in 1867. . . .

The conclusion of the whole matter is that, in my opinion, there is a valid reservation of all oil upon the lot, which is to be possessed and enjoyed by the defendants, but that there is no reservation of natural gas, which remains the property of the landowner.

There is no legal difficulty in allocating the different strata bearing gas and oil to different owners—no difficulty in making the legal distinction of ownership as to gas and oil in the same well—with this limitation, however, that where the well is distinctively an oil well, and the amount of gas merely a subsidiary concomitant, the gas element should be disregarded and the whole go under the reservation; and the like limitation as to a distinctively gas well, where the clear preponderance of gas should carry the whole well to the owner. There may be cases of mixed gas and oil where each has a commercial value and may be profitably worked by separate adjustments, as indicated in the evidence; in which cases it may be that mutual concessions will have to be made by the co-owners in order to the economic utilisation of the joint products. But this and other details, I understood, would be subject to arrangement between the parties if once respective rights were judicially determined. . . .

[Reference to Coniagas Mines Limited v. Town of Cobalt, 20 O. L. R. 622, remarks at p. 632, beginning, "The parties may find it to be to their mutual advantage to come to terms."] .

The defendants the mining parties should account for the net profits made for all gas obtained from this lot, and the Canada Company for all royalties from this source.

Success being divided, instead of an apportionment of costs, it is simpler to follow the usual plan of giving no costs to either side.

I have referred to the American cases cited and . . . to many others arising in the oil-producing States. Those from which I have derived most assistance are decisions very much in line with the method pursued in the Budhill case, viz.: Dunham v. Kirkpatrick, 110 Pa. St. 36; . . . Silver v. Bush, 213 Pa. St. 195; . . . McKinney v. Central, etc., Co., 134 Ky. 339; . . . Deer Lake Co. v. Michigan Gas Co., 89 Mich. 180; also Westmoreland Gas Co. v. Drewitt, 130 Pa. St. 235; Burton v. Forest Oil Co., 54 Atl. R. 267; Ohio Oil Co. v. Indiana, 177 U. S. 190; Wagner v. Malloy, 169 N. Y. 501. The case of . . . Murray v. Alldred, 10 Tenn. 100, is opposed to the weight of authority following Dunham v. Kirkpatrick.

DUNSMOOR v. NATIONAL PORTLAND CEMENT CO.—FALCONBRIDGE, C.J.K.B.—NOV. 19.

Railway—Injury to and Death of Person Crossing Track—Negligence—Evidence—Nonsuit — Findings of Jury—Liability of two Defendants.]—An action by the widow of John Colin Dunsmoor, late of the town of Durham, in the county of Grey, against the National Portland Cement Company and the Canadian Pacific Railway Company, to recover damages for the death of Dunsmoor by being run down by a locomotive engine which belonged to and was being operated by the cement company, on the line of the railway company, at a highway-crossing in the township of Bentinck. The Chief Justice said that, on the evidence adduced by the plaintiff, effect should not be given to the defendants' motion for a nonsuit; and, on the answers of the jury, the plaintiff was entitled to judgment against both defendants. I. B. Lucas, K.C., and Wallace, for the plaintiff. A. G. MacKay, K.C., for the cement company. Angus MacMurchy, K.C., for the railway company.

TAYLOR v. GRAND TRUNK R. W. Co.—DIVISIONAL COURT—NOV. 21.

Master and Servant—Injury to and Consequent Death of Servant—Railway—Brakesman—Negligent Order of Foreman—Cause of Injury—Finding of Jury — Conjecture—New Trial—Costs.]—Appeal by the defendants from the judgment of MACTAVISH, Co. C.J., sitting for MULOCK, C.J.Ex.D., on the findings of a jury, in favour of the plaintiff, in an action to recover damages for the death of Silas Taylor, a son of the plaintiff, who was a brakesman in the employment of the defendants, and was killed, while in the discharge of his duties in the defendants' yard at Madewaska, owing, as the plaintiff alleged, to the negligence of the defendants' servants. The jury found that the cause of the accident which resulted in the death of Silas Taylor was the negligence of the foreman, Kilfoyle, in ordering the deceased to climb to the top of a car while it was in motion, and acquitted the deceased of contributory negligence; and they assessed the damages at $500. There was, in the opinion of the Divisional Court (MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.), evidence that Kilfoyle was guilty of the negligence found by the jury; but the difficulty the Court saw in the way of the plaintiff, upon the evidence, was as to the connection between the negligent order and the accident. No witness was able to tell how the accident happened. The finding of the jury was based on mere conjecture, and was not a reasonable inference from the facts proved. There were, however, some matters mentioned by the witnesses which were not fully developed, and which, if more fully investigated, might have enabled an inference to be drawn in support of the theory that the accident happened while the deceased was in the act of getting on the car. While, upon the present evidence, the judgment could not stand, the ends of justice would be best served by directing a new trial, to enable the plaintiff to develope the matters referred to; but, as the granting of new trial was, in the circumstances, an indulgence to the plaintiff, the costs of the last trial and of the appeal should be costs to the defendants in any event of the action. D. L. McCarthy, K.C., for the defendants. J. R. Osborne, for the plaintiff.

DRAKE v. CADWELL—DIVISIONAL COURT—NOV. 22.

Contract—Work and Labour—Assertion of Substituted Contract—Evidence—Finding of Fact of Trial Judge—Reversal on

Appeal.]—Appeal by the plaintiff from the judgment of the County Court of Essex dismissing the action. Lorne & Son, contractors, of Windsor, agreed with the town corporation of Sandwich to construct a sewer from Bedford street in the town to the Pittsburg dock in the Detroit River, a distance of 1,600 feet, according to plans and specifications prepared by the town engineer. Part of the work undertaken, the outermost 75 feet, was sublet by Lorne & Son to the plaintiff. The price agreed upon for this outlet was $600. The plaintiff alleged that, after he began work, a new contract was made with Lorne & Son, involving an expenditure much in excess of $600, and that the defendant, who, as surety for Lorne & Son, was obliged to take over and complete their contract, was liable as a matter of law to the plaintiff for such excess. Upon the law the trial Judge held that the defendant was not liable; but, on the facts, he found that a second contract was made between the plaintiff and Lorne & Son. Upon the evidence, the Court (BOYD, C., LATCHFORD and MIDDLETON, JJ.) did not agree with the finding of fact of the trial Judge, but were of opinion that there was no new agreement, and that the defendant was, upon that ground entitled to have the action dismissed. Per BOYD, C.:—The Court will not readily interfere with the conclusion of a Judge based upon facts and pronounced after seeing and hearing the witnesses, but the power exists and is to be exercised in proper cases. This is such a case. The evidence of the plaintiff is overborne by the weight of evidence opposed to him. Appeal dismissed with costs. E. S. Wigle, K.C., for the plaintiff. A. H. Clarke, K.C., for the defendant.

RE WILSON—MIDDLETON, J.—NOV. 24.

Will — Construction — Period of Distribution of Moneys in Hands of Executors—Death of Annuitant.]—Motion under Con. Rule 938 for an order determining a question arising under the will of C. S. Wilson, by which the executors were required to retain sufficient to answer the growing payments of the widow's annuity. They were not directed to retain sufficient capital to enable this to be paid out of the income. All the estate not required to meet the annuity became divisible at the expiry of twelve years from the testator's decease. MIDDLETON, J., said that, as the 25 years had elapsed, there was no reason why any money in the executors' hands should not now be divided. The provision as to division

upon the death of the widow only applied to the money in the executors' hands to answer her annuity, and which would be payable to her as annuity, but which, by reason of her death during the twenty-five years,was not needed for that purpose. It had no application to any other part of the estate. Declaration accordingly; costs out of the estate; infants' shares to go into Court. F. C. Snider, for the applicant. F. W. Harcourt, K.C., for the infants.