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DIVISIONAL COURT.

DIAMOND HARROW CO. v. STONE.

Appeal—County Court—Final Order—Dismissal of Action for Want of Prosecution—Rule 435—Application, where Action Brought down to Trial and New Trial Ordered.

Appeal by plaintiffs from order of junior Judge of County Court of Essex directing plaintiffs to proceed to trial with a jury at the jury sittings of the County Court to be held on 11th June, 1901, and in default that the action should stand dismissed with costs.

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

J. H. Moss, for defendant, objected that an appeal did not lie from such an order, and opposed the appeal on the merits.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.), was delivered by

MEREDITH, C.J.:—This is an appeal from an order of the junior Judge of the County Court of Essex, by which plaintiffs were required to set the action down for trial for the then ensuing sittings of the County Court of that county, in default of which his action was to be dismissed.

Upon the appeal being opened, Mr. Moss, for the respondent, objected that no appeal lies. That question was argued and the appeal was heard on the merits subject to it.

We have come to the conclusion that an appeal does lie. The provisions of the County Courts Act, R. S. O. 1897 ch. 55, which are applicable to appeals, are secs. 61 and 62.

The latter part of sec. 62 is that under which the appellants contend that the order is an appealable one. That gives an appeal to a Divisional Court from any decision or order made in any cause or matter disposing of any right or claim, provided always that the decision or order is in its nature final and not merely interlocutory.

We think that this order did dispose of the claim of the plaintiffs, and that it was final in its nature. It is true that it was not conclusive as to the rights of the parties and did not prevent plaintiffs from bringing another action, but it did dispose of their claim in this action and put an end to it entirely, unless plaintiffs should be advised to bring and should bring another action.

The words that I have read are: "A decision or order made in any cause or matter disposing of any right or claim." It seems to me that this order did dispose of a right claimed in this action and of the claim made in this action, and that it was final for the purpose of this action.

The conclusion, therefore, to which we have come is that the appeal lies.

Then with regard to the merits. There is no pretence for saying that plaintiffs were not bona fide prosecuting this action. They brought the action down to trial and a verdict passed in favour of defendant. An application was made for a new trial to the senior Judge of the County Court, and he came to the conclusion that there had been a mistrial, and directed a new trial. The order was made some time about the middle of May. The next sittings of the County Court were upon the second Tuesday in the following month of June.

Plaintiffs made application to the senior Judge to strike out the jury notice, and that motion was pending when the application which resulted in the order appealed from was made to the junior Judge.

It seems somewhat singular that, in view of the fact that a motion was pending before the senior Judge, the junior Judge should have dealt with this motion. One would have thought that the more reasonable course would have been to have referred the matter to the senior Judge or to have

awaited his decision. It is quite true, as Mr. Moss pointed out, that, whether the jury notice was struck out or not, the County Court sittings was one at which the action could be tried; still that does not, in my view, made it less undesirable that the junior Judge should have taken the course that he did.

What he appears to have done was, although only two weeks had passed, although there had been no want of good faith in prosecuting the action on the part of plaintiffs, to make a peremptory order to go down to the sittings, not knowing at that time whether the action should be tried with or without a jury, and that in default of his doing so his action should be dismissed.

It may be sufficient for the disposition of this appeal to say that we think that the Judge did not exercise a judicial discretion in making the order which is appealed from, and on that ground the appeal might be allowed, but, in my opinion, the case was not one coming within the Rule which was applied by the learned Judge.

The Rule which was invoked by the respondent was Rule 433, which reads as follows:

"Except in the cases provided for by Rule 434, if the pleadings are closed six weeks before the commencement of any sittings of the High Court for which the plaintiff might give notice of trial, and he does not give notice of trial therefor (or if the plaintiff has given notice of trial but does not proceed to trial pursuant to such notice), the action may be dismissed for want of prosecution."

The learned editors of the book of Practice, Holmested and Langton, express in a note to that Rule the opinion that an Irish case of Foott v. Benn, in which it was held that where there had been, as there was in this case, a trial, the Rule did not apply, is not applicable in Ontario, in view of Rules 3, 433, and 530.

We do not agree in that view, and think that the Irish case was well decided. That case is reported in 16 L. R. Ir. at p. 247. The head-note is as follows—"An action, in which the place of trial was out of Dublin, was tried at the spring assizes, 1883, when a verdict was directed for the defendant. This verdict was set aside on the ground of misdirection, and a second trial took place at the spring assizes, 1884, resulting in a verdict directed for the plaintiff, which

was also set aside, and a third trial ordered in the Michaelmas sittings, 1883. The plaintiff not having served notice of trial for the next ensuing assizes, the defendant moved to dismiss the action for want of prosecution, contending that the case fell within G. O. XXXV., Rules 2, 4. The Court refused the motion. Semble, the only remedy open to a defendant under such circumstances is trial by proviso under the old practice."

It is quite clear that under the Common Law Procedure Act, which contained a somewhat similar provision, fixing the time, however, by so many terms, which was the method of computing time then, the defendant might give a notice requiring the plaintiff to proceed to trial,—give notice of trial within 20 days, in default of which judgment might be entered dismissing the action.

It was held in a number of cases while that Act was in force, and under the English Act which corresponded to it, that where the plaintiff had once taken his case down to trial and the verdict which was rendered had been set aside, the Rule did not apply to compel him, subject to the penalty of having his action dismissed, to proceed to trial at the next Court for which he could properly give notice of trial.

There is a case which at first sight would seem to be in favour of the view that the Rule is applicable.

I should have observed that the Rules are not precisely the same in Ireland, and that the provisions of the Common Law Procedure Act were still in force there, except in so far as they were varied by the Judicature Act, and to that extent the case differs from this.

The case of Robarts v. French is cited in Holmested and Langton's book—a decision of the Court of Appeal. There there had been a trial, and a new trial had been ordered by the Court of Appeal. A motion was made to that Court to dismiss the action because the plaintiff had not proceeded to trial. The Court determined that it had no jurisdiction, and that the proper forum to which to apply was the Master in Chambers or a Judge in Chambers; but there is no opinion expressed at all as to whether the order could be made or whether the Rule could be invoked in a case of that kind. Indeed, Lord Justice Lindley, in the few remarks which he made at the close of the case, guards himself, I think, against any such view. He says: "I think there is no doubt that this

is a motion to be dealt with in Chambers. The order for a new trial which was made to this Court had nothing to do with the question whether the defendant is entitled by what has happened subsequently to have the action dismissed. If the Master has power to dismiss the action, or to let the action go on, his exercise of it will not interfere in any way with the order of this Court."

The editor of this series of reports, in a note to the case, expressed this opinion: "Before the Judicature Acts, if the plaintiff did not proceed to trial after a rule for a new trial had been made absolute, the defendant could not have judgment for not proceeding to trial (see Day v. Day, 1 M. & W. 39, 5 L. J. Exch. 142, 4 D. P. C. 740; King v. Pippett, 1 T. R. 492; Earl of Harborough v. Shardlow, 8 M. & W. 265, 10 L. J. Exch. 245); and it would seem that this has not been altered by the Judicature Acts or Rules, and that the defendant's only course is, if he desires a judgment to be entered, to himself give notice of trial."

I think, apart from authority, that is the conclusion to which I should have arrived, because the plain reading of the section leads to this conclusion, that when once the plaintiff has complied with the Rule, the 6 weeks having elapsed, by setting the case down for trial and proceeding to trial, the Rule no longer has application.

The provision which I have read is that where the pleadings are closed 6 weeks, or, to paraphrase the Rule, it is: After the pleadings are closed 6 weeks, the plaintiff is bound to bring his case down to trial at the first sittings at which it can be tried according to the practice of the Court.

The plaintiffs here did that, and when they had done it, it seems to me the operation of the Rule as to the case is exhausted.

I may refer to another Irish case, which is mentioned in Drummond and Smith's Judicature Acts, Ireland, p. 442, where it is said: "In Joyce-Townsley Company v. Boyle, the action having gone to trial at nisi prius, the jury disagreed. The plaintiff not having served a second notice of trial, the defendant moved, before the Exchequer Division, for an order to dismiss the action for want of prosecution, and the application was refused with costs. The defendant appealed from this order, and the Court of Appeal affirmed the decision of the Exchequer Division. This decision puts

an end to the difficulty in the application of this Rule to the case of a second trial or a new trial, arising from the conflict of previous decisions of the Judges of the Queen's Bench and Common Pleas Divisions on the one hand, and the Exchequer Division on the other."

The result therefore is that the appeal must be allowed, with costs, and the order appealed from must be discharged with costs.

HODGINS, LOCAL JUDGE IN ADMIRALTY. APRIL 25TH, 1906.

EXCHEQUER COURT IN ADMIRALTY.

ST. CLAIR NAVIGATION CO. v. THE "D. C. WHITNEY."

Ship—Collision—Damages—Assessment by Registrar—Items of Damage—Use of Pump—Services of Tug—Surveyors' Report—Salvage Charges—Value of Ship—Cost of Repairs—Appeal—Costs.

Appeal by the owners of the defendant ship from the report of the deputy registrar at Windsor allowing the sum of $3,751.35 as the amount of the damages to which plaintiffs were entitled for the collision and sinking of the schooner "Monguagon" in Sandusky harbour on 28th November, 1901.

W. D. McPherson, for appellants.

J. W. Hanna, Windsor, for plaintiffs.

THE LOCAL JUDGE:—Several of the questions argued are not specifically set forth in the notice of appeal.

1. Use of pump. It appears that while the pump was being used for pumping the water out of the sunken schooner "Monguagon," a coupling-pin got into the suction and broke the pump. For this the owner of the pump made a deduction of one day for the time the pump was not available or working. The evidence as to this appears on p. 164, in which Captain Pope gives extracts from his log: "December 1st. We got schooner nearly pumped out, and broke pump. Vessel sank again. 2nd. Took coal off the deck of schooner,

and put it in Str. 'T. W. Snook,' getting pump fixed up. 3rd. Didn't get to pumping until afternoon; got her pumped out. 4th. Taking coal off and pumping all day." The time lost was estimated at 12 hours, but, as the first day's pumping became useless by the stoppage of the pump and the sinking again of the "Monguagon," and as it was not until the afternoon of the third day that the pump was sufficiently repaired to allow the pumping to be commenced again, I think the deduction for the lost time should have been two and one-half days, instead of one day; and therefore I deduct the expenses for one day and one-half day of the charge for the pump and for the time of the men operating it, which deduction I find amounts to $64.50.

2. The services rendered by the tug "Cadillac." This tug was used to assist in steering the "Monguagon" from Sandusky to Detroit, her rudder having been broken by the collision. The evidence as to this is as follows: "Q. Was it necessary to have another boat in towing her across the lake? A. Yes, sir. Q. What boat was engaged? A. The tug 'Cadillac.'" The evidence further states that while the "Monguagon" was going along nicely, two steamers pulling her, "she took a sheer and parted the line, and one had then to go back and steer her." I think this charge was properly allowed: see The "Inflexible," Swab. 200.

3. The charge for the surveyors' report. In Sawyer v. Oakman, 7 Blach. at p. 306, Woodruff, J., said: "Such surveys are customary; often quite necessary as a safe guide to the conduct of the owners, and often quite important in reference to the relations of owners to insurers, and to regulate the conduct of master or owner in respect to any attempt to repair where it is apprehended that the cost of repairs will exceed the value of the vessel when repaired; and when the question of abandonment is presented to the owners. Such expenses are constantly allowed, as against insurers, and surely a tort-feasor stands in no more favourable position." See, further, The "City of Chester," 34 Fed. R. 429, and The "Alaska," 44 Fed. R. 498. This charge was therefore properly allowed.

4. Salvage charges. In Marsden on Collisions, it is stated that "if the injured ship sinks in consequence of the collision, the expense of raising and docking her are recoverable as damages:" p. 119. Spencer on Collisions concurs that "salvage expenses incurred by an injured vessel in being

rescued from the perils resulting from the negligent acts of another . . . are properly chargeable as damages against the offending vessel."

"The principles on which the Court of Admiralty proceeds lead to a liberal remuneration in salvage cases, for they look not merely to the exact quantum of service performed in the case itself, but to the general interest of the navigation and commerce of the country, which are greatly protected by exertions of this nature:" per Lord Stowell in The "William Beckford," 3 C. Rob. 355. See also The "Narragansett," Olcott 388.

5. Value of the ship "Monguagon." This reason of appeal alleges that "the value of the 'Monguagon' at the time of the collision could not have exceeded $2,500, as that is the amount at which she was valued by Mr. William Morris, a witness on behalf of the plaintiffs, at the beginning of that season, and her value at the end of the season would not exceed that amount, but would be less than that amount by the wear and tear of the season's operations, and the measure of damages in case of partial loss would not exceed the measure of damages as for a total loss."

The witness referred to was called by the plaintiffs to prove the survey made by himself and another, and the value of the "Monguagon" in her damaged condition—which they placed at $2,000. They estimated the probable cost of the repairs at $1,903, but the actual cost was $1,610.79—which "was just as reasonable a job as he (Morris) had ever seen done." On cross-examination he placed the value of the "Monguagon" before the collision at $2,500, adding: "It was pretty low, because you have to take her value off her when there is a chance, but he considered it was a fair valuation." On re-examination he stated: "Q. What was the object of keeping it low for the owners, what is the object of that? A.—One object is paying taxes in certain places, and another object is in case of general average, and if the schooner is a very high class, why she would have to pay more general average." The other estimates of value were: Captain May, from $3,000 to $3,500; Leonard, $4,500; and Kunna, somewhere near $4,000 and $4,500—each basing his estimate of value on her earning power.

In arriving on this evidence at a fair estimate of the value of the "Monguagon," at the time of the collision, I think the

view expressed by Boyd, C., in Munsie v. Lindsay, 11 O. R. at p. 526, should guide: "It is not as a general thing the best rule, in cases of varying opinion as to value, to reject one set of witnesses in toto, and to adopt the figures of an opposing set. One might rather suspect that neither was exactly to be followed, and that truth lay somewhere between the extremes. The very fact that juries arrive at values by some such path of compromise, indicates that it commends itself to the ordinary mind as a rough and ready mode of solving a difficult question. And even legally trained intellects have resorted to this expedient in despair of finding any more precise method of arriving at a conclusion. I recall the language of Sir Anthony Hart in Scott v. Dunbar, 1 Moll. at p. 457, where he says: 'There is nothing which raises such difference of opinion as the value of land. Surveyors vary so widely that I know of no mode less unsatisfactory than the rough approximation by taking a mean of all their estimates.' A like method of arriving at the average was adopted by Lord Lyndhurst, and is worked out by him in Botts v. Curtis, Younge R. at pp. 555 and 559." Adopting this method in estimating the value of the "Monguagon" at the time of the collision, the lowest average would give $3,500, and the highest average $3,875, or adding these two results together and dividing by two, they give a mean average of $3,687.

6. Another reason of appeal is that "the amount claimed by the plaintiffs, the St. Clair Navigation Company, by reason of the collision in question, was filed at $4,280.25, and has been allowed at $3,751.35, which is very much in excess of the damages sustained by the plaintiffs, the St. Clair Navigation Company, for which the ship 'Whitney' should be liable." This reason of appeal includes in concrete form the several objections discussed and disposed of under the preceding heads 1 to 4.

It also brings up the contention that the allowance of damages to the extent of $3,751.35 (which I have reduced by $64.50, making them $3,686.85) violates the rule recognized in The "Empress Eugenie," Lush. 138, that the cost of the repairs allowed as damages to an injured vessel should never exceed the estimated value of such vessel at the time of the collision. In that case, as in this, there was a conflict of evidence as to the estimated value of the damaged ship. The plaintiff's value was from £675 to £800; the defendant's value was from £450 to £470. The Court found

the value to be £650. The plaintiff's claim for damages was £1,534 13s., but the Court allowed as damages, which included repairs, salvage, dock dues, agency, and charges in regard to cargo, the sum of £723 8s. 7d.

In this case, while all the damages have been assessed at $3,751.35 (less $64.50), the sum of $2,344.88 has been allowed for repairs; and the balance ($1,776.59, less $64.50), $1,712.09, is allowed for salvage, towage, survey, and other charges. So, whether the estimated value of the "Monguagon" is placed at any of the averages warranted by the evidence, the rule of law as to "repairs" recognized in The "Empress Eugenie" (supra) has not been infringed.

The charges properly allowable as damages in collision cases are tersely stated in Desty on Shipping and Admiralty, par. 397, and more fully in Marsden on Collisions, 3rd ed., pp. 110-124. And as to the allowance for repairs, the Cyclopædia of Law and Procedure thus states the rule—subject of course to the limitation as to the value of the ship: "The owner of a ship wrongfully injured in a collision, is entitled to have her fully and completely repaired; and if the necessary consequence of this is that the value of the ship is increased, so that the owner receives more than an indemnity for his loss, he is entitled to that benefit. No deduction is made from the damages recoverable on account of the increased value of the ship, or the substitution of new for old materials." (7 Cyc. 392). See also The "Pactolus," Swab. 173, and The "Providence," 98 Fed. R. 133.

The district registrar will re-apportion the reduced amount of salvage and towage charges, $1,712.09, among the contributory interests entitled to general average, and also compute the interest from 28th November, 1901, at 5 per cent. on the damages allowed, $3,686.85.

As to costs of the appeal, I think the rule adopted by Dr. Lushington in The "Black Prince," Lush. 568, that the costs of an appeal from the registrar should follow the result, and not depend upon the proportion of the plaintiff's original claim which has been partly disallowed, should govern here. The plaintiffs will therefore be entitled to their costs of this appeal.

CARTWRIGHT, MASTER. APRIL 30TH, 1906.

CHAMBERS.

HART v. HUTCHESON.

Pleading—Statement of Claim—Motion to Strike out—Embarrassment—Irrelevancy—Prayer for Relief—Damages—Parties—Company.

Motion by defendants to strike out parts of the statement of claim as being irrelevant and embarrassing and intended to prejudice a fair trial.

John A. Ferguson, for defendants.

Casey Wood, for plaintiffs.

THE MASTER:—The action is brought by plaintiffs on behalf of themselves and the other shareholders (except the individual defendants), against those defendants and the company. The plaintiffs ask: (1) an injunction restraining defendants from issuing stock without the authority of the directors; (2) to prevent defendants from voting on certain stock which it is alleged has been illegally issued; (3) to have the same cancelled; (4) to have the books of the company rectified accordingly; and (5) "damages from the said defendant," costs, and further relief.

The paragraphs attacked do not seem objectionable in view of such cases as Millington v. Loring, 6 Q. B. D. 191. They are only historical statements of what led up to the transactions complained of, or else are statements of fact of which plaintiffs can give evidence at the trial.

So far therefore as the grounds on which the motion was based are concerned, it cannot succeed.

I think, however, that the statement of claim must be amended so far as the 5th clause of the prayer for relief is concerned. It does not appear from which defendant the damages are claimed—grammatically it would seem to be the company—which is impossible. It may be safely assumed that the personal defendants are those intended. This, however, should be made clear. Defendants are not called on to spell out the plaintiffs' meaning. See per Moss, J.A., in

Dryden v. Smith, 18 P. R. 505, at p. 512. At present it is made clear on what ground damages are claimed. The plaintiffs will do well to consider if this should not be rectified.

Plaintiffs should also consider whether the action in its present form can stand as an action brought for the benefit of the company, who are defendants. There should be allegations such as were found in Mason v. Harris, 11 Ch. D. 98, that the defendants have control of the company, and so the company have to be made defendants. This was followed and approved in International Wrecking Co. v. Murphy, 12 P. R. 423, by Street, J. Such an objection can only be taken by way of demurrer, and is not within the jurisdiction of the Master in Chambers. But it may save time and trouble later on to have this made plain now. It is, no doubt, hinted in the opening words of paragraph 7: "For the purpose of securing control of the defendant company . . . the defendant H. (irregularly and unlawfully) caused his own name to be entered upon the books of the company as the owner of $500 of preferred stock." And in the 6th paragraph it further says that "said defendant Hutcheson (irregularly and unlawfully) entered upon the books of the company the firm of the defendants H. & H. as owners of the whole of the unissued common stock, $3,000 in value." But there is no allegation that the defendants did in this way obtain control of the company . . .

The order will, therefore, go that plaintiffs amend their statement of claim in respect of the 5th clause of the prayer for relief and otherwise as they may be advised. The defendants must have a week in which to deliver their statement of defence. But, as the motion has been successful on a ground not taken in the notice, the costs will be in the cause.

APRIL 30TH, 1906.

DIVISIONAL COURT.

GIGNAC v. CITY OF TORONTO.

Way—Non-repair of Highway—Sidewalk—Injury to Pedestrian—Municipal Corporation — Negligence—Inspection —Notice—Indemnity or Relief over.

Appeal by defendants from judgment of BRITTON, J., at the trial, in favour of plaintiffs in an action for damages

for personal injuries sustained by plaintiff Flora Gignac by reason of a fall upon a sidewalk on the south side of Queen street, immediately west of Yonge street, in the city of Toronto, owing, as alleged, to defendants' negligence in permitting the sidewalk to be out of repair, and expenses incurred by the other plaintiff, her husband, by reason of the injury.

J. S. Fullerton, K.C., and F. R. MacKelcan, for defendants.

H. E. Rose, for Kelly, a third party.

J. M. Godfrey, for plaintiffs.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—The defendants are charged with the statutory duty of keeping streets and walks in repair, and have power to appoint overseers or inspectors to see that due care is taken in preventing or removing obstructions to traffic, etc.: sec. 537 of Municipal Act, 1903. The duty is a somewhat exacting one in places where there is continuous thronged and often congested travel by pedestrians, such as the site of the present accident at Knox church, near the corner of Queen and Yonge streets. For the removal of débris from the building being demolished, defendant Kelly (who had the contract) did his teaming over the granolithic pavement or sidewalk, and to protect the walk he laid down loose planks parallel with the street, which were kept in position and flush with the walk by a strap of hoop iron across each end, 18 inches from the end and fastened by nails to the planks. The strap had worked loose, making a space between the plank and the band, in which plaintiff's foot or toe caught, and she was flung to the ground. This was between 8 and 9 in the morning of 26th August. The place is within a short distance of the street commissioner's office; from 10 to 20 city officials passed over the place every day, and policemen were passing over it every 7 minutes—says Kelly. It was so planked and fastened with a strip of hoop iron 1-8 of an inch thick, kept in place by round nails, and by teaming over the planks they would be moved back and forth so as to raise the strip now and again at intervals, particularly at the outside of the planks. It was there from about the first week in August, 3 weeks before the accident, and it was seen by

plaintiff's husband raised in this manner twice, some inches, on different days and 2 weeks or more before his wife fell. The accident, no doubt, occurred from want of secure fastenings of the keepers or strips on the planks. After it worked loose, it would be nailed down again by the workmen. This was done "on different occasions," as Kelly says, "at different times." The planks were two-inch planks . . . and Kelly says that plaintiff's foot tripped on the edge of the plank, and not by reason of the strip being loose—but that is negatived by the findings of the Court. Just after the accident defendants prove that some nails projecting about ⅜ of an inch were nailed down to fasten the strip—the same nails being hammered down with a brick. This method of driving in the same nails in the same place as they got loose would probably result in less grip being obtained each time, and would suggest that a more secure plan of fastening the strip by nails and bolts should have been adopted.

The evidence shews that there was recurring want of repair in the use of the nailed strip as applied to the planks, and when the strip was loose and raised up it would be a most dangerous trap for the unwary and unwarned passer-by. Vigilant observation by the city officer would have disclosed the danger, and no officer is called to say that any attention was given to the place. The normal condition of the sidewalk was disturbed, and it is a primary duty of the municipality to see that in its altered state it is kept in proper repair—at this busy and much frequented place it should have been kept in excellent repair. It seems to have depended very much on how each team was driven over it as to whether the strap would be close to the planks or be more or less raised up. Proper inspection would have insured a more permanent method of making the imposed planks steady and level—so as to withstand displacement by the wear and tear of the loaded teams constantly passing over.

The cases cited in the American Courts of Davis v. Corry City, 154 Pa. St. 598, and McGaffigan v. City of Boston, 149 Mass. 289, are illustrations of the general rule that sources of recurring and repeated danger on a street are to be watched and guarded against by the municipality—and that when the source of danger has existed for such a length of time in a crowded city street as two weeks or less, notice of

the want of repair and dangerous condition will be attributed to the authorities. . . .

[Reference to The Bearn, [1906] P. 48, 74, 75.]

Altogether I see no reason to interfere with the judgment imposing primary liability on the city with right of indemnity as against the contractor.

Appeal dismissed with costs.

MACLAREN, J.A. APRIL 30TH, 1906

C.A.—CHAMBERS.

McLEOD v. LAWSON.

Appeal—Increased Security for Costs—Exceptional Circumstances.

Motion by plaintiffs (respondents) for increased security from defendant Lawson (appellant) for costs of appeal to Court of Appeal from judgment of MABEE, J. (7 O. W. R. 519.)

R. M. McKay, J. B. Holden, and W. H. Irving, for respondents.

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

MACLAREN, J.A.:—The circumstances of this appeal are exceptional. There are 4 respondents, represented by different solicitors, who, it is said, will be represented by different counsel at the argument. The trial was an unusually long one, and it is probable that the argument in this Court will be equally long. In view of these facts and of the importance and variety of the interests involved, and as the appellant now has a judgment against him, it seems to me a proper case for increasing the amount of the payment into Court for security for costs. The appellant has paid in $200. He should pay in another $200, thus giving respondents the same amount of security as they would have in case he had given a bond. See Centaur Cycle Co. v. Hill, 4 O. L. R. 493, 1 O. W. R. 639.

CARTWRIGHT, MASTER. MAY 1ST, 1906.

CHAMBERS.

BARRY v. TORONTO AND NIAGARA POWER CO.

Discovery—Examination of Officer of Company—Senior Assistant Engineer—Chief Engineer a Defendant—Officer Put forward by Company.

Motion by defendant companies to set aside an appointment to examine Julian Thornley as an officer of theirs under Rule 439 (a).

J. H. Moss, for defendants.

W. E. Middleton, for plaintiffs.

THE MASTER:—The plaintiffs have joined as a defendant with the companies, their chief engineer, Mr. Value. They complain of his conduct in many important respects, and the first clause of their prayer for relief is "that the defendant Value may be declared to be disqualified from acting or certifying judicially or otherwise under the contract."

Mr. Value has put in a separate statement of defence of considerable length, denying the charges made against him.

It was argued in support of the motion that Value was the officer who should be examined for discovery. But this is expressly forbidden by Rule 191, and would render it easy to have him removed from the record. Such allegations however are made as, if proved, will not only justify his being made a defendant but require this to have been done.

If the plaintiffs wish to examine him as a party, they can do so, but at present they are not taking that course. Mr. Thornley was the "senior assistant engineer," as appears from an entry in Mr. Value's diary. It was under Mr. Thornley's joint supervision and direction that the works in question were carried on. The entries in his diary are said to be far more detailed than those in Mr. Value's diary.

It is easily understood that plaintiffs may desire to have the examination of Mr. Thornley in preference to that of Mr. Value. In any case they would naturally wish to hear what Mr. Thornley will say before Mr. Value has been examined. It might be difficult for him to contradict or impair the evidence of his superior.

But, however that may be, the language of Rule 439 (a) is plain. No doubt a corporation should put forward the most suitable officer for examination. But the other party would not be bound to accept their nominee. If they persisted in examining an officer other than the one suggested by the corporation, that might reasonably affect the disposition of costs. But serious injustice might be done if the right of examination for discovery was in any way to be regulated by the adverse party.

If I rightly understand the affidavit of defendants' solicitor of 23rd April, Mr. Value resigned in January last, and is no longer an officer of the defendants, and therefore is not examinable as such. If I am correct as to this, the main ground of the motion is taken away. Mr. Thornley has been appointed hydraulic construction engineer of the said company, and has been in chief authority over the construction works of the company at the Falls. This is so stated in the affidavit aforesaid, and is given as a reason why it would be very inconvenient to have him examined, and it is said it will cause serious loss to defendants if he is taken away from the works. This, however, plaintiffs agree to minimize by taking the examination after working hours.

The motion is novel and cannot succeed under the facts and the plain language of the Rules. It must, therefore, be dismissed with costs to plaintiffs in any event.

BRITTON, J. MAY 1ST, 1906.

CHAMBERS.

YEMEN v. MACKENZIE.

Land Titles Act—Appeal—Time—Registration of Caution—Registered Owner Attacking Mortgage — Determination of Invalidity of Mortgage by Local Master of Titles—Jurisdiction—Findings of Fact.

Appeal by plaintiff from order of local Master of Titles for Rainy River South Division, made on 18th December, 1905.

W. Proudfoot, K.C., for plaintiff.

Frank Ford, for defendants.

BRITTON, J.:—Alexander Mackenzie was the locatee of the north-west quarter of section 38 in the township of Shen-

stone, in the district of Rainy River. The former local Master of Titles at Kenora issued a certificate to Alexander Mackenzie, as the patentee of this land, which land was entered by the local Master in his register as parcel 49 for Rainy River South Division. At the time of the entry in favour of Mackenzie, there were executions on file in the local Master's office against the lands of Alexander Mackenzie and Angus Mackenzie. The certificate of title so issued expressed that these executions were an incumbrance against the land. That apparently was entirely unauthorized, because it appeared that the debts represented by the executions were incurred before the issue of the patent to Mackenzie, and so the land was not liable: see sec. 25 of R. S. O. 1897 ch. 29.

The date of Mackenzie's patent was 18th April, 1902.

On 10th July, 1903, plaintiff Yemen and one Lasking, who was a bailiff and conveyancer and notary, went to Mackenzie's residence, and procured from Mackenzie and his wife a charge or mortgage for $400, describing the land as parcel No. 49 south on the register of Rainy River South, and further describing the land as the north-west quarter of section 28.

On 12th July, 1903, an amended certificate of title was issued by the then local Master, shewing an absolute title in Alexander Mackenzie.

This charge or mortgage was not registered; reasons are assigned, not necessary now to consider.

On 5th October, 1903, Alexander Mackenzie and his wife filed a caution, No. 2520, being the one now in question.

I must assume that this caution, being by the then registered owner, was regularly filed under sec. 77 of the Act. On 11th July, 1904, there was registered, with the consent of the cautioners, and subject to the caution, a transfer from Alexander Mackenzie to his wife.

On 25th June the appellant, as mortgagee, applied under sec. 76 of the Act to terminate caution. A great deal of evidence was taken before the local Master and under the Act, and on 18th December, 1905, he decided that the mortgage was not good as against the wife, "as it was obtained without consideration, and that she had no independent advice, and that she signed ignorantly and under pressure."

From this decision the appeal is taken.

Objection was made to the appeal as not in time—the notice not having been served within 7 days, as required by Rule 78 (2) of the Land Titles Act. It was conceded that the notice was not in time, but Mr. Proudfoot contended (1) that the local Master had extended the time on 29th January, 1906, and (2) if paper signed by local Master on 29th January did not amount to an extension of time, the Court now has power to extend under Rule 78, and that further time ought to be allowed.

I am of opinion that the paper of 29th January did not grant further time for service of notice of appeal. That paper is merely the notification to the Court required by Rule 78, form 51. It does not appear that any application was made to the local Master for further time, or that there was any consideration or adjudication by him as to giving further time.

It is a case in which I think an extension of time should be given, and although a little in doubt as to my right under the Rule, no application having been made before the expiration of the 7 days, I grant an extension of sufficient time to permit this appeal to be taken.

Upon the merits the local Master has decided in favour of the wife, Annie Mackenzie, and against the validity of the mortgage to the appellant. I am not disposed to find fault with the findings of fact, but the question of the jurisdiction of the local Master to adjudicate as he has done is a serious one. No doubt, the Act gives very wide jurisdiction and very great power to the Master of Titles, and to the local Master in this case.

Upon reading the many clauses of the Act bearing upon this question, I decide in favour of such jurisdiction. No objection was taken to it in proceeding before the local Master. When an instrument is lodged for registration, and the Master finds a caution alleging that such instrument is invalid, he must either determine the question or refer it to the Court.

The mortgage which the appellant sets up and desires to have registered is one which in form was executed by the wife Annie Mackenzie, and she is now the registered owner of the land. Even with the registration of this mortgage, litigation would be necessary by the appellant to enable him to realize his money either by sale of the land or otherwise. If the local Master had in fact no jurisdiction, then what has

been done will be no bar to his action, should the appellant think proper to bring one to establish his mortgage. . . .

Appeal dismissed without costs.

ANGLIN, J. MAY 1ST, 1906.

TRIAL.

REX v. McAULIFFE.

Criminal Law—Procedure—Lost Indictment—Direction to Prefer New Indictment—Grand Jury—Return of True Bill—Refusal of Prisoner to Plead—Entry of Plea by Court—Conviction—Regularity.

Motion by prisoner for a reserved case.

Prisoner having been charged with murder, the grand jury for the county of Peterborough, at the autumn assizes in 1905, found a true bill for manslaughter against him, to which defendant pleaded not guilty. Owing to the absence of a material witness for the prosecution, the trial was traversed until the spring assizes of 1906. At the opening of the spring assizes, counsel for the Crown informed the presiding Judge that in the interval the indictment against the prisoner had been mislaid or lost, the circumstances rather indicating that it had been stolen, and asked the direction of the Court as to further proceedings.

ANGLIN, J., directed that a new indictment for manslaughter be preferred before the grand jury at the assizes then opening, that being, in his opinion, the proper course in the circumstances.

This was done, and the grand jury returned a true bill. The prisoner having through his counsel declined to plead, ANGLIN, J., directed that a plea of not guilty be entered for him under sec. 657 of the Criminal Code. The trial then proceeded, and the prisoner was convicted.

R. M. Dennistoun, Peterborough, and F. D. Kerr, Peterborough, for the prisoner, moved for a reserved case to determine the propriety of the direction to submit to the grand jury the new indictment and the validity of the conviction upon such indictment.

E. Meredith, K.C., for the Crown.

ANGLIN, J., refused the motion, stating that he had no doubt either as to the regularity or the sufficiency of the proceedings.

ANGLIN, J. APRIL 30TH, 1906.

TRIAL.

RUETSCH v. SPRY.

Deed — Description—Mistake—Reformation — Declaratory Judgment—Building on Land Conveyed—Registry Laws —Estoppel—Covenant—Costs.

Action for reformation of a deed and for a declaration of a right of way.

D. O'Connell, Peterborough, for plaintiff.

G. Edmison, K.C., for defendant.

ANGLIN, J.:—At the conclusion of the trial I indicated my views upon the principal questions of fact in issue between the parties, my acceptance of the version of the transactions involved given by plaintiff and his wife, and rejection of that of defendant wherever it conflicted with the evidence given on behalf of plaintiff. While I have no doubt that the parties throughout were dealing with the entire house in question, and intended the one to buy and the other to sell that house in its entirety, and so much land as was necessary to give plaintiff a rectangular lot with frontage on Dalhousie street, and having as its westerly limit a straight line which should lie west of the extreme western point of the northernmost structure forming part of the building which he intended to purchase, I cannot say that the price paid was fixed without regard to the frontage which such a parallelogram would occupy. The fact that a price of $700 was fixed by defendant, when it was supposed that a frontage of 31 feet would carry the western limit of the parallelogram clear of the house, which he raised to $720 when he discovered that a greater frontage would be necessary to accomplish that purpose, and represented, not dishonestly but quite positively, to plaintiff that by increasing the frontage to 35 feet the purpose which both had in view, as above stated, would be

effectuated, shews that the extent of the frontage was a material element in the bargain. While plaintiff bought implicitly relying upon defendant's representation that the entire house stood upon the parallelogram of 35 x 74 feet described in the deed accepted by him, defendant did not understand that he bound himself to convey more than this quantity of land for the sum of $720. Both parties acted upon the belief, created by defendant, that the entire house stood within the limits particularly described in the conveyance given to plaintiff. In these circumstances, plaintiff has not, in my opinion, made out a case for reformation of his deed by altering the description which it contains, so as to make it include the additional strip of land, 4 feet and 2 inches in width, necessary to complete a lot in form such as the parties contemplated, and including all the land occupied by the building with which they intended to deal. It cannot, I think, be said that defendant intended to sell a plot of land 39 feet 2 inches in width for the sum of $720, and that by mutual mistake the land was erroneously described in the deed as having a width of only 35 feet. The existence of the basis upon which a decree for reformation might be pronounced has therefore not been established: McNeill v. Haines, 17 O. R. 479.

But, upon the true construction of the deed, it should, in my opinion, notwithstanding the definite description by metes and bounds which it contains, be held to include the two triangular pieces of land occupied by those portions of plaintiff's house which lie respectively to the west of the western boundary and to the north of the northern limit of the lands covered by the particular description. My reasons for this view are expressed in the judgment in Fraser v. Mutchmor, 8 O. L. R. 613, at pp. 615-7, 4 O. W. R. 290. See R. S. O. 1897 ch. 119, sec. 12.

An amendment seeking relief in the alternative upon this ground, in the form of a declaratory judgment, was asked and allowed at the trial. The letter written on behalf of defendant requiring the removal of the portions of the house upon the land in dispute and in default threatening proceedings to compel such removal, justified plaintiff's prayer for such relief.

Moreover, defendant, having by his express representation that a parallelogram of land having a frontage of 35 feet on Dalhousie street would include all the land covered by the

building which he purported to sell, led plaintiff to accept the conveyance which he took and to pay his purchase money, as he believed, for the entire house and the parcel of land which it occupied, and having in his deed covenanted with plaintiff for quiet possession of "the land and premises hereby conveyed or intended so to be," and released to him all claims upon "the lands and premises hereby granted or intended so to be," should be held estopped from asserting, as against plaintiff, that the building in question is not upon the lands conveyed.

No evidence was offered in support of the claim made in respect to the right of way. That part of plaintiff's action will therefore be dismissed.

The recent negotiations between the parties for the purchase by plaintiff of a strip of land 6 feet in width, did not result in any binding agreement. They serve, however, to indicate that defendant was only too ready to take advantage of the mistake into which he had led plaintiff, to drive a close bargain for the sale of some additional land. His conduct is not such as commends itself to me. Although the relief given plaintiff was not claimed by him except by the amendment allowed at the close of the trial, his right to that relief has been contested throughout, and, because of the shabby spirit in which defendant has acted, and the very doubtful honesty of some of his evidence, in the exercise of my discretion I allow to plaintiff his costs as of an action for the relief for which judgment is now given.

BOYD, C. MAY 1ST, 1906.

TRIAL.

HODGINS v. BANTING.

Medical Practitioner—Negligence—Malpractice—Evidence—Costs.

Action by a farmer against a physician and surgeon to recover damages for negligent and unskilful treatment of plaintiff in setting a broken leg.

T. G. Meredith, K.C., for plaintiff.

W. MacDiarmid, Lucan, for defendant.

BOYD, C.:—The complaint of plaintiff, as presented by the particulars, is thus set forth, that defendant failed to employ the ordinary and usual skill of a medical practitioner "in setting and treating a fracture of both bones of the lower part of the plaintiff's leg, and in permitting the overriding and overlapping of the two bones and the shortening of the plaintiff's said leg."

According to the now general rule recognized in Town v. Archer, 4 O. L. R. 383, 1 O. W. R. 391, in charges of medical malpractice, when facts are not so much in dispute as the declarations of skilled witnesses upon the method of treatment disclosed by those facts, I directed that the jury should be dispensed with, and the case was tried without a jury. Upon the close of the evidence and after hearing counsel for plaintiff, I expressed my opinion as being adverse to his success, but withheld the final dispositions of the trial till I had further considered all the evidence. Further reflection confirms my original opinion.

There is no complaint of any error in diagnosis—what is relied on by the plaintiff is want of competent skill of treatment. The unfortunate result in this case of a somewhat shortened leg and a slightly everted foot cannot be invoked as sufficient evidence of neglect on the doctrine of res ipsa loquitur. For it is well ascertained both in books of authority cited and in the oral evidence that it is a very common result of fractures that some deformity will result even with the most skilled treatment of modern surgery. One of the experts called for plaintiff, Dr. McEachren, said the shortening, in this case about half an inch, is very near the average, and that in his opinion it should be regarded as a fairly good result.

His criticism was chiefly addressed to the placing of the foot by the plaintiff in its natural position on the foot-rest attached to the posterior splint, and he maintained that the proped method was to adjust it with an inverted position so as to overcome the usual result of an everted foot in such fractures. But therein I think he stood alone; the others who spoke upon this detail justified the practice of the defendant. Many of the doctors favoured the use of lateral splints, but the absence of them in this case was not condemned by the great majority of all who were called. The evidence altogether, to my mind, shewed that in country practice the surgeon, possessing reasonable skill, can safely

extemporize what he deems to be a suitable method of treatment for the particular case in hand, and that he is not to be condemned because somebody else of perhaps equal skill would have pursued another course. There was no lack of care and attention on the part of the defendant, and I cannot put my finger upon any piece of negligence or ignorance in his method of treatment which could be classed under the head of malpractice.

I am disposed to withhold costs in this case, influenced by several considerations: in my discretion I took away the trial by jury on which plaintiff probably relied; plaintiff was advised by two local practitioners that the impaired condition of his leg at the close of defendant's treatment was attributable to some want of skill therein, and honestly proceeded upon that advice, and defendant is backed by an association of fellow practitioners organized as a medical protection society, who take up proper cases free of expense to the doctor who is sued. I do not question the propriety of such a combination; it is sanctioned by English precedent; but in a case of honest belief that injury has been done, and where medical opinions differ as to the propriety of the treatment, it seems hard to cast the costs of unsuccessful litigation with the association upon the individual who is burdened with the deformity after he had paid for and expected a better result.

The action is, therefore, dismissed without costs; if the proper fees of the defendant for his treatment have not been yet paid, they should be paid, as a condition of the plaintiff being relieved from the costs.

MAY 1ST, 1906.

DIVISIONAL COURT.

METALLIC ROOFING CO. OF CANADA v. JOSE.

Trade Union—Conspiracy—Injuring Plaintiffs' Trade—Evidence—Damages—Injunction—Picketting.

Appeal by defendants from judgment of MACMAHON, J., of 10th November, 1905, after trial with a special jury, in

favour of plaintiffs for the recovery of $7,500 damages and an injunction in respect of a conspiracy by defendants, as members of a trade union. This was the same action in which the Court of Appeal (9 O. L. R. 171, 5 O. W. R. 95) disposed of the question of service and representation of parties, although then known as Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association.

W. R. Riddell, K.C., and J. G. O'Donoghue, for defendants.

Strachan Johnston and W. N. Tilley, for plaintiffs.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—The evidence shews that the origin of this trouble arose in the disagreement between the plaintiffs and Local Union 30 (having over 100 members) about one clause in an agreement "negatived" by the union, which plaintiffs refused to sign. The effect of the objectionable clause was one which would confine plaintiffs to the employment of union labour men only, excluding those not in the union. The plaintiffs had the right to refuse to impose such restrictions on their trade, and the whole object of what followed on the part of defendants was to compel plaintiffs to submit to the terms of the local union.

The evidence shews that plaintiffs had union and non-union men working together in the cornice department of their business (the branch in question), 10 in all, of whom 2 were non-union. These men were content and satisfied with their situation, with their wages and hours of work, and no dispute existed because of some being union and others non-union. The workmen of plaintiffs were passive till set in motion by the active procurement of the union and defendants, its officers.

The first letter pertinent to the litigation was written 19th July, 1902, from the secretary of the local (Chapman, defendant) to Bray, secretary of the International Association, defendants. This International appears to be a composite of local unions situate in numerous cities of the United States and Canada. This letter states (sending copy of agreement) that all employers in the city have signed except three. "We control all the men in those shops that refuse to sign, and

these men stand ready to stop work at the call of the executive board." (i.e., of the International) . . . "In order to get time for a reply from the executive board we have given two weeks' grace and by that time we expect to know what to do, . . . we will have 18 men out if decided action is taken, and it is necessary that these employers should be compelled to sign." Though the letters in reply from Bray are withheld—copies of the letters from the members of the executive board are put in, dated 1st August, which approve of what is proposed; promise support . . . refer to the siege or the fight and predict that it will be short, sharp, and decisive. On 6th August the local union give plaintiffs till 12 o'clock the following day to sign the agreement, otherwise the men would be called out. This information was communicated to the International on 11th August, and thereafter financial assistance was sent on by that body to aid the strikers and also this defence. The jury have found and there is evidence to shew that the action throughout of the local body was "indorsed" by the International Association.

The union men in the employ of the plaintiffs were thus (upon the plaintiffs' failure to sign) called out in the middle of the day, and in obedience to the call they left with half a day's work unfinished. Whether the employment was terminable at will or for a defined period is not a material element in considering whether the relation of employer and workmen was arbitrarily disturbed, and goes at most to the quantum of damage: Berry v. Donovan, 188 Mass. 353.

This withdrawal of the men in the midst of their work by the combined action of the defendants was oppressive and unfair to the plaintiffs, not justifiable by any countervailing prospect of pecuniary advantage to the union or the men.

But the unfair aspect of this first step is enhanced and becomes affirmatively spiteful when the next move is made, by which communications are sent broadcast over the country informing the customers of the plaintiffs and others that the plaintiffs deal in "unfair goods" and that these goods will not be handled by "organized labour," the meaning of this being that any one who attempts to use the goods manufactured by plaintiffs shall have his union workmen called out on strike. This is in effect a boycotting of plaintiffs' goods because they will not sign. The loss which resulted to the plaintiffs is not overestimated by the jury at $7,500, which is

the pecuniary measure of the injury inflicted upon plaintiffs by continued and concerted action which could bring no gain directly to defendants nor any reasonable prospect of it. I think the language used in an early case by Mr. Justice Erle, Regina v. Rowlands, 17 Q. B. 671, 687, is still of authority. He says: "The law which allows workmen to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another."

The result of modern decisions appears to be correctly as well as concisely stated thus—"that intentional infliction of damage upon a man's trade by combined action is wrongful unless just cause or excuse can be found for it:" Chalmers-Hunt on Trade Unions, p. 82 (1902).

The answers of the jury are well founded on all the evidence, and there has been no error pointed out either in the charge of the learned Judge or the reception of evidence which should induce any interference by an appellate court as to damages. The body of defendants has been settled in its present shape by the judgment of the Court of Appeal, which is final, and all the defendants personally named appear to be so implicated as to be responsible for what they helped to set in motion or helped on. If they are levied upon for damages, it is not to be supposed that the aggregates for whom they acted will leave them to bear the burden alone. Giblan v. National Amalgamated Labourers Union of Great Britain and Ireland, [1903] 2 K. B. 600.

The judgment as framed is too wide in that it enjoins against picketting. There was no evidence that the strike was carried on by this method, and that clause of the judgment should be expunged.

The appeal is dismissed with costs.

OSLER, J.A. MAY 1ST, 1906.

C.A.—CHAMBERS.

HULL v. ALLEN.

Appeal—Failure to Set down—Extension of Time—Special Circumstances.

Motion by defendant for an order dismissing plaintiff's appeal, and providing for the prosecution of defendant's

cross-appeal from order of a Divisional Court (6 O. W. R. 961).

W. E. Middleton, for defendant.

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

OSLER, J.A.:—Plaintiff should have a further opportunity of prosecuting his appeal. His security was filed within ample time to have brought the case down to a hearing at the present session, which shews that he did not mean to abandon the appeal. That it was not set down was evidently owing to some misunderstanding or difficulty between the appellant and his former counsel. Whatever the difficulty was, it resulted in the appeal not being prepared and set down, as it should have been under the terms of the consent of 26th February, 1906. Defendant means to proceed with his cross-appeal under the terms of such consent, a circumstance of weight in inducing the Court to overlook the delay. Lastly, the amount at stake is considerable. If it is reasonably possible to have the case set down during the present session, that will be ordered. The parties may speak to that again. Otherwise the time will be extended for one month after the question of the sufficiency of the bond or security has been disposed of. Plaintiff to pay costs of motion.

MEREDITH, C.J. MAY 2ND, 1906.

WEEKLY COURT.

RE ARMSTRONG AND JAMES BAY R. W. CO.

Railway — Expropriation of Land — Severance of Farm — Compensation to Land Owner—Award—Value of Land Taken—Damages for Severance—Injurious Affecting of Part of Land not Taken — Loss of Convenient Use of Springs—Farm Crossing — Statutory Right — Witnesses —Opinion Evidence — Costs of Arbitration — Amount of Compensation Increased on Appeal.

Appeal by the land owner, Samuel W. Armstrong, from an award, dated 29th December, 1905, of the majority of the arbitrators appointed under the provisions of the Dominion

Railway Act, 1903, to ascertain the compensation to be paid by the railway company for the land taken by them, described in the award; and the damages sustained by reason of the exercise by the company of their powers of appropriating the lands of the appellant.

E. E. A. DuVernet and J. Kyles, for the appellant.

R. B. Henderson, for the company.

MEREDITH, C.J.:—The dissenting arbitrator has furnished a statement in writing of his reasons for differing from the conclusion reached by his colleagues and of his view as to the compensation which should have been awarded and of his reasons for adopting that view.

I have not, however, had the advantage of being informed by any statement of the other arbitrators as to the basis upon which the compensation to be paid was determined, or as to the manner in which the different subjects for compensation put forward by the appellant were dealt with by them, although upon the argument I expressed my willingness to receive such a statement if they should be minded to make it.

The railway crosses the farm of the appellant, severing from the front and main part of it about 24 acres, including a field, said to contain about 18 acres, which lies east of a road crossing the farm from north to south, marked on the plan filed "road deviation."

The land actually taken comprises 3.09 acres.

The appellant's claim, as presented to the arbitrators, was comprised under four heads: (1) the value of the land actually taken; (2) damages for the severance; (3) damages for the establishment on his land of a railway which cannot be operated without injuriously affecting the property from which the appropriated portion is taken; (4) damages for the loss or serious impairment of the convenient use for the purpose of the farm of the springs in the field immediately east of the land taken.

It is impossible, from anything appearing upon the face of the award, to ascertain how these separate claims were dealt with by the arbitrators who joined in the award, and it would, I think, have been better if it had been shewn, so that an appellate tribunal might be in a better position to determine whether they had erred.

The appellant's farm contains about 195 acres, and is and has been for many years used as a grain and dairy farm, for which, as it clearly appears, it is well adapted.

It is shewn that a supply of spring water to which the cattle can have access at will is of great value to such a farm, though this was not conceded by some of the witnesses for the respondents.

That the springs in the field east of the railway line afforded an abundant supply of excellent spring water for the cattle (including horses) which were kept on the appellant's farm is also, I think, clearly shewn, although even on this some of the respondents' witnesses, not, I think, very successfully, endeavoured to cast doubt.

The evidence makes it abundantly clear, I think, that if this source of supply is, owing to the railway, materially interfered with, the consequence will be to render the appellant's farm much less valuable for dairy purposes, and to reduce very considerably its market value, as well as the rental which it will yield.

I do not refer to the testimony which supports this view, because it is correctly summarized in the statement of the dissenting arbitrator.

The respondents sought to minimize the claim for this injury by shewing that under the provisions of the Railway Act, sec. 198 (2), the Board of Railway Commissioners are empowered to order the respondents to provide and construct a suitable farm crossing across the railway, if the Board should deem it necessary for the proper enjoyment of his lands on either side of the railway, and their willingness to appear before the Board and consent to an order directing that such a crossing be constructed and maintained by them, and also by shewing that it is practicable, by sinking a well in the vicinity of the springs and erecting a windmill and tank, to secure as good, if not a better, supply of water for the cattle as the springs in their present condition afford.

The view of the dissenting arbitrator was that any statutory right of the appellant to a farm crossing ought not to be taken into consideration in fixing the compensation to be paid. It was contended, on the other hand, by counsel for the respondents that it was the duty of the arbitrators to take such a matter into consideration.

In Vezina v. The Queen, 17 S. C. R. 1, the judgment of the Exchequer Court excluded a claim by the land owner for

damages on account of the railway having divided his farm without any means being provided for passing from the one part of it to the other over the railway, because the government, owning and operating it, had in fact made a sufficient farm crossing, which was in actual use.

The Supreme Court differed from the Exchequer Court on this branch of the case because, and only because, the land owner had no statutory right to the farm crossing which had been provided, and of which he might be deprived at any time at the will of the government.

It follows, therefore, I think, that if the respondents have made out that the appellant has a statutory right to a farm crossing sufficient to provide a satisfactory means of access for his cattle to and from the springs, and that it is practicable to make such a crossing, he would not be entitled to damages under the fourth of his claims.

The respondent has not, however, such a statutory right as the Supreme Court referred to. Sub-section 1 of sec. 198, which makes it the duty of the railway company to make crossings, does not, in my opinion, apply to a passage-way under the railway track. The provision as to crossing with live stock makes this apparent, I think, and therefore the only right which the appellant has to such a passage-way, if he has any, is under sub-sec. 2, and whether such a right is to be given to him depends upon his being able to satisfy the Board of Railway Commissioners, not only that it is necessary for the proper enjoyment of his land on either side of the railway, but also that it is safe in the public interest that it should be made, and, moreover, the Board has power to direct how, when, where, by whom, and upon what terms and conditions, the farm crossing shall be constructed and maintained.

Such a right,—assuming that it exists,—is a very different thing from the right which the Supreme Court was considering.

It is, I think, open to serious question whether the farm crossing which the Board is authorized to require the railway company to provide may be different in character from that which sub-sec. 1 deals with, and if only such a crossing as is, in my view, there mentioned, may be ordered to be made, under the authority of sub-sec. 2, there is no power in the Board to direct the construction of a passage-way under the railway.

Assuming, however, that the Board has that power, the proposed consent of the respondents to an order being made is limited to "a cattle-pass 6 feet high by 6 feet wide." The words "sufficient and satisfactory for the purpose of passing cattle to and fro," adding nothing, assuming that a pass of that height and width is not a sufficient one for the convenient passage of cattle,—and the testimony very much preponderates, if not in volume, in weight, that a pass of that height and width in the position where it is proposed to put it would not be a convenient or safe one for cattle, and especially for horses, to pass through. It is shewn to be too narrow for a large herd of cattle, such as is usually kept on the appellant's farm, and too low for horses. There was, doubtless, testimony to the contrary adduced by the respondents, but the opinions of some, at least, of the witnesses who gave that evidence was based upon their experience of a cattle pass the bottom of which was on the level with the adjacent land, and not, as would be the case here, 3 or 4 feet below that level, and at a point where, unless constant vigilance is exercised and somewhat extensive works are constructed, the surface water and the earth from the surrounding parts will lodge, to the serious impairment of the usefulness of the passage-way.

I do not know what view the majority of the arbitrators took as to the feasibility of providing by the well and windmill a sufficient and satisfactory supply of water from the spring, but my own conclusion upon the evidence is that the respondents entirely failed to make out that it was feasible to do so.

With great respect, I think that the majority of the arbitrators did not sufficiently appreciate the effect of the testimony which was adduced by the appellant as to the lessening of the market and the rental value of his farm. The fact that a number of witnesses, not retained expert witnesses of the usual class, but practical dairy farmers, having special knowledge as to the conditions required for carrying on dairying successfully, expressed the opinion that the farm would be reduced in its market value by from $2,000 to $5,000, and from $100 to $300 or more in its rental value, even though others differed from that opinion and thought that the injury would be comparatively trifling, and the latter view appeared to be the more accurate one, would not, in my opinion, justify

the entire disregard of the other opinions, for the fact that a considerable number of experienced men entertained such opinions would well warrant the conclusion that the market value as well as the rental value would be lessened, for what is it that in the main regulates such values but the opinions which intending purchasers or tenants entertain as to the advantages and disadvantages of a property which they are considering?

However that may be, I think that the opinions of the witnesses for the appellant are to be preferred to those of the witnesses for the respondents. The former were, I think, from their experience and knowledge as to the matters of which they spoke, more competent to form an opinion than were the witnesses called for the respondents, and, moreover, some of them spoke, especially the tenant Webster, from a personal knowledge of the farm, and many of them as to the question of the water supply from actual and accurate tests.

My conclusion upon the whole case is that the sum awarded is not adequate compensation for the injury done to the appellant's farm. The allowance of $250 for the land actually taken, which it is said is what was made, is not, I think, unreasonable. I would allow, in addition, $500 for the injury done to the farm by the severance and the inconvenience arising from the railway being constructed across it, and $1,500 for the injury owing to the interference with the means of access to the springs, in all $2,250, instead of the $1,170 which was awarded.

I cannot part with the case without expressing my regret for the enormous expense which has been incurred in settling the comparatively simple question involved in the inquiry which had to be made. No less than 521 typewritten pages are the result of the evidence taken before the arbitrators; the expense of this, with the fees of the arbitrators and witnesses and the costs of the solicitors and counsel fees, will probably far exceed the compensation fixed by the award; and I venture to express the hope that it may be possible to devise some simpler and much less expensive means of ascertaining the compensation which a railway company shall pay to a land owner whose property they have taken or injured in the exercise of their statutory powers.

It seems to me that it is a blot on the railway law that, had the award stood, the whole of this enormous expense would have been thrown upon the land owner; his land is

being taken against his will; honest differences have arisen as to what compensation should be paid to him; according to the evidence of reputable men competent to judge, the amount awarded to him is but one-fifth of what he should receive; and yet, because in the result a majority of the arbitrators have thought that the sum which he had been offered was more by $2.50 than he was entitled to, all the costs of the arbitration must have been borne by him.

The result is that the appeal is allowed, and the amount awarded is increased to $2,250, and the respondents must pay the costs of the appeal.

CARTWRIGHT, MASTER. MAY 3RD, 1906.

CHAMBERS.

IRVINE v. PRENDERGAST.

Third Party Procedure—Motion for Leave to Serve Notice—Delay—Prejudice to Plaintiff.

Motion by defendant Prendergast for leave to serve a third party notice.

W. J. McWhinney, for applicant.

L. V. McBrady, K.C., for plaintiff.

THE MASTER.:—The action was begun on 22nd January, 1906; the statement of defence and counterclaim of defendant Prendergast was delivered on 24th February; and the cause was at issue on 20th March. But it was not until 17th April that the present motion was made by Prendergast to be allowed to serve a third party notice on a company with whom defendant had dealings in August last in respect of the matters which are now in controversy.

An examination of the pleadings makes it very doubtful whether the company could properly be brought in as third parties. However that may be, I think the motion is too late, as Rule 216 provides that "a plaintiff is not to be prejudiced or unnecessarily delayed" by this procedure.

The facts must have been sufficiently known when defendant Prendergast delivered his statement of defence, and he should then have moved under Rule 209.

The delay is attempted to be excused by alleged negotiations for a settlement, but defendant should have reserved his right to make this motion later if no settlement effected.

The case is now ready for trial. If the third parties are to be brought in, plaintiff would be thrown over these sittings.

I therefore think the motion must be dismissed, with costs to plaintiff in the cause.

ANGLIN, J. MAY 3RD, 1906.

CHAMBERS.

LUDLOW v. IRWIN.

Costs—Taxation—Procuring Witnesses not Called—Proceedings Conducive to Interests of Client — Libel — Notice — Admissibility of Evidence—Preparation for Reply.

Appeal by plaintiff from ruling of local taxing officer at Owen Sound disallowing costs of procuring the attendance of certain witnesses—briefing their evidence, etc.

W. E. Middleton, for plaintiff.

C. B. Jackes, for defendant.

ANGLIN, J.:—The action was for libel in a newspaper imputing dishonesty to the plaintiff in his capacity as chemist to a cement company. Upon a verdict of $500, plaintiff was given judgment with costs. Defendant had not pleaded justification, but before the trial he gave a notice, under Rule 488, of his intention to adduce, in mitigation of damages, evidence of the circumstances under which the libel was published. Pursuant to this notice his counsel at the trial called a witness and sought to elicit evidence of alleged facts which, in the opinion of the trial Judge, would only be admissible in support of a plea of justification. Upon this ruling defendant formally tendered similar evidence of several other witnesses. To meet the contingency of such evidence being admitted, plaintiff had a number of witnesses present, whom, in that event, he proposed to call in reply, and it is to the disallowance of the expense thus incurred that he objects.

Rule 1176 provides that: "(1) Between party and party the taxing officer shall not allow the costs of proceedings: (2) Unnecessarily taken; (b) Not calculated to advance the

interests of the party on whose behalf the same were taken; (3) Incurred through over-caution, negligence, or mistake; unless he is of opinion that such proceedings were taken by the solicitor because, in his judgment, reasonably exercised, they were conducive to the interests of his client."

By implication costs of such proceedings, taken because, in the judgment of the solicitor reasonably exercised, they were conducive to the interests of his client, should be allowed. Though not perhaps "proceedings" in a strict sense, the procuring of the attendance of witnesses and the briefing of their evidence, etc., are, I think, within the spirit of the Rule. If not, by analogy to the very reasonable practice therein prescribed, such costs as those here in question should be similarly dealt with.

The line between evidence admissible to prove bona fide belief of the publisher in the truth of the alleged libel at the time of publication in order to rebut evidence, explicit or presumptive, of malice—whether in mitigation of damages or in support of a plea of privilege, is not always very clearly defined. See McKergow v. Comstock, ante 450, 558; Switzer v. Laidman, 18 O. R. 420. Defendant, who gave the notice under Rule 488 and pressed at the trial for the reception of the very evidence which plaintiff had prepared to meet, can scarcely be heard to say that the costs of that preparation were not properly incurred by plaintiff "for the attainment of justice or (in) defending his rights:" Rule 1175.

In my opinion, plaintiff should have been allowed a reasonable sum for the costs in dispute. I have conferred with the learned senior taxing officer, whose vast experience and comprehensive knowledge render his view upon any question relating to the law of costs of the greatest value. His opinion agrees with my own as above expressed.

The appeal will, therefore, be allowed with costs.

MAY 3RD, 1906.

DIVISIONAL COURT.

BROHM v. TOWNSHIP OF SOMMERVILLE.

Municipal Corporations—Contract—Erection of Snow Fence—By-law—Act respecting Snow Fences—Payment for Erecting Fence—Remedy—Action—Arbitration.

Action to recover $130.20 from defendants, being part of the cost of erecting 372 rods of wire fencing along the high-

way pursuant to an agreement, which plaintiff alleged was made by defendants. Defendants denied having made any such agreement. There was nothing in writing between the parties, except an application for payment from plaintiff and some correspondence with a view to arbitration.

Notwithstanding their repudiation of any legal liability, defendants offered to pay plaintiff $38 for so much of the fencing erected by him as was, in the opinion of a committee of council, necessary to overcome drifting caused by the fencing which had been replaced. This offer plaintiff rejected. His suggestions as to arbitration having proved fruitless, plaintiff brought this action in the County Court of Victoria, and recovered judgment for $116.20 with costs. From this judgment defendants appealed.

F. D. Moore, Peterborough, for defendants.

F. A. McDiarmid, Fenelon Falls, for plaintiff.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

ANGLIN, J.:—After a careful perusal and consideration of the evidence, we are of opinion that the judgment in appeal should not be disturbed.

Exercising the powers conferred by sec. 545, sub-sec. 5, of the Municipal Act, 1903, the township council duly passed a by-law No. 530, which enacts that:

"In places where the road is liable to be blocked with snow in winter, and where, in the opinion of the council, such drifts would be prevented by the removal of any rail, board, or other fence, and replacing the same by a wire or other fence, the council may order the removal of such other fence or fences as provided in the Act respecting snow fences, ch. 240 of R. S. O. 1897, and in the removal of such fence or fences by the owners and the erection of such wire or other fences as the council shall direct, the parties erecting such wire or other fences shall be paid out of the general funds of the municipality a sum not exceeding 35 cents per rod of fence."

The County Court Judge expressly accredits plaintiff's witnesses and discredits the principal witnesses called for the defence. We cannot disregard his opinion as to the credibility and veracity of witnesses whom he has seen and heard.

Read in the light of that opinion, the evidence warrants the conclusions of fact reached below, viz., that plaintiff before erecting the fence in question submitted his contract for its construction to the council through the medium of a neighbour, Mr. Abernethy; that the opinion and order of the council that plaintiff's existing fence should be removed, and its direction for or approval of the erection of the wire fence proposed by plaintiff, were expressed to Abernethy by the reeve, Wilson, at a session of the council, and in presence of the township clerk and of several of the councillors; that such order and direction were by Abernethy communicated to plaintiff; and that, pursuant thereto and in reliance upon the by-law and the sanction of the council thus expressed and communicated, plaintiff removed his existing fencing and had the wire fencing in question erected.

Upon these facts the liability of defendants to pay for the fencing, of which the erection was thus authorized, is, we think, reasonably clear. The by-law is in itself a conditional undertaking by defendants to pay, and plaintiff has, by evidence accepted by the Judge, established the fulfilment of the requisite conditions.

Defendants further contend that plaintiff's only remedy is that by arbitration under the Act respecting snow fences, R. S. O. ch. 240, sec. 1, which provides as follows: "And if the council and the owner cannot agree in respect to the compensation to be paid by the council, then the same shall be settled by arbitration in the manner provided by the Municipal Act, and the award so made shall be binding upon all parties."

This statutory provision does not, in my opinion, preclude the jurisdiction of the Court, where, as here, the parties are not merely unable to agree as to the amount of compensation, but the municipal corporation wholly repudiate liability. This defence is not upon the record, and an amendment to enable defendants to defeat an apparently honest claim upon them should not at this stage be permitted. Moreover, they rejected plaintiff's proposals for arbitration upon their solicitor's advice that to enter into such arbitration would involve an admission of the liability of the municipality.

The appeal fails and should be dismissed with costs.

MAY 3RD, 1906.

DIVISIONAL COURT.

SHEA v. TORONTO R. W. CO.

Street Railway—Injury to Passenger Thrown from Car—Negligence — Contributory Negligence — Evidence for Jury—Operation of Car—Duty to Passenger Standing on Platform.

Appeal by defendants from judgment of MABEE, J., at the trial at Toronto, refusing to nonsuit plaintiff after the jury had disagreed. Plaintiff was injured by being thrown from a Queen street west car, near Euclid avenue, by reason, as alleged, of a violent jerk of the car, which was the negligence alleged. Plaintiff was standing on the back platform smoking, and had a parcel in one hand; he had rung the bell, intending to get off at Manning avenue.

H. S. Osler, K.C., for defendants, contended that plaintiff should have held on to the rail, being in a position of danger, and the evidence shewed negligence and contributory negligence so interwoven that the case should not have been submitted to the jury.

H. D. Gamble, for plaintiff, contra.

THE COURT (MEREDITH, C.J., BRITTON, J., MAGEE, J.), held that the Judge was right in refusing to nonsuit. It was a proper inference that the plaintiff was on the platform by the permission of defendants. It may be said that the standard of duty of defendants is higher in regard to a passenger upon the platform; because the danger is greater, the defendants should be more careful. But it is not necessary to go that far. There was ample evidence to warrant a jury in finding that the car was negligently operated, and that in consequence of the negligent operation plaintiff was thrown from the car. The alleged contributory negligence of plaintiff was clearly a question for the jury. It was for the jury to say whether plaintiff's own negligence was the proximate cause of or so contributed to the accident that it would not have occurred without it.

Appeal dismissed with costs.

CARTWRIGHT, MASTER. MAY 4TH, 1906.

CHAMBERS.

SORENSON v. SMITH.

Motion to Dismiss Action—Want of Prosecution—Order for New Trial—Failure of Plaintiff to Set down—Remedy of Defendants—Rule 234—Jury.

Motion by defendants to dismiss action for want of prosecution.

D. L. McCarthy, for defendants.

C. A. Moss, for plaintiff.

THE MASTER:—On 4th April, 1905, a second new trial was ordered by the Court of Appeal: see 5 O. W. R. 576. Nothing has since been done. Defendants now move to dismiss for want of prosecution, under Rule 234.

The motion cannot succeed in consequence of the judgment of a Divisional Court in Diamond Harrow Co. v. Stone, delivered 6th September, 1901, but not reported until now (see ante 685). It was there decided that in such a case as the present the Rule invoked has no application, and that a defendant's only course is to set the case down himself if plaintiff has neglected to do so. . . .

It was asked that plaintiff should be ordered to go to trial at the non-jury sitting at Sandwich on 14th instant. Reliance as to this was placed on the expression of the Court of Appeal (5 O. W. R. at p. 581) that at the next trial a jury should be dispensed with. But, as plaintiff is not in any default, he cannot be put on any terms or deprived of his right to a jury if the trial Judge does not follow the suggestion of the Court of Appeal. . . .

Motion dismissed; costs in the cause.

CARTWRIGHT, MASTER. MAY 4TH, 1906.

CHAMBERS.

O'LEARY v. GORDON.

Security for Costs—Several Defendants—Separate Orders—Practice—Increased Security.

Motion by plaintiff to set aside a præcipe order for security for costs issued by defendant Kidd, notwithstanding that a similar order had previously been obtained by the other two defendants, and that plaintiff had, pursuant thereto, paid $200 into Court, and notified all 3 defendants.

R. McKay, for plaintiff.

A. B. Armstrong, for defendant Kidd.

THE MASTER:—There should be an order analogous to that made in Syracuse Smelting Works v. Stevens, 2 O. L. R. 141. There the defendant who took out the second order had no notice of the previous order or of the payment into Court. But here the right course for defendant Kidd was to have moved for an order that the money paid in by plaintiff should stand for the benefit of all the defendants. He should not have issued the second order, and it should be discharged if plaintiff so desires.

Rule 1208 allows defendants to move for increased security when so advised, and leave so to do need not be reserved.

It was also argued that plaintiff had assets within the jurisdiction. This was not set up when the first order was taken out, nor do I think that the fact is established . . . Daniel v. Birkbeck Co., 5 O. W. R. 757.

The order will be to set aside the præcipe order taken out by defendant Kidd, or declaring the same to have been satisfied, and providing that money paid into Court stand as security for the 3 defendants. The costs of the motion will be to plaintiff only in the cause.

APRIL 19TH, 1906.

DIVISIONAL COURT.

REX v. WOOLLATT.

Municipal Corporations—By-law—Market Regulations—Sale of Fuel—Weighing—Market Fee—Municipal Act, sec. 580, sub-sec. 9—Scope of—Transaction within Limits of Municipality.

Motion to make absolute a rule nisi to quash the conviction of defendant by the police magistrate for the city of Windsor, for selling and delivering a ton of coal without having weighed it on the market scales, and without having paid the fee for weighing, contrary to a by-law of the city of Windsor, upon the ground that the by-law was ultra vires.

W. H. Blake, K.C., for defendant.

W. M. Douglas, K.C., for the informant.

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

MEREDITH, C.J.:—We think, notwithstanding the ingenious argument of Mr. Douglas, that this is a reasonably plain case. It is impossible to believe that the provisions of sub-sec. 9 of sec. 580 of the Municipal Act should be given effect to according to their literal meaning. In the course of the argument illustrations have been given of the absurd consequences which would flow from any such interpretation. It is manifest, therefore, that one must seek to ascertain how these general words are to be limited and restricted, so to give effect to the intention of the legislation, and it seems to me that a reasonably safe guide may be found by looking at the sections with which the section is associated, to see what it was the legislature was dealing with in the group of sections of which sub-sec. 9 forms part.

The legislature had in view markets. The municipalities had been authorized to establish markets and had been given large powers as to imposing fees and requiring certain classes of articles which were brought to the municipality to be sold, to be sold at the public market and not elsewhere.

The group of sections in which this sub-section is found is headed "Markets, etc.," and all of the sections deal with market matters, except, possibly, the one we are considering, and the one dealing with the seizing and forfeiting of bread and other articles for light weight.

Sub-section 5 of sec. 580 provides that the council of certain municipalities may pass by-laws for the regulating of the place and manner of selling and weighing grain, meat, vegetables, fish, hay, straw, fodder, wood, lumber, shingles, farm produce of every description, smallware and all other articles exposed for sale and the fees to be paid therefor.

Then follow various sub-sections dealing with other matters connected with the market. Then follows sub-sec. 9, "for regulating the measuring or weighing (as the case may be) of lime, shingles, laths, cordwood, coal and other fuel." It seems to me that this provision must be limited to such articles as are marketed or exposed for sale within the limits of the municipality, and it cannot have been intended by the legislature that where such articles have been the subject of a completed contract of sale made beyond the limits of the municipality, and the only act done within it is the delivery, there should be the right to impose what is practically a tax upon the vendor of the articles.

I think the applicants are entitled to invoke the rule that power to impose a tax is not given by legislation of this kind unless it appears in plain and unmistakable terms that it is intended to confer the power.

Now it seems to me that all that the legislature intended to accomplish in passing this sub-section will be attained if the sub-section is restricted in its application to cases in which the transaction takes place within the limits of the municipality. I do not say, and I should desire to take further time to consider whether, it is even as wide as that in its application, and whether it ought not to be confined to cases in which the articles are exposed for sale within the limits of the municipality.

I think the by-law is bad, and that the conviction ought to be quashed, and there is no reason why it should not be with costs. The magistrate will, if necessary, be protected.