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COURT OF APPEAL.

JULY 8TH, 1910.

*RE KARRY AND CITY OF CHATHAM.

Municipal Corporations—Power to Regulate Victualling Houses—Consolidated Municipal Act, sec. 583 (34)—Sunday Closing By-law — Reasonable Restraint — Motive — Enforcement of Lord's Day Act.

Appeal by James Karry, a restaurant-keeper in the city of Chatham, from the order of BOYD, C., 20 O. L. R. 178, dismissing a motion to quash a by-law passed by the city council providing that victualling houses should be closed on Sundays from 2 p.m. till 5 p.m. and from 7.30 p.m. till Monday at 5 a.m.

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

J. M. Ferguson, for the appellant.

H. L. Drayton, K.C., for the respondents.

MACLAREN, J.A.:— . . . The by-law purported to be passed under sec. 583 (34) of the Municipal Act, which authorised the council to pass by-laws "for limiting the number of and regulating" such houses. The question is, was this by-law a "regulation" authorised by the statute?

It was strongly argued by the applicant that it was not a regulation but a prohibition; and Virgo v. City of Toronto, [1896] A. C. 88, was relied upon as an authority. An examination of the by-law, and judgment in that case, however, shews that there

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

are marked distinctions between the two by-laws. . . . It would appear from the judgment that the word "govern" is taken as being synonymous with "regulate."

The words "regulate" and "regulation" have been construed in a number of cases in our own Courts. . . .

[Reference to Baker v. Town of Paris, 10 U. C. R. 621; Re Greystock and Township of Otonabee, 12 U. C. R. 458; In re Campbell and City of Stratford, 14 O. L. R. 184.]

I am of opinion that the principle laid down by the Judicial Committee in Hodge v. The Queen, 9 App. Cas. 117, is strongly in favour of the validity of the present by-law. . . . See also the reasoning of Dubuc, C.J., in Re Fisher and Carman, 16 Man. L. R. at p. 562. .. .

On the whole, I am of opinion that such a regulation as that now in question is, under the authorities, well within the powers of the municipal council of Chatham under sec. 583 (34) of the Municipal Act.

Counsel for the appellant also urged that the by-law in question should be quashed on the ground that it is unreasonable and oppressive. This point is in reality partly involved in the other, and it was in part argued under that head. The legislature probably refrained from making any uniform regulations for the province on this head, because it is essentially one that can be best determined by the authorities in each locality. . . . On the material . . . I do not think any such case is made out as would justify the interference of a Court. If, in the result, the public should prove to be inconvenienced by the by-law, which does not appear at all probable, the council would, no doubt, amend the by-law in accordance with the public desire; but, if they should refuse to do so, the electors have the remedy in their own hands . . . .

Under this head we were urged to set aside the by-law on the ground that among the motives influencing those who promoted the by-law was that of aiding in the enforcement of Sunday legislation. In reality it is a question of power rather than of motive. The later authorities shew that the Courts should be slow in setting aside the by-laws of public representative bodies clothed with ample authority on the ground of supposed unreasonableness. . . . .

[Reference to Kruse v. Johnson, [1898] 2 K. B. at pp. 99, 100; Kelly v. Armstrong, 12 Man. L. R. 87; Re Fisher and Carman, supra; Waldron v. Westmount, Q. R. 8 S. C. 324; Corporation of Ste. Louise v. Chouinard, Q. R. 5 Q. B. 362; Haggerty v. Victoria, 4 B. C. R. 163.]

In my opinion, the appeal should be dismissed.

MAGEE, J.A., concurred, for reasons stated in writing.

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

MEREDITH, J.A., dissented, for reasons stated in writing. He was of opinion that the by-law was not passed for the purpose of regulating victualling houses, a subject within the power of the municipal council, but for the purpose of compelling the better observance of the Lord's day, a subject quite beyond the power of the council.

JULY 8TH, 1910.

*NETTLETON v. TOWN OF PRESCOTT.

Municipal Corporations — Negligence — "Lock-up" — Lack of Proper Heating—Injury to Prisoner—Duties of Constable — Caretaker—Responsibility of Municipal Corporation Acting as Deputy of the Crown—Respondeat Superior.

Appeal by the plaintiff from the judgment of a Divisional Court, 16 O. L. R. 538, dismissing the action.

The plaintiff was confined in the lock-up owned and established by the defendants, the municipal corporation of the town, and in his statement of claim alleged that while he was there the defendants negligently omitted to keep the place reasonably warm, and that this negligence caused him to be seriously ill, and he brought the action for damages for the injury thus sustained.

At the trial before MULOCK, C.J.Ex.D., and a jury, the jury answered certain questions in such a way that the trial Judge deemed the answers to be irreconcilable, and he declined to enter judgment for either party.

BOYD, C., and MAGEE, J., being a majority of the Divisional Court which heard motions by the plaintiff and defendants for judgment, held that the defendants were not responsible for the injury to the plaintiff. MABEE, J., dissenting, was of opinion that the defendants were liable.

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

J. A. Hutcheson, K.C., for the plaintiff.

J. B. Clarke, K.C., for the defendants.

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

GARROW, J.A.:— . . . The learned Chancellor so fully and satisfactorily dealt with the whole subject that, agreeing as I do with his conclusions, I have but little to add.

The distinction between the liability of a municipal corporation for the consequences of its act when acting as a deputy for the general government, or, according to the British theory, for the Crown, in matters relating to the general public good, and when in the smaller field of local affairs it represents only the interests of the inhabitants within its local jurisdiction, is clearly drawn in the cases to which the learned Chancellor refers, to which I should like to add an instructive case from the Court of Appeal for the State of Virginia, City of Richmond v. Long's Administrators, reported in 17 Grattan R. 375, where a similar conclusion was arrived at in a very well-reasoned judgment.

In the former class, in which, in my opinion, this case belongs, the rule respondeat superior does not apply.

Nor do I understand Mabee, J., who dissented, to have proceeded upon a different view of the law, but rather upon the view that the defendants are responsible for the conduct of Lee, as the janitor of the building in which was situated the lock-up in which the plaintiff was confined. What creates the difficulty—the only one, I think, in the case—is the circumstances that Lee, in addition to being janitor, was also a constable, and appears to have acted as the deputy of the chief constable, Mooney, who was the keeper of the lock-up. In the statement of claim Mooney and Lee are bracketed together, the one as chief constable, the other as assistant constable, and both as servants of the defendants. It was Lee who first told the plaintiff that Mooney had a warrant for his arrest; and Lee, according to the plaintiff's evidence, had a key of the part of the prison in which the plaintiff was confined, and "came down once or twice to see me, to see how I was getting on"—which was no part of his duty, or even, one would think, of his opportunities, if he was acting merely as janitor or caretaker. In these circumstances the plaintiff cannot complain if he is held to the language of his pleading, and Lee treated, as indeed he seems to have been, not merely as the janitor of the building, but as the deputy of Mooney, the keeper of the lock-up.

At the same time I am of the opinion that the result should not be otherwise even if Lee is to be regarded solely in his other character, as mere caretaker. The defendants did not cause the imprisonment. They had supplied a proper enough prison with appliances to heat it sufficiently. No one disputes that. And it was the duty of the keeper of the prison to see that these appliances were, if necessary, used. Mooney visited the prisoner as

late as midnight of the night in question, and was, therefore, in a position to see and to know whether the prison was or was not sufficiently heated, having regard to the temperature of the night. And, if he failed in his duty, the result cannot, in the circumstances, be made to fall upon the defendants.

The appeal must be dismissed with costs.

MEREDITH, J.A., for reasons stated in writing, agreed that the appeal should be dismissed.

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

HIGH COURT OF JUSTICE.

BOYD, C., IN CHAMBERS. JUNE 15TH, 1910.

REX v. RUDOLPH.

Liquor License Act—Convictions for First and Second Offences—Conviction for First Offence Quashed—Amendment of Conviction for Second Offence—R. S. O. 1897 ch. 245, sec. 101 (5)—Scope of—New Conviction Drawn up—Matter of Form—Penalty—Costs—Sec. 86—Criminal Code, sec. 735—Discretion of Magistrates—License Inspector—Prosecutor—Sec. 94—Term of Imprisonment—"Thirty Days"—"One Month"—Amendment—Criminal Code, sec. 146.

Motion for an order quashing a conviction of the defendant for an offence against the Liquor License Act.

J. B. Mackenzie, for the defendant.

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

BOYD, C.:—I am of opinion that the conviction herein is good as against the objection argued before me.

The defendant had been convicted of one and a first offence of selling liquor without a license, and was also convicted of a second offence for a second violation of the Act. The first conviction was quashed for illegality, and that left the other conviction to be in effect for a first offence. The statute intervenes in such a case by providing, R. S. O. 1897 ch. 245, sec. 101, subsec. 5, for the summoning of the offender and the amending of

the subsequent conviction by adjudging such penalty or punishment as might have been adjudged had the previous conviction never existed. That is, the quashed conviction and the offence it represents may be treated as non-existent; and the offence second in sequence treated and punished as a first offence. I do not read the enactment as limited to cases where the quashed conviction has been made by a County Court Judge, on appeal; the language is wide enough to cover every case where a first conviction has been legally avoided.

Nor is the objection tenable that the magistrates have drawn up a new record of the amended conviction, instead of making the necessary alterations on the face of the old conviction. Both are returned by the magistrates, and the manner of making the amendment is only a matter of form, not of substance.

Nor can I interfere because the magistrates have imposed a penalty of $45 and costs, though that is the same penalty as appears as for the assumed second conviction. The amount is within their jurisdiction in respect of a first offence. Section 86 gives the limit for a first offence of not less than $20 "besides costs," and not more than $50 "besides costs." That language imports that "costs" are, as it were, accessory to the penalty and the power to give costs is not withheld, though sec. 101, subsec. 5, speaks only of "penalty or punishment." "Such penalty or punishment as might have been adjudged" implies and includes the awarding also of costs if the Justices think fit. I have no means of saying (except by a guess) that $45 is not an appropriate penalty for the offence; and I cannot assume that the magistrates have imported any improper feeling into the case, so long as they act within statutory limits. The meaning is entirely for their discretion within those limits. It may also be pointed out that the magistrates in cases of summary conviction can order the payment of costs in their discretion, by the Criminal Code, sec. 735.

Objection is made that the information is laid by Raney, License Inspector for the township of Saugeen, and that the village of Tara, where the sale was made, is not within his district. I was not referred to any evidence on this point, and it does not seem material so far as the validity of the conviction is concerned, for by the Liquor License Act, sec. 94, "any person may be the prosecutor."

It is further and lastly objected that the conviction was for "thirty days" imprisonment in case of default of payment of fine and costs, which is not necessarily "one month," that being the statutory definition of the time (sec. 86). As returned to me,

"thirty days" is obliterated and "one month" substituted. Whatever force may be in the objection, it is an amendable error under 2 Edw. VII. ch. 12, sec. 15, which provides that all the provisions of the Criminal Code, 1892, with respect to amendment of convictions, shall apply to convictions under the Ontario statutes.

The Code of 1892 provides, sec. 889, that on certiorari the Court has power to modify any excess in the amount of punishment, if satisfied that the offence has been committed. I would, therefore, ratify the change from "thirty days" to "one month" if that were necessary. This section was acted on in Regina v. Spooner, 32 O. R. 451. The case cited of Regina v. Gavin, 30 N. S. R. 162, 1 Can. Crim. Cas., was decided upon the scope of sec. 117 of the Canada Temperance Act, R. S. C. 1886 ch. 106; but the application of that case to this is displaced, and the effect of the decision itself is wiped out, by the amendment now made to the Canada Temperance Act by adding to sec. 117 the further amendatory powers contained in the Criminal Code as found in 55 & 56 Vict. ch. 29, sec. 889 (cited above), and also in R. S. C. 1906 ch. 152, sec. 146.

The application is dismissed with costs.

DIVISIONAL COURT. JULY 7TH, 1910.

McKEAND v. CANADIAN PACIFIC R. W. CO.

Master and Servant—Injury to and Consequent Death of Servant—Negligence—Defect in Way—Absence of Direct Evidence as to Cause of Injury—Findings of Jury—Inference—Causal Connection—Contributory Negligence.

Appeal by the defendants from the judgment of MAGEE, J., upon the findings of a jury, in favour of the plaintiff, for $1,200.

Action by the mother of Adam McKeand, an unmarried man, who was killed on the 8th September, 1909, while in the employment of the defendants, to recover damages for his death.

The deceased was engaged in wheeling about 200 lbs. of concrete in a barrow from the mixer along and over a runway and platform, when he fell with the loaded barrow from the runway or platform to the highway below, a distance of 20 feet, and received injuries from which he died. The runway was constructed of two planks, 10 inches in width, placed side by side. This way was not

protected or guarded. It led to a platform about 5 feet wide, from which the cement was dumped from the barrow below, filling in the space above an over-arched driveway under the railway. The barrow was found below at a point corresponding to the west end of the runway, where it formed an angle with the platform. The concrete was under the barrow. No one saw the man fall. The last seen of him before the accident was when he started on the runway with the barrow. The body was found about 10 feet from the barrow.

The jury found that the death was owing to the negligence of the defendants in allowing men to use a runway only 20 inches wide and 20 feet from the ground; that the way was defective for the same reason; and that the deceased could not, by the exercise of reasonable care, have avoided the injury.

The appeal was heard by CLUTE, SUTHERLAND, and MIDDLETON, JJ.

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

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

CLUTE, J. (after stating the facts):—After a careful reading of the evidence, the natural conclusion is that the deceased fell from the 20-inch runway. I do not think that any jury could say that that was a safe way for a man wheeling a load . . . Sooner or later, I should think, there would be an accident; sooner or later, he would go off. The slightest misstep or want of balance would probably be sufficient. Upon the evidence, the jury were well justified, in my opinion, in making the findings which they did.

The appeal should be dismissed with costs.

SUTHERLAND, J.:—I agree.

MIDDLETON, J.:— . . . It is still open for a jury in a proper case to draw inferences from proved facts, and nothing is more difficult than to draw the line between cases in which the inference is admissible and those in which the finding of the jury has passed the sphere of legitimate inference and become a mere guess. . . . The plaintiff in an action such as this has not to prove the absence of contributory negligence, and the defendant cannot escape liability merely by the statement that, if the facts surrounding the occurrence could be ascertained, contributory negligence would be shewn. The death of the only witness is the misfortune of the one upon whom the onus lies, and, unless he can prove his case in some other way, he fails. . . .

The jury were, I think, well warranted in finding that the fall was from the narrow runway, and not, as suggested by the defendants, from the wider platform. It was also open to them to find that this runway was too narrow.

Mr. Hellmuth, while controverting both of these propositions, based his main argument upon the necessity of establishing a causal connection between the negligence and the fall. He says it is a mere guess that the negligence so found caused the man to fall.

With this I cannot agree. I think it is a fair inference. There may or may not have been negligence on the part of the man, but the onus is upon the defendants to establish it.

When we find a workman, in the course of his employment, placed in a position of peril by the negligence of the master in the construction of the works and ways of the master, and an accident happening precisely in the way one would expect as the result of the negligence found, the jury can infer that the negligence caused the accident.

Appeal dismissed with costs.

DIVISIONAL COURT. JULY 7TH, 1910.

DOLSEN v. CANADIAN PACIFIC R. W. CO.

Railway—Animals Killed on Track — Swing-gate — Defective Posts—Fault of Company — Gate Becoming Unfastened — Findings of Jury—Railway Act, secs. 254, 295—Statutory Obligation.

Appeal by the defendants from the judgment of BOYD, C., upon the findings of a jury, in favour of the plaintiff.

Action to recover $525 damages for the loss of three horses of the plaintiff killed by a train of the defendants on their line of railway where it crossed the plaintiff's farm, on the 13th June, 1909. The plaintiff also claimed damages for breach by the defendants of the statutory duty to erect and maintain upon their railway across the plaintiff's land swing-gates and fences suitable and sufficient to prevent cattle and other animals from getting on the railway.

The horses got on the track from the plaintiff's land through a gate which it was the defendants' duty to maintain. The gate was out of repair.

The jury found that the loss of the plaintiff's horses was the direct result of improper posts which caused the fastenings of the gate to work improperly; and assessed the damages at $525.

The appeal was heard by CLUTE, SUTHERLAND, and MIDDLETON, JJ.

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

O. L. Lewis, K.C., for the plaintiff.

CLUTE, J. (after stating the facts and quoting a part of the charge to the jury):—The question, then, is simply this: it not being disputed that the gate was out of order and in such condition that it required special care to fasten it securely—and it also appearing that when the gate was thus securely fastened it effectually prevented the cattle or horses from getting from the plaintiff's land upon the track—ought the evidence here to have been submitted to the jury? Or does the fact that the plaintiff's witness Turner stated that he securely fastened the gate, he being the last one to pass through it before the accident, preclude the plaintiff from asking the jury to find that he did not securely fasten it, but only in such a way as would permit it to be opened by the horses rubbing against it? In short, was there evidence that ought to have been submitted to the jury or not?

The Railway Act, R. S. C. 1906 ch. 137, sec. 254, provides that the company shall erect and maintain upon their railway swing-gates with proper hinges and fastenings. Section 295 provides that no person whose horses, etc., are killed or injured by any train shall have any right of action against any company in respect of such horses, etc., if the same were killed or injured by reason of any person . . . failing to keep the gates on each side of the railway closed when not in use.

By whose neglect of duty was it that the horses escaped through the gate upon the track? There is no evidence that the gate was opened by a stranger. . . .

[Reference to McMichael v. Grand Trunk R. W. Co., 12 O. R. 547; Dunsford v. Michigan Central R. R. Co., 20 A. R. 577; Studer v. Buffalo and Lake Huron R. W. Co., 25 U. C. R. 160.]

I am of opinion, upon the evidence, that the case could not properly be withdrawn from the jury. I think the jury were justified in taking the evidence of Turner, the farm-hand, to mean that he fastened the gate, as he thought, securely, but, owing to the defective condition of the gate and fastening, it was

not in fact securely fastened, and this was owing, not to the carelessness of the servant, but to the neglect of the defendants in not providing proper fastenings.

Appeal dismissed with costs.

SUTHERLAND, J.:—I agree.

MIDDLETON, J.:—I do not think the railway company discharge their statutory obligation to maintain a gate with proper hinges and fastenings when they maintain a gate with such a fastening as that described in the evidence—a fastening whose whims and vagaries were calculated to deceive the elect, let alone an ordinary farm-hand. The man, no doubt, is quite honest when he says he fastened the gate on Thursday, but the jury might well believe that, though fastened in one sense, so that it did not at once swing open, it was not properly fastened so that the shaking from the wind or from horses rubbing against it might not cause it to open.

The duty of the railway company is to provide a proper fastening, one which can be readily and effectually fastened so as to keep the gate shut. . . . If the gate, by reason of disrepair, was in such a condition as only to fasten when a considerable amount of time and patience had been expended, there is not, in my view, a compliance with the statute. The railway company must know that the ordinary "hired man" may be relied on to fail at some time to discharge this added duty; and the risk of his failure to master the mystery of an ill-working hasp should be borne by the company.

Appeal dismissed with costs.

DIVISIONAL COURT. JULY 7TH, 1910.

POWLEY v. MICKLEBOROUGH.

Negligence—Injury to property by Overflow of Water—Leaving Tap Turned in Floor above—Flats in Building Tenanted by Various Persons—Cause of Action — Tort — Assignment—Parties—Assignee and Assignor Joined as Plaintiffs.

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

At the time of the injury complained of, the plaintiffs George Powley & Co. were the tenants and occupiers of a part of a flat

in a building in Front street, in the city of Toronto, and the defendants were tenants and occupiers of a flat above, in the same building. The plaintiffs alleged that the defendants on the 25th March, 1909, negligently turned on and left turned on during the night a water tap in the premises occupied by them, which caused large quantities of water to escape from the tap and flow down upon the flat below, causing damage. In June, 1909, the George Powley Paper Co. were incorporated, and acquired and took over the assets of George Powley & Co. The action was brought in the name of the new company, but George Powley & Co. were added as plaintiffs, and the action came down to trial with both before the Court.

The County Court Judge held (relying on McCormick v. Toronto R. W. Co., 13 O. L. R. 356), that the plaintiffs were not entitled to recover, because, a cause of action for tort not being assignable, the new company could not sue, and George Powley & Co. could not sue, because Powley, on examination for discovery, admitted that all the assets of the firm, including this very cause of action, had been transferred to the new company.

The appeal was heard by CLUTE, SUTHERLAND, and MIDDLETON, JJ.

W. A. Proudfoot, for the plaintiffs.

A. C. McMaster, for the defendants.

CLUTE, J.:— . . . I think the position taken as to the plaintiffs not being entitled to sue is entirely untenable. Both parties are before the Court, and a right of action is vested in either one or the other—it is immaterial which.

It is, I think, clear that the principle of Rylands v. Fletcher, L. R. 3 H. L. 330, is subject to qualification in a case of this kind. . . .

[Reference to Blake v. Wolf, [1898] 2 Q. B. 426; Anderson v. Oppenheimer, 5 Q. B. D. 602; Stevens v. Woodward, 6 Q. B. D. 318; Childs v. Lissamon, 23 N. Z. L. R. 945.]

It was clearly established that the water came from the defendants' floor above . . . through a crack in the concrete floor. . . . The fair inference to be drawn from the evidence, in my opinion, is, that the defendants, by themselves or their servants, who were allowed to use the lavatory, negligently left the tap turned on, and that the water overflowed and caused the injuries complained of.

This is a case where it seems unnecessary to refer the matter back for trial, as all the facts are before the Court.

The judgment of the Court below should be set aside, and judgment entered for the plaintiffs for $303 with costs here and below.

SUTHERLAND, J.:—I agree.

MIDDLETON, J.:—Upon the argument it was plain that the judgment of the Court below could not stand upon the ground upon which the learned Judge had placed it. The assignor and assignee were both before the Court as plaintiffs, and the effect of the assignment is, therefore, quite immaterial. The right of action against the wrongdoer must be vested in either one or the other, and their respective rights are quite immaterial. . . .

All the cases are collected and most satisfactorily dealt with in . . . Child's v. Lissamon, 23 N. Z. L. R. 945. When the claim for damages is made against the landlord, and the water pipes are placed upon the premises for their more convenient enjoyment, the landlord is not liable when negligence is shewn: Anderson v. Oppenheimer, 5 Q. B. D. 602. If the claim is made against a tenant occupying an upper flat, prima facie he is liable for the escape of water from a tap left open. The onus is upon him to establish facts freeing him from liability. In Stevens v. Woodward, 6 Q. B. D. 318, the defendant escaped by shewing that the tap was interfered with by the wrongful act of a servant who had been forbidden to use the lavatory. In Ruddiman v. Smith, 60 L. T. 709. the defendant failed to escape when it appeared that the negligent clerk was using the lavatory in the course of his employment.

Appeal allowed, and judgment to be entered for the plaintiffs.

DIVISIONAL COURT. JULY 7TH, 1910.

RICHARDS v. JOYNT.

Malicious Prosecution—Issue and Enforcement of Search Warrant—Favourable Termination of Proceedings — Reasonable and Probable Cause—Jury—Misdirection — Nondirection — New Trial—Malice—Indirect Motive — Counterclaim—Order for Payment of Money—Acceptance—Liability.

Appeal by the defendants from the judgment of the Senior Judge of the County Court of Bruce in favour of the plaintiff on the verdict of a jury, in an action for the malicious issue and

enforcement of a search warrant; and cross-appeal by the plaintiff from the judgment of the Judge in favour of the defendants upon their counterclaim for a money demand, tried without a jury.

The appeal was heard by MEREDITH, C.J.C.P., MACLAREN, J.A., and SUTHERLAND, J.

O. E. Klein, for the defendants.

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

The judgment of the Court was delivered by MEREDITH, C.J.:—The principal objection taken upon the argument, that there was no proof of the termination of the proceedings in favour of the plaintiff, is untenable. The proceedings were the issue and enforcement of a search warrant in respect of a quantity of ashes, upon the information of the defendant Johnston, in which he deposed that the plaintiff had unlawfully stolen the ashes.

Such a proceeding being ex parte, and the plaintiff, therefore, having had no opportunity of being heard, the rule requiring the plaintiff in an action for malicious prosecution to prove that the prosecution terminated favourably to him, does not apply: Steward v. Gromett, 7 C. B. N. S. 191.

We think, however, that the case was not properly tried. There was no ruling as to the absence of reasonable and probable cause, and the jury were not asked to find the facts bearing on that issue in order that the question might be determined by the Judge, nor were they instructed in what view of the facts in controversy absence of reasonable and probable cause would be proved. In addition to this, the learned Judge made some observations as to the only purpose of and circumstances under which a search warrant could properly be issued, which were erroneous in law; and matters which should have been left to the jury to determine were in effect determined by the Judge himself. I refer particularly to what was said by him as to the circumstances under which a settlement between the parties was alleged to have been reached after the issue of the warrant.

The amount of the verdict was small, $35. . . . It is to be hoped that the parties may find some means of adjusting their differences . . . ; but, if the action is unfortunately to be again tried, it will be well for the presiding Judge to take care to point out that the putting of the criminal law in motion for an indirect purpose, such as was suggested was the object of the defendants, viz., to recover the ashes, is a circumstance bearing on the question of malice, and that if, on the undisputed facts

or the facts as found by the jury, absence of reasonable and probable cause is not proved, that circumstance and even actual malice on the part of the defendants is immaterial.

There is no ground for disturbing the finding of the Judge on the counterclaim. It was shewn that the order which the plaintiff gave to the defendant Joynt on the 17th August, 1908, to pay to John Hunstein $20 "out of each car of ashes loaded," was accepted by Joynt; and, in view of this and the fact that the order was given in consideration of Hunstein discharging a chattel mortgage which the plaintiff had given him, it was not open to the plaintiff to revoke the order.

The effect of the transaction was, that, as each car-load of ashes was shipped, Joynt became liable to Hunstein for $20, and the fact that payment had not been actually made was, therefore, immaterial.

The result is that the appeal should be allowed and a new trial directed, and that the cross-appeal as to the counterclaim should be dismissed; and that there should be no costs of the last trial or of the appeals to either party.

DIVISIONAL COURT. JULY 7TH, 1910.

*EARL v. REID.

Negligence—Collapse of Building during Alterations—Injury to Person in Neighbouring Building — Findings of Jury — Res Ipsa Loquitur — Independent Contractor — Evidence — Licensee.

Appeal by the defendant Reid from the judgment of LATCHFORD, J., in favour of the plaintiff, upon the findings of a jury.

The defendant Reid was the owner of a four-storey brick building, comprising two premises, known as Nos. 197 and 199 Dundas street, in the city of London. As originally constructed, a brick wall, about 17 inches thick, divided the two premises from foundation to roof. Many years ago, three arch-shaped openings were made in the section of this wall which divided the ground floor, for the purpose of converting two stores into one. Subsequently these openings were closed by the defendant Reid, not by restoring the solid brickwork, but by a wall, about

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

4 inches thick, on either side, on a line with the surface of the original wall, leaving a hollow space, about 8 inches wide, between the two.

On the 29th April, 1907, the defendant Reid made a lease to one Smyrles of the whole of the main building for 25 years from the 1st August, 1907, which lease contained an agreement by Smyrles that he would "forthwith after possession . . . is given proceed to make the alterations and improvements to the said building set out in the annexed plan, at his own expense, and complete the said improvements without delay. And it is understood and agreed that upon the expiration or sooner termination of this lease, the said improvements and additions shall become the property of the lessor."

One of the alterations indicated on the plan was the removal of between 50 and 60 feet of that section of the wall above referred to which divided the first floor of the main building into two compartments, and the substitution therefor of three iron columns supporting steel beams against the wall above, and resting on plates, 13 or 14 inches square, imbedded in cement on top of the wall below.

By arrangement between Reid, who occupied the first floor above No. 197, and a tenant who occupied the first floor above No. 199, Smyrles was allowed to take possession of that floor about the 10th June, 1907, for the purpose of making the alterations.

Smyrles engaged the defendants Kernahan and Wilson, contractors, to do the work.

The work of putting in the steel beams and iron columns was completed on the 12th July, 1907, and either on that day or on the 15th July the shoring which had been used to support the wall until the columns were in place was removed.

The easterly wall of Reid's building was an outside wall, facing on a lane which divided it from the building of one Brewster, in which the plaintiff was on the 16th July, 1907, employed as a clerk. On the afternoon of that day, as described by a witness, Reid's building "went down in a wedge shape in the centre and crushed out the walls," and the easterly wall fell against Brewster's building, crushing it in, whereby the plaintiff was injured.

This action was brought against Reid and Kernahan and Wilson to recover damages for the plaintiff's injuries.

At the trial, at the close of the plaintiff's case, counsel for the defendants moved for a nonsuit, which was granted to the defendants Kernahan and Wilson only.

In answer to questions submitted, the jury found that the plaintiff's injuries were caused by the defendant Reid's negligence, which consisted "in placing the iron columns on a defective wall;" and assessed the damages at $500.

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

G. S. Gibbons, for the defendant Reid.

J. F. Faulds, for the plaintiff.

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

. . . As to the cause of the mishap, I do not think it is necessary to determine whether or not that found by the jury is supported by the only evidence offered, because I think the maxim res ipsa loquitur clearly applied and could be invoked by the plaintiff against Reid as owner of the building, for the law cast upon him a duty to exercise reasonable care to prevent it falling upon her.

I think it is the plain duty of every owner of land to keep the buildings or structures thereon in such a condition that they shall not, by falling or otherwise, cause injury to persons lawfully upon adjoining lands. . . . While the owner cannot be charged for injuries caused by inevitable accident, the result of vis major, or of the wilful act or negligence of some one for whom he is not responsible, he is liable for injuries caused by the failure on his part to exercise reasonable care. . . .

[Reference to Frith v. Bowling Iron Co., 3 C. P. D. 254; Mullin v. St. John, 54 N. Y. 567; Mahoney v. Libbey, 123 Mass. 20; Kirby v. Boylston, 14 Gray 249; Shearman & Redfield's Law of Negligence, 5th ed., para. 701a; Laugher v. Pointer, 5 B. & C. 547, 560; Quarman v Burnett, 6 M. & W. 510; Roberts v. Mitchell, 21 A. R. 433, 439.]

The degree of care required must depend upon the circumstances of each case. . . . The plaintiff was lawfully upon the adjoining land of her employer; and entitled to have the same care exercised towards her by the defendant as her employer would be entitled to.

Such being the duty of the owner, is this not a case, therefore, having regard to the extent and extraordinary character of the collapse, where the burden should be cast upon the owner to account for an occurrence which presumably could not happen without the negligence of some one? Buildings properly constructed and properly maintained do not fall without some adequate cause. . . .

[Reference to Scott v. London and St. Katharines Dock Co., 3 H. & C. 596; Gee v. Metropolitan R. W. Co., L. R. 8 Q. B. 175; Kearney v. London Brighton and South Coast R. W. Co., L. R. 5 Q. B. 411, L. R. 6 Q. B. 759; Clerk & Lindsell on Torts, 3rd ed., p. 467 et seq.; Sangster v. Eaton, 21 A. R. 624, 24 S. C. R. 708.]

I think the facts of this case bring it within the rule . . . and that, in the absence of any explanation by the defendant, the presumption must be that the building fell either owing to some defect in the plan or design for the alterations or by reason of some negligence in making the alterations; and whether or not the negligence was that found by the jury, it was not incumbent upon the plaintiff to shew. . . .

Is the defendant Reid relieved from liability because it was shewn that the work was being done for the tenant, Smyrles, by independent contractors, under the supervision of an architect? . . .

[Reference to Bower v. Peate, 1 Q. B. D. 321, 326; Dalton v. Angus, 6 App. Cas. 740, 829.]

The right of the plaintiff to retain her judgment in this case . . depends upon whether the undisputed facts establish that, when the defendant contracted with Smyrles for the alterations to his building, he owed to her and the other occupants of the adjoining land a duty of such a nature that he could not by delegating its performance to another, escape liability for its non-fulfilment.

I think the case comes within the principle stated by Lord Blackburn in Dalton v. Angus, supra, for the defendant Reid, in addition to the general duty which, as owner of the building, he owed to his neighbours, as pointed out in the cases above cited on the question of the application of the rule res ipsa loquitur, also, in the circumstances of this case, when he authorised the alterations in his building to be made, owed a special duty to the plaintiff and others who might be within the reach of its fall, to see that proper precautions were taken to prevent its falling.

I also think that, as between an owner of land who is putting up, demolishing, or altering buildings thereon, and his neighbours, the principle should be applied, which has been adopted in many cases, that a person who authorises work of a hazardous nature in or near a highway, to the injury of a member of the public using the highway, cannot rid himself of liability for negligence in performing the work by shewing that such negligence was that of an independent contractor employed by him.

I refer to such cases as Kirk v. City of Toronto, 8 O. L. R. 730, which followed Penny v. Wimbledon Urban District Council, [1898] 2 Q. B. 212, [1899] 2 Q. B. 72. . . . Valiquette v. Fraser, 39 S. C. R. 1; . . . Encyc. of the Laws of England, vol. 9, pp. 559 to 562.

Assuming that the relationship between the defendant Reid and Smyrles at the time of the accident was that of owner and independent contractor, I am of opinion that the principles enunciated in Bower v. Peate, Dalton v. Angus, and Penny v. Wimbledon Urban District Council, supra, are applicable to the facts of this case, and support the judgment; but, in the absence of any evidence of the defendant Reid to shew that the accident was unavoidable or attributable to the Act of some person not under his control or to vis major, the liability of the defendant Reid may, I think, well be rested on the rule of law stated by Littledale, J., in Laugher v. Pointer, 5 B. & C. 547, at p. 560, cited with approval by Parke, B., in Quarman v. Burnett, 6 M. & W. at p. 510, and adopted by Jessel, M.R., in White v. Jamieson, L. R. 18 Eq. 303, "that in all cases where a man is in possession of fixed property, he must take care that his property is so managed that other persons are not injured, and that whether his property be managed by his own immediate servants or by contractors or their servants. . . ."

Smyrles's tenancy had not begun when the accident happened, and he was doing the work which was in progress when it happened by permission of the defendant Reid, and was in the position not of a tenant in possession but of a licensee brought on the premises by the defendant Reid.

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

TEETZEL, J. JULY 7TH, 1910.

GOWGANDA MINES LIMITED v. SMITH.

Company—Shares—Subscription — Seal — Allotment—Special Agreement—Misrepresentations—Prospectus.

Action to recover $3,250, being the balance of the price of 25,000 shares of stock in the plaintiff company subscribed for by the defendant at 15 cents per share.

The defendant's first subscription was for 10,000 shares, on the 23rd November, 1908, and the second subscription was for 15,000 shares on the 3rd December, 1908.

The subscription agreement was executed under seal by the defendant and several other persons, and was in the following form: "We, the undersigned, hereby subscribe for the number of shares of a company to be incorporated and known as Gowganda Mines Limited, set opposite our respective names, at 15 cents per share, payable upon call of American Securities Company Limited, as follows: one-third in cash upon allotment, one-third at 30 days thereafter, and one-third at 60 days thereafter. It is agreed that all subscriptions hereunder are subject to the terms and conditions contained in the foregoing agreement, and that said stock shall not be allotted until 500,000 shares shall have been subscribed for."

The "foregoing agreement" was an underwriting agreement, dated the 31st October, 1908, between M. P. Vandervoort, of the first part, and Robert Greig, of the second part, which agreement, after reciting that Vandervoort held an option to purchase certain mining claims in the district of Gowganda, and had agreed to sell those claims for $75,000, to a company to be incorporated by Greig, subject to the terms thereinafter expressed, provided:—

(1) That Greig agreed to organise and incorporate a company known as the Gowganda Mines Limited, with a share capital of $1,000,000, divided into 1,000,000 shares of $1 each.

(2) That Vandervoort agreed to sell the mining claims to the company for $75,000.

(3) That of the capital stock of the company Greig agreed to underwrite or cause to be underwritten 400,000 shares at 15 cents per share, the same to net $60,000.

(4) That Vandervoort agreed to underwrite or cause to be underwritten 300,000 shares at 15 cents, to net $45,000.

(5) That 500,000 shares should be underwritten or subscribed for before any allotment should be made, and if 500,000 shares were not underwritten or subscribed for within 30 days from the date of the agreement, the same should be null and void.

(6) That upon the underwriting of the whole 700,000 shares, 200,000 should be for the benefit of the company, and the amount realised thereon, $30,000, should go into the treasury of the company for the benefit of the company and the development of the claims, and that when 500,000 shares should have been underwritten and subscribed the company should be incorporated, and Vandervoort should convey to the company the mining claims and receive in part payment thereof five-sevenths of the amount realised from the stock; and the balance of the $75,000 should be paid out of the sale of the remaining 200,000 shares.

(7) That all stock so underwritten should be pooled with the American Securities Company Limited for one year, and that the pooled stock should not be placed upon the market for one year, and not at less than 35 cents per share; and that upon the sale of any pooled stock the number of shares sold should be made up of a pro rata amount underwritten or subscribed for by each party to this agreement.

The company was incorporated by letters patent dated the 3rd November, 1908; and at a meeting of the directors held on the 13th November, 1908, the above agreement was, by resolution, adopted and confirmed by the company.

Both of the defendant's subscriptions were taken in lieu of subscriptions by former subscribers to whom allotments had been made, and who, with the consent of Greig, who had obtained the same under the agreement, and who was also the secretary of the company, were allowed to withdraw their subscriptions, and whose shares the directors of the company consented should be transferred to the defendant; and these shares were on the 4th December, 1908, formally allotted to the defendant.

As to the first subscription for 10,000 shares, the defendant was notified by the American Securities Co. of the first call of 5 cents per share thereon, and on the 27th November he paid the amount, $500.

On the 7th December the defendant notified both companies that he withdrew both of his subscriptions, and on the 9th December demanded the return of the $500 which he had paid, and made no further payments.

This action was brought by the two companies, the Gowganda Mines Limited and the American Securities Co. Limited.

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

Z. Gallagher, for the defendant.

TEETZEL, J.:— . . . As to the right of withdrawal, the agreement signed by the defendant being under seal, I think the case is governed by Nelson Coke and Gas Co. v. Pellatt, 4 O. L. R. 481, and Re Provincial Grocers Limited, 10 O. L. R. 705. I cannot construe the document executed by the defendant as a mere offer which would require formal acceptance by the company in order to complete his contract. The provision in it relating to allotment has only to be complied with in order to mature the time for payment and put the defendant in default: in other words, the agreement, when signed, sealed, and delivered by the defendant, was a completed contract, subscribing for a certain amount of the stock and agreeing to pay for the same

on dates fixed by reference to the time when the company should allot the stock to the defendant. All the terms and conditions of the "foregoing agreement" referred to in the agreement signed by the defendant were complied with, and more than 500,000 shares had been subscribed for when the defendant subscribed; and I find that on the 4th December the defendant's subscriptions were accepted, and the whole 25,000 shares subscribed for were allotted to him by the company. So that, on the above authorities, I must hold that the defendant could not withdraw from his agreement after its execution and delivery by him, and that before the action the three instalments of the purchase-price had matured under the terms of the agreement.

Then as to the defence that the subscription was induced or obtained by verbal representations prior to the receipt by the defendant of a copy of the company's prospectus, within the meaning of sub-sec. 3 of sec. 97 of the Ontario Companies Act, I find, on the evidence, that the defendant first obtained a copy of the prospectus on the 27th or 28th November, in a letter from Mr. Greig dated the 27th November. I also find as a fact that the defendant was not induced by Mr. Greig or by any one on behalf of the company to subscribe for any shares. The solicitations for both subscriptions came to Mr. Greig through a friend of the defendant; and, instead of being induced to take the shares, the defendant was accommodated with them through the intervention of his friend. . . . I . . accept Mr. Greig's evidence, and hold that neither of the subscriptions was obtained or induced by verbal representations as distinguished from written representations, and the only written representations by Mr. Greig to the defendant were the agreement . . and the copies of the reports and plan annexed thereto.

Judgment for the plaintiff for $3,250 and costs, and the defendant's counterclaim for the $500 dismissed with costs.

BRITTON, J. JULY 8TH, 1910.

WILLIAM HAMILTON MANUFACTURING CO. v. HAMILTON STEEL AND IRON CO.

Company—Winding-up—Action by Company in Liquidation — Breach of Contract—Non-delivery of Goods Contracted for—Time—Adoption of Contract by Liquidators—Failure to Tender or Secure Payment—Damages—Relief from Further Delivery under Contract by Non-payment for Part Delivered—Approval of Court to Action being Brought—Business Carried on by Liquidators—Right of Liquidators to Sue in Name of Company.

Action by a company in liquidation under the Dominion Winding-up Act, the Trusts and Guarantee Co. being the liquidators, to recover $2,000 damages for breach of an alleged agreement by the defendants to sell and deliver to the plaintiffs 250 tons of No. 1 pig iron at $20.25 per gross ton, and to give to the plaintiffs the option within thirty days from the date of the agreement, the 14th June, 1906, to purchase an additional quantity of 250 tons at the same price.

The plaintiffs asserted an exercise of the option to purchase the additional quantity; they admitted delivery of 233 tons, 950 lbs., and claimed damages for non-delivery of 266 tons, 1050 lbs.

The winding-up order was made on the 11th December, 1906.

This action was begun on the 20th May, 1909.

F. R. MacKelcan, for the plaintiffs.

G. Lynch-Staunton, K.C., and F. Morison, for the defendants.

BRITTON, J., set out the facts, the contracts, and the correspondence, and proceeded:—

The sale in these contracts is for delivery in about equal monthly proportions between the date of the first contract and the 31st December, 1906.

Shipping instructions as to this iron were to follow. The shipping instructions did follow, but a perusal of the correspondence will shew that the delivery in about equal monthly proportions was not carefully observed. There was considerable give and take between the parties, each endeavouring to accommodate the other. The defendants were not able at all times to ship iron as fast as the plaintiffs required it, and, on the other hand, the plaintiffs were not ready to pay, and the defendants were ex-

ceedingly lenient about exacting pay, but no damage is specifically claimed, not has any been proved by reason of any delay in any delivery actually made. The claim is for refusal to deliver.

I do not find anything in the contract or in the correspondence to extend the time for delivery.

How did the matter stand on the 31st December, 1906? Up to that date both contracts were in force; after that date neither was. The contract was a commercial one, a trade contract in reference to a material the price of which was fluctuating; it was one in which time was of the essence, and the defendants were not bound to continue it open for delivery after the last-mentioned date.

The plaintiffs admit that they received 233 tons, 950 lbs., of iron, and the defendants have not proved that they delivered any more, although in the letter of the 7th December the defendants speak of the car they intended to ship as completing the contract of the 14th June, for delivery prior to the 31st December. The plaintiffs do not dissent from that, but in their letter of the 7th December called attention to the second contract for the additional 250 tons.

There was no breach of contract prior to the 11th December, 1906, for which the plaintiffs are entitled to sue.

There would be a right of action and the plaintiffs would succeed to the extent of recovering damages for non-delivery after the 11th and prior to the 31st December, 1906, were it not that the liquidators, in adopting the contract, did not either tender the money for prior deliveries or in any way secure the defendants or shew them that future deliveries would be paid for. The authority for this is found in Ex p. Chalmers, L. R. 8 Ch. 289, and Ex p. Stapleton, 10 Ch. D. 586. . . .

In applying these cases, I do not overlook the fact that, although the plaintiffs had not paid for prior deliveries, and really owed a large sum of money, they were technically not in default, as the draft of the defendants had been accepted and did not mature until the 7th January, 1907.

If it should be held elsewhere that the plaintiffs are entitled to succeed for non-delivery prior to the 31st December, 1906, the damages, in my opinion, would be only to the extent of two car-loads. The largest quantity for which the plaintiffs sent specifications or shipping instructions was two car-loads. It was not shewn, so far as my recollection serves me, what is the definition of car-load as to quantity, but the average quantity on the cars delivered by the defendants and accepted by the plaintiffs was 22 tons, 1086 lbs. Estimating in that way, the defendants were

in default, roughly speaking, 45 tons. Possibly only 28 tons were really required or could be used to advantage before the end of the year.

There were specific instructions to ship two car-loads, which the defendants, apart from insolvency, ought to have shipped and did not ship on or before the 31st December.

The exact loss was not estimated, but it was approximately . . . $240.75.

After the 31st December the position was entirely changed. During December the conduct of the plaintiffs cannot be commended. In the correspondence there was concealment of their financial position, to the prejudice of the defendants. On the 5th December, only the day before the resolution was passed admitting insolvency, the plaintiffs asked that a draft be made at thirty days for the amount overdue for iron delivered. After the resolution was passed, and before there was formal notice to the defendants of the winding-up, iron was urgently asked for but not delivered. The defendants were entitled to stand upon their strict legal rights.

I have considered the question . . . whether or not the defendants were relieved from further delivery by the non-payment by the plaintiff for the iron already delivered. . . .

[Reference to Withers v. Reynolds, 2 B. & Ad. 882; Bloomer v. Bernstein, L. R. 9 C. P. 588.]

In this case neither the plaintiffs nor the liquidators intended to put an end to the contract. They desired to keep it on foot, but at the same time they did not pay, and the liquidators refused, unless the Court would compel them, to pay for the iron already delivered. . . .

[Reference to Mersey v. Naylor, 9 App. Cas. 434; Rhymney v. Brecon, 83 L. T. N. S. 111; Boyd v. Sullivan, 15 O. R. 492; Cornwall v. Henson, [1900] 2 Ch. 298.]

The conduct of the purchaser must amount to a repudiation of the contract in order to justify the vendor in treating the contract as abandoned. The law is, that breach of one stipulation in the contract does not carry with it an intention to repudiate the whole.

In this case the liquidators were insisting that the contract was not broken. They were anxious to hold the defendants to it. Upon the cases cited, I must hold that whatever contract subsisted was not repudiated merely by the non-payment for iron already delivered or by the conduct of the liquidators. Then the contract must be dealt with as subsisting.

Even so, the liquidators, if entitled to have delivery of iron, are only so entitled upon shewing the vendors that they are ready to pay for the goods to be so delivered. It would be a most unfortunate thing if, in addition to the loss already sustained by the defendants in having iron to the value of $3,884 received and used by the plaintiffs, the defendants were obliged to deliver a further quantity without at least having it shewn that the iron would be paid for on delivery. . . .

[Reference to Ex p. Chalmers, L. R. 8 Ch. 289; Ex p. Stapleton, 10 Ch.D. 586.]

In this case the liquidators never paid the price for iron delivered, and they never tendered payment for either the iron delivered or undelivered, under the alleged contract, if the same was still subsisting.

For the above reasons, I think the plaintiffs are not entitled to recover for non-delivery after the 31st December, 1906.

It was objected that the approval of the Court to bringing this action was not shewn . . . R. S. C. 1906 ch. 144, sec. 34. Such actions are not usually brought without approval, but, as there has been no application to stay, I do not feel called upon to express an opinion. It is not an issue on the merits.

The defendants also object that the business carried on by the liquidators was ultra vires under the Winding-up Act, and that, even if the defendants were guilty of breach of contract in failing to deliver, the plaintiffs are not entitled to recover, for there were no damages sustained.

"The plaintiff company in liquidation retains its corporate powers, including the power to sue, but such powers must be exercised through the liquidator under the authority of the Court. The liquidator must sue in his own name when he acts as representative of creditors and contributories, and in the name of the company to recover either its debts or its property." See Kent v. La Communauté des Soeurs, [1903] A. C. 221.

Action dismissed with costs.

BRITTON, J. JULY 8TH, 1910.

SOVEREIGN BANK OF CANADA v. PARSONS.

Set-off—Business of Manufacturing Company Carried on by Receiver under Order of Court—Goods Manufactured by Receiver for Customer—Assignment by Receiver to Bank of Moneys Due for Price of Goods—Right of Customer to Set off Damages for Breach of Contract Made with Company.

Action to recover $15,028 and interest, in the following circumstances.

The Imperial Paper Mills of Canada Limited were doing business at Sturgeon Falls, and entered into divers contracts with the defendants for the manufacture and supply of paper. Before these contracts were made, the company had a large bonded indebtedness, to secure which they had executed a mortgage upon all their plant and property to Carritt and Sinclair as trustees.

Adolphe Diehl and Alfred S. Wagg, as bondholders, on behalf of themselves and all others, began action (Diehl v. Carritt) to realise their securities by sale of the company's undertaking. In that action, on the 27th October, 1906, on the application of the plaintiffs therein, John Craig, the company's manager, was appointed, by order of the Court, receiver and manager, and the company were ordered to hand over to him, as receiver and manager, all stock, goods, chattels, and effects belonging to the company.

By that order the receiver was authorised to borrow money, not exceeding $40,000, for the purpose of carrying on the company's business, and any loan or advance to the receiver was to be a first charge upon the undertaking and assets which should come to the hands of the receiver.

By a further order made on the 10th December, 1906, the receiver was authorised and directed to obtain money not to exceed $50,000, upon the sale and pledge of book accounts and commercial paper of the company. That order further provided that the borrowing power under the order of the 27th October was not to be deemed exhausted by this latter order, and that any person from whom money was obtained should be entitled to rank in priority to the debenture-holders for any difference which might become due beyond the security pledged.

By order of the 9th January, 1907, George Edwards was appointed joint receiver and manager with Craig, and they, as

receivers and managers, were authorised to obtain money by sale or pledge of book accounts and commercial paper of the company, as provided for in the order of the 10th December, 1906, subject to the limitation that they were not in excess of $40,000, to create a charge in priority to the lien and charge of the debenture-holders.

The receivers and managers continued to manufacture paper for the defendants.

About the 1st May, 1907, as the plaintiffs alleged, the receivers and managers, having then on hand manufactured material which the defendants had ordered, and which the receivers and managers were about to ship, assigned and hypothecated the manufactured goods to the plaintiffs. This shipment amounted to $4,504, and this amount was paid by the plaintiffs to the receivers and managers.

Similar assignments and hypothecations of other material manufactured were made to the plaintiffs, on dates ranging from the 4th May to the 20th June, 1907, and for all these the receivers and managers received in due course from the plaintiffs, in consideration of such assignments and hypothecations, the full amount.

On the 7th October 1907, by order in Diehl v. Carritt, E. R. C. Clarkson was appointed receiver and manager in place of Craig and Edwards.

On the 9th October, 1907, Craig, Edwards, and Clarkson, with the approval of an Official Referee, to whom a reference had been directed in Diehl v. Carritt, assigned to the plaintiffs any interest they or any of them had in claims against the defendants for the price of paper.

This action was commenced on the 7th November, 1907, the plaintiffs claiming $15,028 and interest as the amount due by the defendants for paper supplied by the receivers, assigned to the plaintiffs.

The defence was that the claim of the plaintiffs arose by reason of certain contracts made by the company and assumed and adopted by the receivers and managers and by reason of new contracts and the carrying out of the same by the receivers and managers with the defendants for the supply of paper, and that, by reason of breach of these contracts, the defendants were entitled to set off the damages they had sustained, and they alleged that these damages were in excess of the plaintiffs' claim.

J. Bicknell, K.C., and W. J. Boland, for the plaintiffs.

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

BRITTON, J., after setting out the facts as above, first referred to the counterclaim for damages against the receivers and managers delivered by the defendants and struck out by Meredith, C.J., whose order was affirmed by a Divisional Court and the Court of Appeal: 18 O. L. R. 665. He then referred briefly to the evidence, and proceeded:—

If there had been no assignment to the plaintiffs, and if, by leave of the Court, the action had been brought by the receivers, it would in this case have been regarded as an action for the benefit of incumbrancers, and, if so, the claim of the defendants could not be set off: see Mullarkey v. O'Donohoe, 16 L. R. Ir. 365. . . .

Power was given to the receivers, not only to carry on the business, but to raise money for the purpose and to pledge the assets by way of security for the money so raised. The good faith of the receiver has not been questioned. The money was advanced by the plaintiffs, and, as was argued at the trial on behalf of the plaintiffs, the plaintiffs were really the owners of the property invoiced to the defendants, and which went into their possession. The plaintiffs can get only such value for the property as the defendants promised to pay for it to the receiver, and that price must be subject to all proper deductions as to freight, tare, quality, etc., according to the terms under which the defendants were purchasing. The receiver, being authorised to carry on the company's business, incurred the liability to the plaintiffs in the reasonable management and working of the mill.

The receiver may be personally liable to the plaintiffs, and he is entitled to be indemnified by the company out of the assets of the company. Whether the receiver is personally liable to the plaintiff or not, the plaintiffs are entitled to stand in the place of the receiver and be paid directly out of the assets of the company. This is the principle stated in Raybould v. Turner, [1900] 1 Ch. 199.

A receiver under the direction of the Court acts for all parties and he would not be permitted by the Court to carry on the business or manage it if so managing was to result in a priority to any creditor other than as priorities existed at the time of appointment. . . .

[Foster v. Nixon's Navigation Co., 23 Times L. R. 138, distinguished.]

Here the fact is, and I am warranted by the evidence in so finding, that the paper delivered by the receiver, although for the purpose of filling the contract, was under the new arrangement that the receiver should be paid therefor, and that he would not, could not, recognise old claims which were good, if at all, only

against the company. The defendants accepted the situation on the 3rd April. They could not, after this acceptance, and after getting the paper represented by invoices beginning the 4th May, take a different position.

This is not the case of the company or the liquidator of the company or the receiver suing for a debt due to the company which accrued prior to the appointment of liquidator or receiver. The case, therefore, of Banks v. Jarvis, [1903] 1 K. B. 549, is clearly distinguishable.

I have no doubt that it is quite within the power of the Court to appoint a receiver, and authorise him to carry on a business for a limited time by carrying out old contracts and entering upon new ones: see Taylor v. Peate, 39 Ch. D. 538. In the present case the power was not so, in terms at least, and the power given could only be exercised by raising money and giving security, which would be inconsistent with allowing a purchaser to set off an old debt against the purchase-money.

Having reached the conclusion that the defendants have no right to set off their damages. . . . I do not deal with the further question of the defendants' right of set-off as against the plaintiffs, even if no receiver had been appointed. The defendants were formally notified of the assignment on the 30th July, 1907. It is alleged that no damage resulted to the defendants before that date.

The plaintiffs further contend that of the damages claimed all or the greater part accrued after the notice of assignment, and so could not be set off, although such damages grew out of the same transaction. Watson v. Midwales Co., L. R. 2 C. P. 593, was cited. . . .

If the plaintiffs consent to accept judgment for $12,113.68, there will be judgment for that amount, with interest at five per cent. per annum from the 7th November, 1907, and with costs. If the plaintiffs are not content, but desire a reference, it will be referred to the Master in Ordinary to ascertain and determine what amount the defendants are entitled to have deducted from the invoices representing the plaintiffs' claim. . . . The amount of the deductions so found shall be taken from $15,754.20, and the plaintiffs will be entitled to judgment for the balance, with interest and costs down to the reference; costs of reference reserved. . . .

VILLAGE OF COLBORNE v. GIROUX—SUTHERLAND, J.—JULY 9.

Interim Injunction—Order to Continue.] — Motion to continue an interim injunction restraining the defendant from doing work on Division street in the village of Colborne. Injunction continued until the trial. Grayson Smith, for the plaintiffs. G. F. Macdonnell, for the defendant.

RE CASCI AND HILL—SUTHERLAND, J., IN CHAMBERS—JULY 11.

Land Titles Act—Registration—Construction of Deed—Division Line—Intention of Parties.]—Appeal by F. W. Casci from a decision of the Master of Titles, under the Land Titles Act, allowing the objection of William H. Hill to the registration of the appellant as owner of the westerly 30 feet of part of lot 8 in the first concession from the bay, in the township of York. The question upon the appeal was whether the Master was justified in construing the deed in question so as to give effect to what he found to be the intention of the parties when it was made. Held, that the Master properly found that the division line intended when the deed was made was what was then the recognised division line between the properties of Ann M. Hill and Levi Ashbridge. The conduct of the appellant subsequent to his deed shewed the property he understood he was buying. He put his west fence along this boundary and went into possession of his property. It is proper—if that can reasonably be done—to give a construction to the deed in accordance with the intention of the parties; and that is what the Master did. Appeal dismissed with costs. K. F. Mackenzie, for the appellant. S. W. McKeown and J. W. McCullough, for the respondent.

STEWART v. DICKSON—SUTHERLAND, J.—JULY 11.

Contract — Setting aside — Misrepresentations.]—Action by four brothers, three of them farmers and one a medical student, to set aside an agreement in writing, dated the 5th March, 1909, between them and the defendant, a financial agent, and for incidental relief. The plaintiffs, under a prior agreement, had contracted to purchase a large tract of land in Saskatchewan from a Battleford company for $103,950, and had paid $26,000 on account

of the purchase-money, but had not been able to make the further payments required; and the agreement with the defendant was entered into for the purpose of assisting them to carry out the prior agreement. By it they agreed to transfer all their interest in the Saskatchewan lands to the defendant, and he agreed to arrange with the land company for such payments as would postpone the payment of the balance of the principal and interest then due, etc. The learned Judge finds, upon the evidence, that the writing of the 5th March does not contain the true agreement between the parties; that the plaintiffs were misled by the representations of the defendants when they signed the document; that the defendant had failed to live up to the terms of the true contract; and that he had improperly endeavoured to secure their signatures to a document dated the 7th June, 1909, which would have had the effect of altering the contract. Judgment for the plaintiffs, with costs, setting aside the agreement of the 5th March, and directing the defendant to deliver up a promissory not for $5,850 bearing the same date, the cash and notes received by him in connection with sales of land, and all other documents received from the plaintiffs relating to the lands. H. Cassels, K.C., for the plaintiffs. C. A. Moss, for the defendant.