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COURT OF APPEAL.

APRIL 4TH, 1912.

*STONE v. CANADIAN PACIFIC R.W. CO.

Railway—Injury to Brakesman in Attempting to Uncouple Box Freight Cars—Defective System—Foreign Car—Dominion Railway Act, secs. 264, 317*—Interchange of Traffic—Negligence—Evidence for Jury—Findings of Jury.*

Appeal by the defendants from the judgment of BOYD, C., at the trial, in favour of the plaintiff, upon the findings of a jury, in an action for damages for personal injuries.

The plaintiff, a brakesman employed by the defendants, was endeavouring to effect a coupling between two box freight cars, and while doing so was either shaken off or fell from a ladder affixed to the side and close to the end of the car in which he was riding, and one of the wheels passed over his right arm, necessitating amputation. The car was not the property of the defendant, but had been received and was being hauled over their lines under the interchange of traffic provisions of the Railway Act. It was referred to in the evidence as "the Wabash car."

The plaintiff attributed the accident to three causes: (a) the ladder being defective, because the lowest step, or the step which was placed below the bottom of the car, was not joined to the rest of the ladder, but was separate and attached to the bottom timbers of the car, and was loose and insecure; (b) there was no ladder on the end of the car close to where the side ladder was; and (c) the coupling-rod used for controlling the action of automatic couplers, did not extend outward from the couplers to the side of the car, or within a short distance from it, but was so short as to necessitate the going in between the cars, or at all events to render it necessary to reach very far beyond the side of the car in order to get hold of it.

*To be reported in the Ontario Law Reports.

At the trial, witnesses were examined on both sides. At the conclusion of the plaintiff's case, counsel for the defendants moved for judgment, on the ground that no case of negligence had been shewn; but the learned Chancellor declined to withdraw the case from the jury. The motion was renewed at the conclusion of the whole case, and again denied.

Question were submitted to the jury and answered as follows:—

1. Was the car in question owned by the Canadian Pacific Railway Company or by another company? A. Owned by another company.

2. Was the car and its fittings reasonably safe for the employees of the Canadian Pacific Railway Company, in the usual operations of the road? A. We think not.

3. Was the plaintiff, having regard to all the circumstances, in his method of arranging the gear for coupling the cars, acting according to good and proper practice? A. Not having received circular No. 4, we think he acted to the best of his knowledge.

4. If not, wherein did he err?

5. Was the plaintiff injured in consequence of any defect in the make-up of the car? A. Yes, in our opinion we think he was.

6. If he was so injured, state everything which you find to be wrong. A. The car in question lacked the ladder on end of car and long lever equipment used by C.P.R., in which company he was employed.

7. Could the plaintiff, by the exercise of reasonable care, have provided for the coupling of the cars with safety to himself? A. In our opinion, not under the circumstances.

8. Do you find negligence as to the matters in dispute: (a) in the Canadian Pacific Railway Company; (b) in the plaintiff; (c) or in both of them?

9. If so, state briefly what was the negligence in each case.

10. If the plaintiff is entitled to damages, state how much. A. The jury have agreed on $6,000 for damages for plaintiff.

Upon the answers, judgment was entered for the plaintiff for $6,000.

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

I. F. Hellmuth, K.C., and Angus MacMurchy, K.C., for the defendants.

A. E. H. Creswicke, K.C., and Christopher C. Robinson, for the plaintiff.

Moss, C.J.O.:— . . . Upon all the facts disclosed in evidence, and having regard to the circumstances under which the plaintiff met with the injury, I think that, if I had tried the case without a jury, I should have had no hesitation in holding that the plaintiff had not succeeded in fastening liability upon the defendants. But, the case having been submitted to the jury, and their answers to the questions being now before us, there arise for consideration the questions: (a) whether there was evidence proper to submit to the jury upon the question of negligence on the part of the defendants; and, if so (b), whether, upon the answers, judgment should not have been entered for the defendants. . . .

[The learned Chief Justice then explained at length the circumstances which led to the plaintiff's injury.]

Upon the whole, although scanty, there was enough at the close of the plaintiff's case to justify the refusal to enter judgment for the defendants. But, at the close of the whole case, when it had been proved, and indeed admitted, that the car was not the defendants' property . . . other questions arose as to the liability of the defendants for the failure of this car to comply with the requirements of sec. 264 of the Dominion Railway Act, applicable to couplers and ladders on box freight cars. The car had been received in the ordinary course of the obligation to interchange traffic, imposed by sec. 317 of the Railway Act. It had been inspected in due course and passed, in accordance with the ordinary practice, by inspectors whose competency was not questioned. . . . It is shewn that there is no rule, statutory or otherwise, requiring that there shall be ladders on the ends as well as on the sides of box freight cars used on railways operated in the United States. The car was provided with automatic couplers; but the complaint is as to the length of the lever or coupling-rod. There is no express provision in the Railway Act prescribing the length of the lever; but the testimony for the defendants shewed that the end of the lever on the car extended to within 15 or 16 inches of the side, instead of 32 or 33 inches, as the plaintiff stated. The modern Canadian lever is made to extend out to the side, or to within at least 8 inches; but cars from the United States, with the end of the lever 15 or 16 inches from the side, are admitted and passed in the usual and ordinary course of inspection. Unless the provisions of sec. 264 apply, there appears to be no statutory or other rule against the transport of foreign box freight cars, although they do not comply in every respect with the Railway Act. . . .

[The Chief Justice then set out the provisions of sec. 264 (1) of the Railway Act and of clause (c).]

Assuming the expression "and cause to be used" to comprehend freight cars in transport over the defendants' lines, the car in question was not open to objection for any defect in the above-mentioned respects. . . .

[The Chief Justice then quoted sub-sec. 5.]

The car in question had not ladders on the ends, but it was not a car "of the company." There is a distinction drawn between the couplers to be used on all trains, and the equipment of box freight cars with ladders. The obligation with regard to the latter is confined to cars of the company. The car was, therefore, not in contravention of the sub-section. Even if the contrary were the case, it is clear that their absence in no way contributed to the accident which befell the plaintiff. I think that, upon the whole case, the jury should have been told that no case appeared upon which they could reasonably find that the defendants were negligent, and that no case of liability had been made out, and that the action should have been dismissed.

Assuming, however, that it was proper to submit the case to the jury, is the plaintiff entitled to judgment upon the answers returned to the questions? It is to be observed, in the first place, that the jury failed to return answers to the very pointed and material question on the head of negligence contained in No. 8. But they answer the very general question No. 2 . . . which is not directly pointed at the alleged defects leading to the injury, and a negative answer to which is not a finding of negligence on the part of the defendants.

The answer to questions 4 and 5 bear more directly on the question. They attribute the plaintiff's injury to the fact that the car in question lacked the ladder on the end of the car and the long lever attachment used by the defendants in their cars. But there is no evidence on which a jury could reasonably find that these alleged defects were the proximate cause of the accident. The plaintiff was endeavouring, by using the side ladder, not as a means of descending to the ground and there effecting the coupling, as he admits was the proper course, but for the purpose of enabling him by using the lowest step as a foothold and crouching with his body in a strained and awkward position, to effect the coupling, without stopping the car or getting down to the ground. The position was admittedly an improper and certainly a very dangerous one, not authorised to be taken. The method adopted by the plaintiff to endeavour

to effect the coupling was the very one most calculated to expose him to danger and risk of injury. And there is no evidence to justify the answer to the 7th question—an answer which in its terms is inconclusive and unsatisfactory. There were no "circumstances" to prevent the plaintiff from adopting the perfectly safe course which he admits he might have adopted.

Having regard to the evidence in this case, I do not think the answers sufficient to support the judgment entered for the plaintiff; and I think that, notwithstanding them, judgment should have been entered dismissing the action.

The appeal should be allowed and the action dismissed, with costs, if exacted.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH and MAGEE, JJ.A., also concurred in the result, for reasons stated by each in writing.

Appeal allowed.

APRIL 4TH, 1912.

*REX v. BRITNELL.

Criminal Law—Exposing for Sale and Selling Obscene Books—Criminal Code, sec. 207—Magistrate's Conviction—Evidence to Sustain—Knowledge of Sale and of Character of Books.

Case stated by one of the Police Magistrates for the City of Toronto, under sec. 1104 of the Criminal Code.

The defendant was convicted by the magistrate upon an information charging that, in the month of April, 1911, the defendant, contrary to law, exposed for sale and sold certain obscene books, tending to corrupt morals, contrary to the form of the statute in such case made and provided.

The question considered by the Court was, whether there was evidence upon which the defendant might be convicted of selling and of having knowingly sold or exposed for sale obscene books, within the meaning of sec. 207 of the Criminal Code.

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

*To be reported in the Ontario Law Reports.

George Wilkie, for the defendant.
J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

MEREDITH, J.A.:—The convicted man is a reputable bookseller, who carries on business, in an extensive way, in one of the business centres of Toronto. Although neither his reputation, nor the character and extent of his business, is a reason why he should not be convicted, and punished, if guilty, yet they are not things without weight, and very considerable weight, in considering the probabilities of the truth of the charge against him, upon the question whether there was any reasonable evidence of guilt adduced against him at the trial, as well as upon the question of fact, with which the Court cannot deal, whether guilty or not guilty.

The charge against him seems to have been a double one in two senses, exposing for sale and selling two different obscene books; but no question is raised in that respect; the conviction seems to have been in accordance with the charge, as if of one offence only.

The offence is one against morality, and one of a despicable character; the maximum punishment of which is two years' imprisonment; and it must be "knowingly" committed, "without lawful justification or excuse."

Assuming the books to have been sold, or exposed for sale, and to have been obscene books, which is assuming a good deal in favour of the prosecution, two other essential things must have been proved against the accused before he rightly could have been convicted: (1) that the books were sold or exposed for sale with his knowledge; and (2) that he knew of their obscene character. This is but a reasonable provision of the law; if it were otherwise, the lot of a book-seller, however honest, and anxious to avoid anything like offending against morality, would be a hard one; and especially hard upon one who carries a stock of a quarter of a million volumes, as one of the witnesses thought the accused does.

Neither book was manifestly or notoriously obscene or immoral; and it may be that neither is in that respect better or worse than a great number of books which are freely sold and read everywhere; and there is, I should think, nothing in either of them to make them very attractive to any one; and the small profit to be derived from their sale is hardly such as would induce a large dealer to conceal them in his cellar, so that he might sell them with less chance of being found out, and to sell them with the possibility of two years' imprisonment in the penitentiary before his eyes.

There was no sort of evidence of any exposure of them for sale; and there, manifestly, should have been a finding of not guilty to that extent; but there was not; on the contrary, there seems to have been a conviction in respect of which the penalty imposed was to some extent imposed.

Nor can I think that there was any reasonable evidence of a guilty knowledge on the part of the convicted man of the sale which was made, and which was of one of the books only, or of its obscene character, if it really has any.

It is quite plain that in the extensive business of the convicted man the books in question might have been bought and sold without his knowledge; he did not attend to the department in which such books, that is, "works of fiction," are sold. He testified that he did not know that there were any such books in his establishment; that he had, a year or more before, found invoices of them and returned them, because, from what he had heard, he thought their tendency was suggestive, and so did not want to sell them. There is not a word of testimony to the contrary of this; the most that can be said is, that, if dealing with a man who might be thought untruthful and tricky, there were some circumstances of suspicion, a book having been sold and other books having been found in the cellar; things which are not unsatisfactorily explained by the witnesses for the prosecution. But no one, much less a reputable man doing an extensive reputable business, is to be convicted on suspicion merely; when there is no more than that against him a verdict of not guilty should be entered. The statement that from what he had heard he thought their tendency suggestive, is a good way removed from an admission that he knew that they were obscene.

The cases which were referred to on the argument here were very different from this case; in them the obscene character of the writings was manifest, and in some of them it was the author who was prosecuted and who had sold them.

In a case of this character, where there may be different opinions as to the immorality of a book which is being generally sold here and in other countries or another country, it would seem to me to be the better course for those who object to its sale on that ground, to give notice of such objection to such a book-seller as the convicted man is, and to prosecute only if the objection is not heeded. No such book-seller can have any reasonable desire to sell such books as those in question, if they be obscene, for all there is in it for him, at the risk of being branded as a criminal and sent to the penitentiary for two years,

after first perjuring himself in the hope of escaping conviction.

I would answer the second question in the negative, and direct that the accused be discharged.

MAGEE, J.A., gave reasons in writing for the same conclusion.

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

HIGH COURT OF JUSTICE.

RIDDELL, J. APRIL 4TH, 1912.

MERCANTILE TRUST CO. v. CANADA STEEL CO.

Master and Servant—Injury to and Death of Servant—Dangerous Work—Warning—Negligence—Lack of Proper Appliances—Negligence of Servant—Findings of Jury—Prohibited Act—Inadvertence—Absence of Express Finding of Contributory Negligence.

Action brought by the administrators of a deceased Italian labourer for damages for negligence resulting in his death.

A. M. Lewis, for the plaintiffs.
J. W. Nesbitt, K.C., for the defendants.

RIDDELL, J.:—The defendants were building a blast furnace—this consisted of a steel jacket, in the form of what may, with sufficient accuracy, be described as a vertical cylinder. This jacket was over 60 feet high, and was being lined with firebrick at the time of the accident. The lining was effected in this way. Beginning at the bottom with the firebrick, when the lining had been inserted to a certain height, a new floor was put in at a height of 4 ft. 6 in. above the bottom floor, and from this another ring of firebrick was put in place—then another floor was put in 4 ft. 6 in. above the second floor, and so on, a new floor being made at each 4 ft. 6 inches. In order to permit of the firebrick, fire clay, etc., being sent up to the bricklayers, a square shaft was inserted, running from the bottom to the floor upon which operations were being carried on—this shaft could not be put in the

centre, as there required to be at that place a rod from which as a centre the workmen could carry a cord, which, being carried around, kept the inside of the brick circular. This shaft was built at one side of the centre, and up the shaft came the tubs containing the materials for the bricklayers.

The operations above being carried on in a contracted space, it is obvious that there was always danger of some substance, brick, etc., falling down the shaft—and indeed it was to be feared that some substance might fall from the tubs in their ascent, as they sometimes oscillated, struck the shoulder of the shaft, etc.

The deceased was working at the bottom of the shaft when a portion of a brick fell down the shaft and inflicted such injuries that he died shortly after. . . .

At the trial . . . it appeared that the brick which caused the injury had been thrown down on the platform or floor by a bricklayer, and, rolling over and over, at length reached the shaft, and so fell down.

It was contended that the employers should have had one or other of two appliances to prevent the possibility of such an occurrence: (1) A pair of butterfly valves level with the floor which would be shut at all times except when a tub was passing the floor. This the witnesses for the defence prove to be impracticable—and the jury have negatived the proposition of the plaintiff. (2) A continuation of the sides of the shaft up beyond the level of the floor or platform. This, it was said, would be very inconvenient, and in any case it would not prevent the falling of material from ascending tubs. The jury found that the accident would not have happened had the appliance been present, but were unable to agree whether the absence of it was a defect.

It appeared in evidence that the foreman, recognising the danger of material falling down the shaft, directed the deceased, when he first was put on the job, to keep from under the shaft—the workman said that he had been on the job before and would stand on one side. At the side there was a small platform, built either by himself or by another, for him to stand upon; and this is where he should have stood, there being no necessity for his being under the shaft at all. Moreover, very shortly before the accident, a fellow-workman had seen him crossing under the shaft and had warned him of the danger. This same workman said that occasionally he himself went under the shaft, but that this was forbidden, and he knew quite well how dangerous it was, and took the risk.

The jury found, in answer to questions, that these warnings

were given; that the deceased was not in his proper place; that he knew the danger; and that, had he been in his proper place, he would not have been injured.

I relieved the jury from further answering.

It is obvious that, unless the answers to the latter questions are sufficient to dispose of the case, there should be a new trial. It is not enough that a suggested appliance would have prevented the accident, if the absence of the appliance is not a defect.

But where the questions answered are sufficient to dispose of the case, there is no need of further proceedings: Findlay v. Hamilton Electric Light and Cataract Power Co., 11 O.W.R. 48, discussed in D'Aoust v. Bissett, 13 O.W.R. 1115; Dixon v. Ross, 1 D.L.R. 17 (Nova Scotia); and here I think such is the case.

I have again considered the law, and can arrive at no other conclusion than that at which I arrived in D'Aoust v. Bissett—followed as it has been in the King's Bench Divisional Court recently (King v. Northern Navigation Co., 24 O.L.R. 643, ante 172.)

The very recent case of Barnes v. Nunnery Colliery Co., [1912] A.C. 44, shews that, even under the Imperial Act, more favourable to the workman as it is than our own, there can be no recovery where the accident took place when the workman was doing a prohibited act. . . .

In the present case, as in that just mentioned, the dangerous act, while prohibited in form, was really "winked at," as was the case in Robertson v. Allan (1908), 77 L.J. K.B. 1072.

In addition to the cases already mentioned, the following are in point: Deyo v. Kingston and Pembroke R. W. Co., 8 O.L.R. 588; Markle v. Simpson, 9 O.W.R. 436, 10 O.W.R. 9; Grand Trunk R. W. Co. v. Birkett, 35 S.C.R. 296; Best v. London and South Western R. W. Co., [1907] A.C. 209; Brice v. Edward Lloyd Limited, [1909] 2 K.B. 804; Mammelito v. Page-Hersey Co., 13 O.W.R. 109.

It is strongly urged by Mr. Lewis that all the default of the deceased might be due to inadvertence, and that, in the absence of an express finding of contributory negligence, the plaintiffs might still recover.

This argument is completely met by a decision of the Chancery Divisional Court in Laliberté v. Kennedy, sustaining a judgment of Mr. Justice Teetzel at the trial, dismissing the action upon the plaintiffs' own shewing. In that case (I was of counsel both at the trial and in the Divisional Court) the deceased's work was to feed blocks to a circular saw, wholly unguarded. The blocks were placed upon a car, which itself ran to the saw

upon a tramway. The car was so arranged that, whenever any weight was placed upon it, it inevitably ran to the saw. By reason of the arrangement of blocks, etc., there was a great likelihood of the person feeding putting his foot upon the car and being carried at once to the saw—and the deceased was warned accordingly by the foreman not to put his foot upon the car. After working for some time in safety, he was observed by a fellow-workman to put his foot upon the car—the anticipated result occurred; he was carried to the saw and cut in two. It was perfectly apparent that his act was by pure inadvertence—a mere temporary forgetfulness when he was busy at his master's work. The case was tried by Mr. Justice Teetzel without a jury at Lindsay, on the 2nd and 3rd June, 1904, and that learned Judge held that the fact that the act of the deceased was by inadvertence did not relieve his representative, and dismissed the action. The Divisional Court (The Chancellor, Meredith and Magee, JJ.) dismissed an appeal from this judgment on the 13th December, 1904. This case is, in my humble judgment, good law, and I follow it.

Wilson v. Davies, 10 O.W.R. 315, in the Court of Appeal, may also, in some respects, be in point.

The action will be dismissed with costs.

TEETZEL, J. APRIL 6TH, 1912.

REYNOLDS v. FOSTER.

Vendor and Purchaser—Contract for Sale of Land—Statute of Frauds—Incomplete Agreement—Description of Land—Knowledge of Purchaser—Extrinsic Evidence to Identify Land—Terms of Mortgage to be Given by Purchaser—Manner and Time of Payment of Principal—Tender of Conveyance—Sufficiency—Charge of Fraud—Failure to Prove—Costs.

An action by the vendor for the specific performance of a contract for the sale of the King George Apartments in Bloor street, Toronto, for $60,000; and, in the alternative, for damages for breach of contract. It was admitted at the trial that since the action the plaintiff had resold the property for $53,000; and he claimed as damages the difference in price and certain expenses; also a large sum for special damages.

The defences chiefly relied upon were: (1) fraud and mis-

representation by the plaintiff and his agents as to the income derived from the property; (2) no sufficient tender of conveyance by the plaintiff; and (3), that the whole agreement was not in writing, as required by the Statute of Frauds.

C. A. Moss, for the plaintiff.
W. Nesbitt, K.C., and E. E. Wallace, for the defendant.

TEETZEL, J.:—I have no difficulty in finding as a fact, upon the evidence, that there was no fraud, deception, or misrepresentation practised by either the plaintiff or his agents as to the income derived from the property or any other matter inducing the contract; and that, if the defendant misunderstood the statements as to income or other matters, it was due to his own stupidity or want of care.

I also find that, before the time fixed for completion of the contract, the plaintiff was ready and willing and in a position to carry out all its terms which were imposed upon him, of all of which the defendant had knowledge. I also find that, before the time fixed for completion, the defendant repudiated the contract, and did not intend to perform any of its terms; and that what the plaintiff did in the way of formally tendering his conveyance was all that, under the circumstances, was necessary for him to do to entitle him to maintain this action, assuming that the contract meets the requirements of the Statute of Frauds.

Counsel for the defendant relied upon two items in respect of which he argued that the contract is incomplete, and, therefore, does not comply with the statute: (1) the description of the property; and (2) the provision that the defendant, as part of the consideration, was to "give a third mortgage on King George Apartments for $4,000 at 6 per cent."

The property is described as follows: "All and singular the premises situate on the north side of Bloor street west, known as 'King George Apartments,' known as No. 568 and 570, Bloor street west, plan No. , as registered in the registry office for the said city of Toronto, having a frontage of about 50 feet by a depth of about 130, to lane 20 feet, more or less." Now, the fact is, that, at the rear of the premises, the lane referred to extends only 26 feet, and then turns north, and that the remaining 24 feet, instead of having a depth of about 130 feet, has a depth of 149 feet 5 inches; but, over the rear section of 19 feet 5 inches by 24 feet, the owners to the east have a right of way from the lane to Bathurst street at the east.

Before the purchase, the defendant inspected the premises,

and his attention was called to this section and to the right of way over it; and, while he asserts that he was told by the plaintiff that the right of way was limited to the right of the owners to the east to take garbage over it, I find as a fact that he is mistaken as to this, and that he was informed that the right of way was general to those owners. Under these circumstances, I am of opinion that the error in the agreement in stating the property as having only a "depth of about 130 feet to a lane 20 feet more or less," is not fatal to the agreement; and I think the general description, coupled with the knowledge of the defendant that the section 19 feet 5 inches by 24 feet, subject to the right of way, formed part of the premises he was buying, coupled also with the discussion and inspection of it, bring the case within the principle of such cases as Foster v. Anderson (1908), 16 O.L.R. 565; Plant v. Bourne, [1897] 2 Ch. 281; and Lewis v. Hughes (1906), 13 B.C.R. 228; and that, therefore, extrinsic evidence would be admissible for the purpose of identifying the land and shewing the subject-matter of the negotiations between the parties.

As to the other objection, the question is, whether the omission to state the terms of the mortgage to be given back by the defendant, other than the amount of the mortgage and rate of interest, renders the agreement incomplete without recourse to oral testimony.

I am not able to find, upon the evidence, that the terms of payment of this mortgage were even orally agreed upon; for, although, when examined in chief, the plaintiff says that it was agreed to be a five years' mortgage, he recedes from this on cross-examination, and the defendant swears that there never was any such agreement. If it had been orally agreed upon and not put in the writing, the judgment in Green v. Stevenson (1905), 9 O. L.R. 671, would probably bar the plaintiff from enforcing the agreement. It is possible that, when the plaintiff's agents prepared the agreement for signature by the defendant, they thought no difficulty would arise in fixing the terms of the mortgage and that it would be safe to leave the matter as a subject of future treaty, or they may have assumed that, in the absence of other stipulation, the principal would be payable in five years. Giving the mortgage as part of the consideration was such a material part of the agreement, that I think it is necessary, in order to satisfy the Statute of Frauds, that the agreement should contain such particulars as would enable the Court, in the event of specific performance being asked, to declare the terms of the mortgage which the defendant should execute. While the Court will carry into effect a contract framed in general terms where

the law will supply the details, it is also well-settled that, if any details are to be supplied in modes which cannot be adopted by the Court, there is then no concluded contract capable of being enforced: Fry, 5th ed., sec. 368. See South Wales R.W. Co. v. Wythes (1854), 5 DeG. M. & G. 880; Bayley v. Fitzmaurice (1857), 8 E. & B. 664.

No difficulty would, of course, arise as to general form and terms of the mortgage to be given; as, I think, in the absence of any provision to the contrary, the law would imply a mortgage in terms of the Short Forms of Mortgages Act. See Fry, 5th ed., secs. 372-379, and cases cited.

I can find no authority indicating that, in the absence of express provision, the law will imply the terms upon which the principal money of a mortgage, agreed to be given, shall be payable. In sec. 369 of Fry, 5th ed., a number of instances, upon authorities cited in the notes, are given, where it has been held that the contract was incomplete, such as when it was not stated from what time an increased rent was to commence; where the contract did not state, either directly or by reference, the length of the term to be granted; where a contract for a lease for lives neither named the lives nor decided by whom they were to be received; where there was a contract for a partnership which defined the term of years, but was silent as to the amount of capital, and the manner in which it was to be provided.

I think that the matter of when and how the principal money was to be payable was such a material part of the agreement that its omission rendered the agreement incomplete, and that it is impossible by implication to supply the omission; and that, therefore, neither judgment for specific performance nor for alternative damages can be awarded.

The action must be dismissed; but, the defendant having failed to support his charge of fraud, there will be no costs.

BRITTON, J. APRIL 6TH, 1912.

DULMAGE v. LEPARD.

Contract—Lease of Hotel—Sale of Stock and Furniture—Breach by Vendor—Cash Deposit—Waiver of Tender—Damages—Loss of Estimated Profits—Recovery of Trifling Sum—Costs.

Action for the specific performance by the defendant of an agreement for leasing to the plaintiff the hotel of the defendant

at Wingham; or, in the alternative, for damages for breach of the agreement.

W. Proudfoot, K.C., for the plaintiff.
Charles Garrow, for the defendant.

BRITTON, J.:—Negotiations for this agreement were carried on between the plaintiff and defendant, and on the 31st July, 1911, having arrived at a clear understanding, they went to the office of Mr. Holmes, the solicitor for the defendant, where the agreement was reduced to writing and signed by the parties.

The defendant agreed to let to the plaintiff the Exchange Hotel and premises in the town of Wingham for five years from the 1st September, 1911, at the yearly rental of $700 and taxes, payable monthly in advance, and to sell to the plaintiff the household goods and furniture in the hotel at a valuation. . . . The purchase-price was to be paid in cash at the conclusion of the valuation.

After the agreement was signed by both parties, and apparently all completed, the defendant suggested that there ought to be a deposit, or something paid "to bind the bargain." The plaintiff agreed to this at once, and promised to pay or make a deposit of $100 on the following Saturday—the 5th August.

The defendant's son, William Lepard, was living with the defendant at the time, and assisting the defendant, more or less, in the hotel business. He was present when the agreement between the parties was entered into.

On the 3rd August, the son William wrote to the plaintiff a post-card, as follows: "In regard to renting the hotel, father has changed his mind and does not care to rent. Would sell—but not rent. Hoping he has not put you to much trouble, remain, yours sincerely, W. C. Lepard, Wingham." The plaintiff received this card in due course at the Gorrie post-office.

So far there is practically an entire agreement between the parties. Now the conflict begins.

The plaintiff says that on the 5th August he went to Wingham with a marked cheque for $100 to pay to the defendant as promised; that he saw the defendant, and asked him if he had notified the inspector. The defendant said "no," that it, the agreement, was off, and asked the plaintiff to wait until Billy would come home; . . . but the plaintiff could not and did not do so, but returned to his home in Gorrie without paying or making any actual tender of the $100.

The defendant denies that the plaintiff was at his house on

the 5th August, and denies that he had any conversation with or even saw the plaintiff after the 31st July, until the 19th August, when he admits that the plaintiff was at his (the defendant's) hotel at Wingham, and that on that day the son was not at home, and that the plaintiff desired to see the son. The plaintiff said that the day he was at Wingham with the cheque was the day of the Borden meeting at Harriston. It was established that the Borden meeting at Harriston was on the 19th August. The plaintiff was in error as to that; but he could not be mistaken about being at Wingham on that day, and about having the cheque for $100. If it is not true that the plaintiff had the cheque at Wingham on the 5th, the plaintiff has sworn falsely; it was not any mistake about that. I do not think that the plaintiff swore falsely. . . . He was, in my opinion, at Wingham on the 5th and on the 19th August, and the son of the defendant was absent on each day. The defendant knew of the post-card written by his son to the plaintiff shortly after it was written, and he adopted it and confirmed it, on the 5th, 19th, and 31st August. I am of opinion that there was a complete waiver of any tender of payment or deposit of the $100 on account, as promised by the plaintiff.

The plaintiff's solicitor, Mr. Vanstone, was consulted by the plaintiff on the 7th August; and, after that, all that took place was consistent with the breach by the defendant, and with the defendant's determination, arrived at on or before the 3rd August, that he would not carry out his agreement.

The plaintiff avowes a readiness and willingness and ability on his part to do all that was required of him.

I do not understand how the defendant can truthfully say that he was willing to carry out his part, and only refused to do so because of the non-payment of the $100. He admits that he did not ask the plaintiff for the $100, or put forward to him the non-payment as a reason, either on the 19th or 31st August.

This action was commenced on the 16th October, 1911.

The defendant, in his statement of defence, which was filed on the 3rd February, 1912, said that he was willing to carry out the agreement, although not liable in law for any breach on his part.

This is not a case for ordering specific performance of the agreement. Counsel for the plaintiff said, on the argument, that he would be quite willing to limit his damages to those sustained by reason of not having the hotel for the five months prior to the 1st February, 1912; and he thinks his loss was $1,000.

It is difficult to measure the plaintiff's damages and to fix any

amount he has really lost by the defendant's breach of contract. No evidence was produced that would shew that the plaintiff's bargain as a whole was a good one. The defendant has not attempted to sell for any higher price than the plaintiff was to pay.

The plaintiff's estimate of $1,000, at least, is a mere optimistic guess. The prior owner and occupant of these premises—Mr. Hill—thinks he made as net profit for eighteen months, $1,500, but then he says, "Wingham was different from last autumn." Even Mr. Hill's evidence was not satisfactory. He qualified every answer by stating his uncertainty.

The defendant states that he not only did not make money, but lost money, during the time from the 1st September last; but the account-book, in itself, in my opinion, is hardly consistent with his statement. It was stated by the defendant that the book correctly shews the amount of his income and output for these months. If I have correctly understood the entries, and correctly made the computation, the book shews for these months about $1,500 receipts over disbursements. Some accounts—particularly the coal account—are not yet paid; then, of course, the amounts received, to some extent, represent stock on hand, which the plaintiff would have been obliged to pay for. Then, taxes, wear and tear of furniture, and the plaintiff's time, should be taken into account.

The plaintiff cannot recover for supposed or estimated profits. Very much of an hotel-keeper's business depends upon the personal character and demeanour and habits of the proprietor and his serving staff. The extent of his business will depend upon the work going on in the town where the hotel is kept. The weather, the price of supplies, the careful looking after the little details, all combine to help or hurt hotel business; so it cannot be said whether the venture would have turned out profitably or otherwise had the plaintiff secured the hotel in question.

The plaintiff incurred some legal expenses before the commencement of this action.

On the whole, I think it can be fairly said that the plaintiff lost by the defendant's default $75, and I assess the plaintiff's damages at that amount.

There will be judgment for the plaintiff for $75, with costs on the County Court scale, and there should not be allowed to the defendant any set-off of costs.

DIVISIONAL COURT. APRIL 6TH, 1912.

*BEATTY v. BAILEY.

Mortgage—Covenant for Payment Implied in Instrument Creating Charge under Land Titles Act—Action for Mortgage Money—Instrument not under Seal—Effect of Provisions of Act—Limitation of Actions—Period of Limitation—Second Mortgagee—Release to First Mortgagee—Effect of, on Right to Sue—Inability to Reconvey—Reservation of Rights.

An appeal by the plaintiff from the judgment of DENTON, Jun. J. of the County Court of the County of York, dismissing an action in that Court, brought for the recovery of $797.20, for principal and interest, upon the covenant implied in an instrument creating a mortgage or charge upon land registered under the Land Titles Act.

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

W. J. Elliott, for the plaintiff.

W. C. Chisholm, K.C., for the defendant.

BOYD, C.:—The Land Titles Act was expressly designed to simplify titles and to facilitate the transfer of land; it is not intended to change or destroy civil rights and remedies. True it is that "seals" were in effect abolished as a necessary part of any instrument affecting land, and the forms given in the Act or approved by the Act for the transfer and the mortgaging or charging of land are to be without seals. This is intended to emphasise the fact that the virtue of the Act does not rest on the technical form and execution of the conveyance, but upon the fact of the instrument (whatever it is) being registered under the Act. It is the certificate of this registration held by the owner which corresponds to the ordinary possession of title deeds: R.S.O. 1897 ch. 138, sec. 101. . . .

[Reference to the provisions of secs. 13, 33, 34, 40 (3), 41, 101, 107.]

By the rules annexed to the Act, No. 71 directs the use of the forms given in the schedule, and No. 28 gives the form (not under seal) used in this case by the owner, Bailey, when

*To be reported in the Ontario Law Reports.

he mortgaged to Beatty, in August, 1891. That mortgage was to be paid in June, 1894, and in the case of an ordinary mortgage under seal the Statute of Limitations would bar at the end of 20 years—the mortgage being made before the 1st July, 1894 (R.S.O. 1897 ch. 72, sec. 1, sub-sec. (*h*)). In the form given by the Land Titles Act and in the instrument which was registered in this case, there is nothing as to a covenant to pay; that term is supplied by the statute in sec. 34 . . . *i.e.*, such a covenant shall be implied as against the owner of the land who creates the charge which is completed by the fact of registration. So that the obligation to pay as by and under a covenant to pay is to be regarded as a statutory obligation placed upon the owner for the benefit of the lender or chargee.

The additions to sec. 107 made by the amendment now appearing in 1 Geo. V. ch. 28, sec. 102, may prove useful in litigation arising upon the instrument in other jurisdictions, but do not seem to be needed in the present case.

The registered charge which is created uno flatu with the covenant to pay included or implied by virtue of the statute, is to be regarded as the effective and completed instrument, binding both land and person so far as security for the money advanced is concerned; and, though the land may be discharged by an act of grace on the part of the chargee, that does not per se relieve the covenantor from the payment of the debt till after 20 years have elapsed without action to recover the claim.

The release given by Beatty was limited to the land in question, and he expressly reserves his rights in respect of the moneys secured and to be paid. The effect is to free the land for the benefit of the first chargee and so enable him to realise more speedily by sale of the estate, which was not worth what was due on the first charge. The effect of the registration of this cessation was, upon sale, to give the purchaser an absolute ownership as to the land, but to leave unimpaired the right of the plaintiff to proceed for the recovery of the amount due by the mortgagor, Bailey: In re Richardson, L.R. 12 Eq. 398; Bell v. Ross, 26 Vict. L.R. 512, per Madden, C.J.

The obligation to pay rests upon the covenant or contract imposed by statute; and the action is, therefore, an action founded upon a specialty, within the meaning of the Statute of Limitations, and is not barred by lapse of time less than 20 years from the date of default (which at the earliest was in this case 1894): Cork and Bandon R.W. Co. v. Goode, 13 C.B. 826; Essery v. Grand Trunk R.W. Co., 21 O.R. 224, following Ross v. Grand Trunk R.W. Co., 10 O.R. 447.

No defence, therefore, arises by virtue of any Statute of Limitations or lapse of time.

The judgment below, therefore, should be entered against the defendant on this issue.

The next defence, and the one to which effect was given by the County Court Judge, rests upon the equitable situation of the parties, which I proceed to consider.

The first mortgagee had a power of sale by the terms of the mortgage and the statutory charge, and could enforce a sale against the mortgagor. It may be that the concurrence of the then owner of the equity of redemption and the second mortgagee assisted in the more inexpensive way of realising upon the property; but it is undoubted that the land was disposed of by the paramount act of the first mortgagee; and the law is, that, if a surplus remains unpaid after the exercise of a power of sale, the mortgagee may sue for its recovery by action on the covenant: Rudge v. Richens, L.R. 8 C.P. 358. The release of the land by the second chargee was only to facilitate either the foreclosure or the sale of the property by the first mortgagee—as it appeared then that the land was not of value to satisfy even the first mortgagee. Had the land been foreclosed by the first mortgagee, that change of the property would not have interfered with the right of the second mortgagee (who was not to blame) to sue upon the covenant. No doubt, the rule is, that the mortgagee suing on a covenant in the mortgage must ordinarily be in a position to reconvey the land upon payment of what is due. But that does not necessarily apply to the case of a second mortgagee whose rights against the land have been extinguished by the act of the first mortgagee. . . .

[Reference to Coote on Mortgages, 7th ed., vol. 2, p. 982.]

The mortgagor's duty was here to pay off the first mortgage and so prevent the exercise of the power of sale by which the equity of redemption was extinguished. I think the principles of decision acted on in In re Burrell, Burrell v. Smith, L.R. 7 Eq. 399, 466, apply to this case and go to invalidate the judgment pronounced by the learned County Court Judge.

I think judgment should be entered for the amount claimed, with costs and costs of appeal.

LATCHFORD, J., concurred.

MIDDLETON, J., also concurred, for reasons stated in writing, in which he referred to Kinnaird v. Trollope, 39 Ch. D. 636, and Palmer v. Hendrie, 28 Beav. 341.

Appeal allowed.

MIDDLETON, J., IN CHAMBERS. APRIL 9TH, 1912.

D. v. W.

Evidence—Examination of Witness upon Pending Motion for Particulars—Attempt to Obtain Discovery as to Matters in Question in Action—Irrelevancy—Abuse of Process of Court.

Motion by the plaintiff for an order directing Bertha Alice D. to answer certain questions asked her upon her examination as a witness on a pending motion, and, in default, committing her to the common gaol for contempt.

W. T. J. Lee, for the plaintiff.
G. M. Clark, for the defendant.
C. A. Moss, for Bertha Alice D.

MIDDLETON, J.:—The action is brought by D.E.D. for $50,000 damages said to have been sustained by reason of the defendant having procured Bertha Alice D., the plaintiff's wife, to desert him and to live in adulterous intercourse with the defendant.

The defendant, in addition to denying the charges made against him, says that, if the said Bertha Alice D. did at any time cohabit with him, the defendant, and absent herself from the home of the plaintiff, this was done with the consent and connivance of the plaintiff, and for the purpose of carrying out a conspiracy between the plaintiff and his said wife, for the purpose of placing the defendant in a false and compromising position, so as to enable the plaintiff to obtain money from him.

The plaintiff has served notice of motion returnable before the Master in Chambers for particulars of the acts upon which the defendant relies in support of the allegations that the plaintiff connived at the relation between the defendant and his wife, and for particulars of the conspiracy between the plaintiff and his wife, and the times when and places where and the acts upon which the defendant relies in proving such conspiracy.

In support of this motion the plaintiff has filed no affidavit of his own, but seeks help from the examination of his wife as a witness.

The wife, on being served with a subpœna, attended with counsel, and protested against the examination sought; and, after being sworn, answered some preliminary questions; but, as soon as it became apparent that the examining counsel intended to in-

quire into her relations with the defendant, she, on the advice of her counsel, declined to answer, whereupon the plaintiff launched this motion.

With the pleading and its sufficiency or the fate of the motion for particulars, I am in no way concerned. It is, however, quite clear to me that the examination sought is a flagrant abuse of the process of the Court. The sufficiency of the pleading and the plaintiff's right to particulars must depend, in the first place, upon the pleading itself; possibly it may be important that he should pledge his own oath as to his ignorance of the matters upon which he seeks information; but I am clear that he has no right, by the mere launching of this motion, to call upon his wife to undergo, at his instance, an examination touching the matters which will be in issue at the trial of the action. The desire of the plaintiff, it is quite clear, is to use the process of the Court for an indirect and ulterior purpose. The evidence sought is not relevant to the issue upon the motion; in fact, the plaintiff's counsel went so far as to say that he was seeking in this way to ascertain the evidence upon which the defendant would rely when he came to prove his case at the trial.

Obviously this is not the function of particulars; and, if it were, the party seeking particulars would not be allowed to anticipate a favourable result of his motion by obtaining in this indirect way the information he seeks by it.

Other reasons were suggested upon the argument as justifying this examination at this stage. These reasons were even more improper than that specifically dealt with.

The motion must be dismissed; and I fix the costs of the wife, to be paid forthwith, at $30; this to cover any claim she may have for allowance to her counsel for attending upon the examination. The costs of the defendant will be to him in any event of the cause.

RIDDELL, J. APRIL 10TH, 1912.

LEAKIM v. LEAKIM.

Marriage—Action by Husband for Declaration of Invalidity—Incapacity of Wife—Jurisdiction of High Court—Motion to Strike out Statement of Claim and Dismiss Action—Con. Rules 261, 617—*Judgment.*

Motion by the defendant to strike out the statement of claim and to dismiss the action.

The motion was heard in the Weekly Court.

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

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

RIDDELL, J.:—The plaintiff alleges in his statement of claim that he and the defendant were married in Russia; that the defendant was born without vagina, uterus, and tubes, and consequently physically incapable of copulation, and the marriage was never consummated, although the parties lived together for some time. He asks for a declaration that "the alleged ceremony of marriage did not constitute a valid marriage between the said parties or in the alternative that the said marriage may be dissolved."

A motion is made under Con. Rule 261 to strike out the statement of claim and to dismiss the action.

It is clear that the case is fully and exactly covered by T. v. D., 15 O.L.R. 224, by which I am bound.

Without, therefore, expressing an independent opinion, I follow T. v. D., and strike out the statement of claim.

The writ of summons is indorsed for the same relief as is asked in the statement of claim, and there is no pretence that the statement of claim can be amended. It is, therefore, a proper case for turning the motion into a motion for judgment under Con. Rule 617, and dismissing the action.

The motion will be allowed, the statement of claim struck out, and the action dismissed with costs.

TEETZEL, J. APRIL 10TH, 1912.

THOMSON v. MAXWELL.

Way — Private Right — Prescription — User — Cessation — Unity of Possession — Reservation — Limitations Act, sec. 36.

An action for a declaration that the plaintiff was entitled by prescription to a right of way over the defendant's farm.

W. J. Elliott, for the plaintiff.

K. F. Mackenzie, for the defendant.

TEETZEL, J.:—I find upon the evidence that the right of way in question has been used by the plaintiff and his prede-

cessors in title for fully seventy years, although prior to the 5th October, 1852, both the dominant and servient properties were occupied by Andrew D. Thompson as a locatee from the Crown.

On or about that date, as appears from a document on file in the Crown Lands office, Thomson assigned his right to the land comprising the servient tenement to James Maxwell, the defendant's father.

Mrs. Isabella Mosher, a daughter of Andrew D. Thomson, deceased, now 79 years old, but possessing a very bright mind and a wonderful memory, gave very satisfactory evidence as to the early history of the right of way and of its enjoyment by her father and brothers, and of the occupation of the dominant property. I accept her evidence when it conflicts with evidence given for the defendant; and from it conclude that, for some time prior to 1873, the defendant's father did not, as contended by the defendant, enjoy the exclusive occupation of the land now owned by the plaintiff. The defendant's father and his family did occupy the house upon the plaintiff's land, for a period prior to 1873, but I am unable to find that the tenancy extended to the whole farm, or that there was any suspension of the use and enjoyment of the right of way by the owner of the dominant property during that period.

The most serious objection raised by the defendant to the plaintiff's claim rests upon the existence of a lease by the plaintiff to the defendant, dated the 1st November, 1910, of the dominant property. The lease is for one year.

The action was commenced on the 3rd May, 1911, during the currency of the lease, and Mr. Mackenzie argued that, by virtue of the lease of the dominant property to the owner of the servient property, a unity of possession of the two properties is constituted; and, therefore, the plaintiff cannot maintain the action, because, under sec. 36 of the Limitations Act, 10 Edw. VII. ch. 34, it is provided that "each of the respective periods of years in the next preceding two sections mentioned shall be deemed and taken to be the period next before some action wherein the claim or matter to which such period relates was or is brought into question," etc. Without deciding what would be the result to this action if the lease in question gave the exclusive possession of the dominant property to the defendant during the term of the lease, I think this lease does not do so, because of the express reservation in it, which reads, "The lessor reserves the right to cut and remove timber."

This reservation necessarily implies the reservation of the

right to so much of the possession of the property as may be required for the purpose of cutting and removing timber, and also the reservation of the right to use the usual means of ingress to and egress from the property for those purposes.

It is laid down in Halsbury's Laws of England, vol. 2, p. 272, "that, in cases where enjoyment as of right is necessary, a cessation of user which excludes an inference of actual enjoyment as of right for the full statutory period will be fatal at whatsoever portion of the period the cessation occurs; and, on the other hand, a cessation of user which does not exclude such inference is not fatal, even although it occurs at the beginning or the end of the period."

While as a general proposition it is true that where there is unity of possession there can be no enjoyment of an easement as of right, and consequently during the period of such unity of possession there is such a cessation of user which ordinarily excludes an inference of actual enjoyment as of right during the full statutory period, I am of opinion that in this case there was not, under the lease in question, such a complete unity of possession as should exclude an inference of actual enjoyment as of right by the plaintiff at the time this action was brought.

Judgment will, therefore, be declaring that the plaintiff has acquired by prescription the right of way in question over the defendant's lands, subject to the right of the defendant to maintain a gate at the southerly end thereof, and to the duty of the plaintiff to maintain a gate at the northerly end, and to an injunction restraining the defendant from interfering with the plaintiff's user of the right of way. Costs to be paid by the defendant.

TEETZEL, J. APRIL 10TH, 1912.

WILEY v. TRUSTS AND GUARANTEE CO.

Contract — Correspondence — Construction — Transfers of Land Held in Escrow — Undertaking not to Register — Violation—Reconveyance—Costs.

Action to compel the defendants to reconvey certain properties to the plaintiffs as executors of a deceased person.

I. F. Hellmuth, K.C., for the plaintiffs.
J. W. Bain, K.C., and M. L. Gordon, for the defendants.

TEETZEL, J.:—As between the plaintiffs and the defendants (the company, Warren, and Stockdale), the right of the plaintiffs to a reconveyance of the properties in question rests upon the letter of the 7th March, 1907, from the plaintiffs' solicitors to the defendant company and the reply thereto of the same date.

The first letter encloses the transfers and expressly states that they are deposited with the company only in escrow until the consideration-money is paid, and that, "if you cannot hold these transfers on the above conditions, kindly return the same to us, as they are left with you on no other conditions." In the letter from the defendants' manager to the plaintiffs' solicitors acknowledging the receipt of the transfers, he says: "All I can say is, that I will hold the transfers unregistered subject to the terms of the undertaking I have." (This has reference to an undertaking, dated the 22nd November, 1906, by the testator whose executors the plaintiffs are, to execute the transfers to the defendant company as trustees for the Nipegon Syndicate.) "I know of no arrangement by which Mr. Wiley is entitled to any consideration for these transfers; but, in taking this stand, I wish to state that the position of the parties is not to be prejudiced merely by the transfer of possession of the transfers from you to me."

Instead of holding the transfers "unregistered" and so that the "position of the parties is not to be prejudiced merely by the transfer of the possession of the transfers from you to me," as undertaken in the last-recited letter, the company shortly afterwards, without the knowledge or consent of the transferor or his solicitors, registered the transfers, and conveyed the properties to one of their officers in trust, who afterwards conveyed them to another officer in trust. These officers are both defendants, and the plaintiffs' claim is for a reconveyance.

I think, upon a proper construction of the letters above recited, and there being no pretence that the consideration for the transfers was paid, the plaintiffs are entitled to judgment directing the defendants to reconvey to them the lands described in the transfers, free from any incumbrance done or suffered by them, but without prejudice to any action the defendant company may be advised to bring upon the above-mentioned undertaking.

The defendants must also pay the costs of this action.

DIVISIONAL COURT. APRIL 10TH, 1912.

McCLEMONT v. KILGOUR MANUFACTURING CO.

Master and Servant—Injuries to Servant—Dangerous Machinery in Factory—Proper Guarding—Negligence — Contributory Negligence—Evidence for Jury—Findings — Factories Act—Statutory Duty—Voluntary Assumption of Risk.

Appeal by the defendants from the judgment of BRITTON, J., ante 446, upon the answers of the jury.

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

T. N. Phelan, for the defendants.

W. M. McClemont, for the plaintiff.

The judgment of the Court was delivered by TEETZEL, J.:—The action was for damages under the Workmen's Compensation for Injuries Act, the negligence relied upon being a breach of the Ontario Factories Act, in not guarding dangerous machinery. The questions put to the jury and their answers were:—

(1) Were the defendants guilty of any negligence which occasioned the accident to the plaintiff, in not having the projecting set-screw in the collar upon the shaft in the defendants' factory guarded otherwise than it was guarded when the plaintiff was injured? A. Yes.

(2) If so, in what respect were the defendants so guilty? What was the negligence of which the defendants were guilty? A. In not having a separate guard over set-screw or in not having a collar on shaft with counter-sunk set-screw.

(3) Did the plaintiff know and appreciate the danger of the work at which he was employed at the time the accident happened, and did he, knowing the danger, voluntarily undertake the risk? A. Yes.

(4) Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

Damages assessed at $1,000.

The grounds of appeal chiefly relied on by Mr. Phelan were: (1) that there was no evidence of negligence to warrant the case being submitted to the jury; and, if there was any negligence, it was that of the plaintiff, who failed in his duty as foreman, within the meaning of sec. 6 of the Workmen's Compen-

sation for Injuries Act; (2) that the evidence established contributory negligence, and that the finding of the jury on that question was perverse; (3) that the maxim *volenti non fit injuria* applied; and the answer to the third question, therefore, entitled the defendant to judgment dismissing the action.

The set-screw by which the plaintiff's clothing was caught and which caused his injury, projected at least an inch and a quarter above the surface of the collar which it entered. The collar with the projecting set-screw surrounds a shaft which, when in operation, revolves very rapidly; and, having regard to its position and use, was, unless well guarded, manifestly, when in operation, a source of danger to the defendants' employees who might be required to work near it.

The plaintiff's case is founded upon the allegation that the defendants violated the provisions of the Ontario Factories Act in not, as far as practicable, securely guarding the set-screw in question. The defendants had provided a box-shaped guard or covering for the whole shaft, the top of which was removable; and the principal contest at the trial centred around the question whether, under all the conditions, that guard was sufficient; and that led to the first question being put to the jury, referring to the guard which had been provided by the defendants.

Before the accident, the plaintiff removed the top of the guard in question, to enable him to place upon the belt a mixture used to prevent the belt slipping around the pulley. For that purpose the plaintiff stepped inside the box-shaped guard; and, while putting on the mixture, his leg was necessarily near the collar in question, and the projecting screw caught his trouser-leg, and he was thrown down upon the revolving pulley, and his knee-cap was shattered and other injuries inflicted.

The plaintiff swore that in order properly to do the work he undertook it was necessary for him to get inside the box, although he knew the unguarded condition of the screw.

It was also manifest from the size of the box, that, while standing in it and putting the mixture on the belt, one of his legs would not be far from the revolving collar and screw.

There was evidence that the set-screw could have been securely guarded, or sunk into the collar, so that no part would have been projecting beyond the surface of the collar; and the jury, in answer to the second question, so found—a conclusion which, I think, is warranted by the evidence. The effect of this finding, coupled with the admittedly dangerous character of the machinery, is to find the defendants guilty of a violation of sub-sec. 1 of sec. 20 of the Factories Act.

Evidence was given by the defendants that the plaintiff could have applied the mixture to the belt without getting in the box; and the jury were given a view of the machine in operation, and of tests made to apply the mixture, without the operator getting in the box.

As observed by the learned trial Judge, there certainly was very strong evidence of contributory negligence; but I agree with him that it was not so conclusive and undisputed as to warrant that question being withdrawn from the jury; nor, the jury having been permitted to view the machine and the tests made to demonstrate the plaintiff's alleged negligence, can I say that the finding was perverse.

Having thus a finding in effect that the defendants were guilty of a violation of the Factories Act, and a finding absolving the plaintiff from contributory negligence, the effect of the jury's answer to the third question remains to be considered.

The question of the applicability of the maxim *volenti non fit injuria* in relief of a defendant guilty of a violation of a statutory duty such as is imposed by the Factories Act, was settled by a Divisional Court in England in Baddeley v. Earl Granville (1887), 19 Q.B.D. 423, where the decision was, that the defence arising from the maxim was not applicable in cases where the injury arose from the breach of a statutory duty on the part of the employer. Mr. Phelan cleverly criticised this decision as being at variance with the decision of the Court of Appeal in Thomas v. Quartermain (1887), 18 Q.B.D. 685, and as not reconcilable with recognised legal principles; and his argument was supported by the view of Mr. Beven, in an article on the maxim, published in 13 Law Magazine, p. 19, in 1888; also in his Law of Negligence, 3rd ed. (Canadian), p. 644; also by Mr. Labatt, at pp. 1512-14 of his book on Master and Servant.

It is to be observed, however, that the decision has never been overruled, and is treated by the following writers as settling the law that the defence of *volenti non fit injuria* is not available where the injury arises from breach of a statutory duty on the part of the employer for the benefit of the workman himself and others: Underhill on Torts, 9th ed. (1912), p. 190; Clerke and Lindsell's Law of Torts, Canadian ed. (1908), pp. 518 and 522 (*h*); Ruegg's Employers' Liability, 8th ed. (1910), pp. 235-6; Smith's Law of Master and Servant, 6th ed. (1906), p. 209; Dawbarn on Employers' Liability, 4th ed. (1911), p. 73; and Pollock's Law of Torts, 7th ed. (1904), p. 505.

The decision has also been followed by the Courts of this country. Citing it, in Rogers v. Hamilton Cotton Co., 23 O.R. 425, at p. 435, Mr. Justice Street, in delivering the judgment of a Divisional Court, says: "The principle *volenti non fit injuria* has been held not to apply when the accident has been caused by the defendant's breach of a statutory duty. And, even if applicable, the knowledge of the workman of the existence of the defect has been considered to be merely an element in the question of contributory negligence: Thomas v. Quartermain, 18 Q.B.D. 685."

It has also been applied in British Columbia, by the Supreme Court, in Love v. New Fairview Corporation (1904), 10 B.C.R. 330; and by the Supreme Court of Nova Scotia in Bell v. Inverness Coal and R.W. Co. (1908), 42 N.S.R. 265.

The holding in Groves v. Wimborne, [1898] 2 Q.B. 402, adopted in many subsequent cases, that the defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of an absolute duty imposed by statute upon his master for his protection, shews the strong judicial tendency to construe and apply such provisions so as effectually to secure the intended protection. See Sault Ste. Marie Pulp Co. v. Meyers (1902), 33 S.C.R. 23, and Siven v. Temiskaming Mining Co., ante 695.

Lord Shaw of Dunfermline, in Butler v. Fife Coal Co., [1912] A.C. 149, at pp. 178-9, said: "The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable." This is a most interesting case, and illustrates the view of the highest Court in the Empire as to the strictness with which employers of labour should be held to the observance of duties cast upon them by statute for the protection of their employees.

The judgment should be dismissing the appeal with costs.

DIVISIONAL COURT. APRIL 10TH, 1912.

*RUDD v. CAMERON.

Slander—Words Spoken of Plaintiff in Reference to his Trade —Publication—Speaking Brought about by Action of Plaintiff—Privilege—Malice—Damages—Quantum.

Appeal by the defendant from the judgment of BRITTON, J., upon the verdict of a jury, in favour of the plaintiff, in an action for slander.

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

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

E. F. B. Johnston, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C. J.:—The action is for defamatory words alleged to have been spoken of the plaintiff in the way of his trade.

The appeal is rested upon two grounds: (1) that there was no evidence of publication; and (2) that the occasion upon which the words were spoken was privileged, and there was no evidence of malice; and it was also contended that the damages awarded ($1,000) are excessive.

According to the testimony of the plaintiff, having learned that statements affecting him similar to those alleged to have been made by the defendant were in circulation, and being unable to trace them to their source, he employed two detectives "for the purpose of ascertaining the facts and getting information for his solicitors," which I understand to mean, for the purpose of finding out the author of the statements and bringing an action against him.

The detectives, having made the acquaintance of the defendant, adopted the ruse of telling him that they were going to erect a club-house in the vicinity of Arnprior, and that the plaintiff was anxious to secure the contract for building it. Their object, no doubt, was to induce the defendant to speak his mind as to the plaintiff, and in this they appear to have succeeded, for it is upon what was then said by the defendant that the action is based.

The occasion upon which the words were thus spoken was privileged; but it is contended by the learned counsel for the

*To be reported in the Ontario Law Reports.

defendant that, the speaking of them having been brought about by the action of the plaintiff himself, there was no publication; and in support of that contention he cited King v. Waring (1803), 5 Esp. 13; Smith v. Wood (1813), 3 Camp. 323, 14 R.R. 752; and Starkie on Slander and Libel, 3rd ed., pp. 381, 514. . . .

[Examination of and quotations from these cases and reference to Odgers on Libel and Slander, 5th ed., p. 179; Folkard, 7th ed., pp. 166, 263; Weatherston v. Hawkins (1876), 1 T.R. 110; Warr v. Jolly (1834), 6 C. & P. 497; Rogers v. Clifton (1803), 3 B. & P. 587; Duke of Brunswick v. Harmer (1849), 14 Q.B. 185; Gordon v. Spencer (1829), 2 Blackf. (Ind.) 286, 288; Yeates v. Reed (1838), 4 Blackf. 462, 465; Jones v. Chapman (1839), 5 Blackf. 88; Haynes v. Leland (1848), 29 Me. 233, 234, 243; Sutton v. Smith (1853), 13 Mo. 120, 123, 124; Nott v. Stoddard (1865), 38 Vt. 25, 31; Heller v. Howard (1882), 11 Ill. App. 554; White v. Newcombe (1898), 25 N.Y. App. Div. 397, 401; O'Donnell v. Nee (1898), 86 Fed. Repr. 96; Radnead v. Delaney (1899), 102 Tenn. 289, 294, 295; Shinglemeyer v. Wright (1900), 124 Mich. 230, 240; 25 Cyc. 370, 371.]

Upon the whole we are of opinion that we should follow Duke of Brunswick v. Harmer; and, following it, hold that there was evidence for the jury of publication, and that the first objection, therefore, fails.

The second ground of appeal also fails; there was evidence, which the jury believed, that there was no truth in the statements made by the defendants; and there was ample evidence, out of the defendant's own mouth on his examination for discovery, that he knew that they were untrue, or that he made them recklessly, not caring whether they were true or false; and there was evidence from which malice might be inferred, in the bad feeling which had existed on the part of the defendant towards the plaintiff, and his statements to the plaintiff's bookkeeper. . . .

The damages are substantial; but, in view of the defendant's conduct throughout and his not having gone into the box to testify on his own behalf, we cannot say that they are so excessive as to warrant the Court in setting aside the verdict.

The appeal is dismissed with costs.

MEDLAND V. NAYLOR—KELLY, J.—APRIL 4.

Counterclaim—Assignment by Counterclaiming Defendants for Benefit of Creditors—Dismissal of Counterclaim—Leave to Assignee to Intervene.]—The defendants Cross & Urquhart on the 19th April, 1911, delivered a counterclaim, claiming from the plaintiffs damages for having on the 14th February, 1911, issued an injunction order against the defendants restraining them until the 23rd February, 1911, from moving, selling, or dealing with a certain stock of groceries sold by the defendants the Naylors to the defendants Cross & Urquhart; the plaintiffs by the injunction order having undertaken, in the usual way in such cases, to abide by any order that the Court might make as to damages. On the 23rd February, 1911, the injunction was dissolved. On the 19th April, 1911, the plaintiffs served notice of discontinuance of their action against all the defendants. No other proceedings were taken in the action until the 15th February, 1912, when notice of trial of their counterclaim was served, on behalf of the defendants Cross & Urquhart, on the plaintiffs' solicitor. The defendants Cross & Urquhart made an assignment for the general benefit of their creditors on or about the 5th February, 1912. Application was now made by the plaintiffs for an order dismissing the counterclaim, on the ground that the defendants Cross & Urquhart, by reason of the assignment made by them, had no longer any cause of action against the plaintiffs or any status to continue the action. KELLY, J., said that, in his opinion, these defendants, since their assignment, had no right to carry on these proceedings; and it had been stated that the assignee declined to take any steps to continue them. He, therefore, ordered that proceedings on the counterclaim should be stayed until further order, without costs; and, if the assignee should not, within twenty days after service on him of this order, intervene and continue the proceedings in his name, the counterclaim should be dismissed with costs against the defendants Cross & Urquhart, including the costs of this application. J. P. MacGregor, for the plaintiffs. F. Slattery, for the defendants Cross & Urquhart.

SCARLETT v. CANADIAN PACIFIC R.W. CO.—MASTER IN CHAMBERS —APRIL 6.

Fatal Accidents Act—Two Actions Brought on Account of Death of Same Person—Order Staying one—Actions by Mother and Widow as Administratrix.]—Two actions were brought under the Fatal Accidents Act, 1 Geo. V. ch. 33 (O.), to recover damages for the death of George Scarlett, who was killed on the 2nd February, 1912. The first action was brought by the mother, on the 15th March. The second action was brought by the widow as administratrix, on the 1st April. The defendants moved to have one of the actions stayed. The Master said that the case did not differ in its facts from Mummery v. Grand Trunk R. W. Co., 1 O.L.R. 622. There the action of the administratrix was allowed to proceed, and the other was stayed. It seemed to have been the opinion of Mr. Winchester, then Master in Chambers, that any person claiming to be beneficially entitled could bring an action immediately after the death if there was no executor or administrator—but that, if a personal representative was appointed, and an action begun within six months of the death, then, apart from long delay in commencing such action, the first action must usually be stayed. The Master thought he was bound by this decision, with which he agreed. He, therefore, made an order directing that the second action should proceed, and the first be stayed until further order. Costs of the motion to be to the defendants in the second action. It was not a case for any costs as between the two plaintiffs. C. W. Livingston (MacMurchy, Spence, & Walker), for the defendants. W. A. Henderson, for the plaintiff in the first action. H. R. Frost, for the plaintiff in the second action.

MACDONALD v. SOVEREIGN BANK OF CANADA—MIDDLETON, J., IN CHAMBERS—APRIL 6.

Evidence—Foreign Commission—Unnecessary Testimony—Admission—Order Refusing Commission Affirmed upon Terms.] —An appeal by the defendants from the order of the Master in Chambers, ante 849, refusing to direct the issue of a commission to Los Angeles to take the evidence of A. E. Webb. The learned Master refused the order upon an admission by the plaintiff that none of the shares forming the subject-matter of this action were transferred from A. E. Webb & Co. to the plaintiff or to any of

his alleged predecessors in title. The learned Judge said that, after hearing counsel for both parties and considering the material, he was not quite clear that this admission was wide enough to protect the defendants. He was, however, convinced that it was extremely unlikely that Webb would be able to give any evidence which would be in any way material to the matters in question in the action. As the plaintiff's counsel had expressed his readiness to submit to any terms that might be deemed proper to protect the defendants, if this view should prove erroneous, and as the case was to be tried without a jury, the learned Judge thought that no inconvenience could be occasioned by the adoption of the course suggested upon the argument, namely, that the action should be allowed to proceed to trial without this evidence, the plaintiff undertaking, in addition to what he had already undertaken, that if, in the opinion of the trial Judge, when the facts came to be developed before him in evidence, Webb could give any testimony that would be of any assistance whatever, the defendants should be at liberty then to have a commission for the purpose of taking his evidence, so that it might be put in before judgment. It appeared to the Judge, on the evidence given in Stavert v. McMillan, that there could be no difficulty in tracing the shares held by the plaintiff, and that at the trial it would be found that this commission would be quite useless. If the course suggested should be productive of any additional expense at the trial, the trial Judge would have ample jurisdiction to deal with it. Subject to these variations, the order was affirmed; costs to be in the cause unless otherwise directed by the trial Judge—this provision as to costs being made because at the trial it might appear that the whole application was misconceived, and in that case a variation of this order might be proper. W. J. Boland, for the defendants. G. H. Kilmer, K.C., for the plaintiff.

JAMES v. CITY OF TORONTO—MASTER IN CHAMBERS—APRIL 6.

Jury Notice—Action against Municipal Corporation—Non-repair of Highway.]—The plaintiff by the statement of claim alleged that on the 10th October last he was walking on Queen street, Toronto, and, "shortly after passing Bond street, the plaintiff came in sudden contact with a hard, slippery mound of earth, several inches above the level of the sidewalk, and as a result thereof was thrown violently forward, sustaining serious and painful injuries." By the next paragraph, the plaintiff said

that the injuries complained of were caused by the negligence of the defendants in placing the mound of earth on the sidewalk and leaving it there, "thus rendering the said sidewalk unsafe for travel by pedestrians." The plaintiff served a jury notice; and the defendants moved to strike it out. The Master said that he was unable to agree with the argument that the present case was distinguishable from Brown v. City of Toronto, 21 O.L.R. 230. There it was said by Riddell, J., at p. 238, in reference to Clemens v. Town of Berlin, 7 O.L.R. 33: "If a plaintiff can make out a case of wrong-doing on the part of a municipality irrespective of their duty, common law and statutory, as to highways, and allege a cause of action not based upon nonrepair of the highways, he may be entitled to hold his jury notice. At all events, the case has no application here, where the injury is undoubtedly due to a defect in the highway itself." This, the Master said, was conclusive; and the jury notice must be struck out, with costs to the defendants in any event. C. M. Colquhoun, for the defendants. Irving S. Fairty, for the plaintiff.

RICKERT v. BRITTON—MASTER IN CHAMBERS—APRIL 11.

Security for Costs—Plaintiffs Residing out of Ontario—Action by Unincorporated Association and Members—Class Action—Addition as Plaintiff of Member Residing in Ontario.] —Motion by the plaintiffs to set aside a præcipe order for security for costs. The action was brought by the president and eight other officials of the United Garment Workers of America, on behalf of themselves and all other members of the union, and by the union, to restrain the defendants from using the plaintiffs' trade mark. The named plaintiffs were all resident in New York—but many members of the union resided and carried on business in Ontario, and particularly at London, where the defendants resided and carried on business. On the first return of the motion, an order was made allowing the plaintiffs to amend by adding as a plaintiff A. H. Carroll, another officer of this union, who resided at London. Afterwards, the defendants obtained leave to have the matter further discussed, it having been made to appear that Carroll had not any property in the province exigible under execution. The Master said that, as a member of the union, Carroll, no doubt, had an interest in the action; and it was not the case of a merely nominal plaintiff lending his name to enable others, who were the real actors,

to escape giving security or any later liability for costs. Here, if Carroll had been originally made a plaintiff, no order for security could have been made: Sykes v. Sykes, 4 C.P. 645. The decision in Metallic Roofing Co. v. Jose, 12 O.L.R. 200, shewed that, in the converse case, where the unions were the real defendants, all their property and assets were declared by the trial Judge to be "liable to satisfy the claim of the plaintiffs, against the defendants in the action, for damages and costs." This would seem to be a fortiori where the union is plaintiff, as in this case. That judgment was affirmed by the Court of Appeal, 14 O.L.R. 156—that part of it was specially affirmed. Here the union itself, being a plaintiff, must have been so made with the consent of the majority, if not the whole body, of the members, who in that case would, therefore, if necessary, be held liable for costs, under the recent decision in Re Sturmer and Town of Beaverton, ante 333, 613, 25 O.L.R. 190. Leave to appeal from this was refused: ante 715. Order to issue as originally made, adding Carroll as a plaintiff, and giving costs of the motion to the defendants only in the cause. J. G. O'Donoghue, for the plaintiffs. Irving S. Fairty, for the defendants.

BATHO V. ZIMMER VACUUM MACHINE CO.—MASTER IN CHAMBERS —APRIL 11.

Particulars—Statement of Claim—Infringement of Rights under Patent for Invention—Postponement until after Discovery.]—This action was brought by a patentee, charging the defendants with manufacturing machines "upon the principle of or only colourably differing from the plaintiff's inventions." The defendants demanded particulars before pleading. Some were furnished. They now moved for more definite particulars of the alleged infringements. They said that the particulars given, namely, "All the machines manufactured or sold by the defendants infringe all the claims in the plaintiffs' patents," are too vague. Counsel for the plaintiff cited and relied on the following authorities as shewing that the particulars already given were sufficient at this stage to enable the defendants to know what was being complained of and to set up such defence as they thought adequate: Frost on Patents, 3rd ed., p. 396, and cases cited; Russell v. Hatfield, 2 Pat. Cas. 144; Mandleberg v. Morley, 10 Pat. Cas. 256. The Master said that he had examined these cases, and was of opinion that the

motion was not entitled to prevail at this stage. The order should, therefore, be, that no further particulars be ordered at this stage; but that, after examination of both parties for discovery, the defendants may apply for further particulars, if so advised, or the plaintiff may furnish the same if he desires so to do. The Master drew attention to what was said by Stirling, J., in the Mandleberg case, where the defendants were only sellers: "If a manufacturer is attacked for infringing a patent by a particular process, he does not want to be told in the shape of particulars or otherwise what the process is he is using. But it is a very different thing with respect to a vendor." In Kleinert Rubber Co. v. Eisman Rubber Co., 12 O.W.R. 60, where an order for particulars of breach was made, the facts were not set out, nor was it said at what stage the motion was made, nor what particulars, if any, had already been given. It, therefore, seemed better to follow the authorities, which, if cited in the Kleinert case, were not referred to in the judgment. Costs of the motion to be in the cause. E. G. Long, for the defendants. A. C. McMaster, for the plaintiffs.

CORRECTIONS.

In Adams v. Gourlay, ante 909, the counsel for the plaintiff was R. S. Robertson. On p. 911, 12th line from the bottom, "plaintiff's counsel" should be "defendants' counsel."

In Huegli v. Pauli, ante 915, on p. 918, 2nd line from the bottom, "19" should be 23.