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BURBIDGE, J. JANUARY 26TH, 1903.

EXCHEQUER COURT.

## ATLANTIC AND LAKE SUPERIOR R. W. CO. v. THE KING.

*Security for Costs—Petition of Right—Company—Crown—English Companies Act.*

Application by the Crown for security for costs of a petition of right.

E. L. Newcombe, for the Crown.

W. D. Hogg, K.C., for the suppliants, referred to Colwell v. Taylor, 31 Ch. D. 34; Cook v. Whellock, 24 Q.B.D. 658; Dartmouth Com'rs v. Dartmouth, 34 W. R. 774; Wallbridge v. Trust and Loan Co., 13 P. R. 67; Major v. McKenzie, 17 P. R. 18.

BURBIDGE, J.—This is an application on the part of the respondent for security for costs, on the ground that there is reason to believe that if the respondent is successful in the defence the assets of the suppliant company will not be sufficient to pay his costs.

The application is based upon sec. 69 of the Companies Act, 1863 (U. K. 25 & 26 Vict. ch. 89), which, it is argued, is in force as part of the practice and procedure in this Court under sec. 21 of the Exchequer Court Act and the Rules of Court (see Audette's Practice, p. 217, Rule 1), which provide that the practice and procedure in the Exchequer Court shall, so far as they are applicable and unless otherwise provided for, be regulated by the practice and procedure in similar suits, actions, and matters in the High Court of Justice in England. The case is not otherwise provided for; but the proceeding being by petition of right; it is necessary in the first instance to see what the practice is in England in such a proceeding. By sec. 7 of the English Petition of Right Act (23 &

24 Vict. ch. 34) it is, among other things, in effect provided that the laws and statutes and the practice and course of procedure in force as to security for costs in suits in equity and personal actions between subject and subject shall, unless the Court otherwise orders, be applicable and apply and extend to petitions of right. Under that provision the Crown may call upon the suppliant to give security for costs in any case in which, if it were an action between subject and subject, an order for security for costs would be granted. The right of the Crown to obtain such an order is also recognized in sec. 28 of the Exchequer Court Act.

So far no difficulty arises, and if the provision relied upon were a general rule applicable to all companies, or if it had been expressly made a rule of procedure in this Court, there would perhaps be no good reason against following it in this case; but it is not a general rule applicable to all companies, but only to "limited companies" within the meaning of that expression as used in the section referred to; and while it is a provision which relates to practice and procedure in the case provided for, it is a provision that effects substantive rights. It constitutes a limitation upon the right which limited companies otherwise would have to bring actions or proceedings in the Court upon the same terms as individuals or other companies.

Then the provision occurs in a statute relating to companies and not in one dealing principally with procedure or practice in the Courts; and, while too much weight should not be given to that consideration, and none of the others may be absolutely conclusive against the contention set up for the respondent, the matter does not, on the whole, appear to be sufficiently free from doubt to justify the granting of the application.

The application should, I think, be refused, with costs in any event, to the suppliants to be allowed or set off, as the case may be.

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JANUARY 26TH, 1903.

C.A.

WILSON v. HOWE.

*Limitation of Actions—Claim against Estate of Deceased Person—Corroboration — Special Agreement with Deceased — Terms of Credit.*

Appeal by plaintiff from judgment of BRITTON, J., (1 O. W. R. 272) dismissing the action, which was brought by plaintiff to recover from defendants, as executors of Marvin Howe, the amount of an account alleged to have been owing by Marvin Howe to the plaintiff for work done and materials sup-

plied, and also to recover other small claims against defendants personally and as executors. The trial Judge found against the plaintiff on these latter claims, but in his favour as to $450 for blacksmithing work done and materials. This claim, however, he held to be barred by the Statute of Limitations, and dismissed the action.

J. P. Mabee, K.C., for appellant.

J. Idington, K.C., for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

GARROW, J.A.:—The only question involved in this appeal relates to plaintiff's claim for work done and goods supplied upon what is called "the running account" against the late Marvin Howe, all other claims having been abandoned by his counsel on the argument of the appeal. . . . The account is made up of a general blacksmith's account and of articles of agricultural machinery supplied by plaintiff from time to time to deceased. I may say at once that, after a careful perusal of the evidence, I can see no sufficient reason for making a distinction between the blacksmith's account and the arlicles supplied. . . . In my opinion the account must be dealt with as a whole, and the bar of the statute applied, if it is to be applied, to the whole, and not to a part only, of the account. Nor do I think the agreement set up by plaintiff one which offends against the law relating to frauds upon creditors, as contended by defendants' counsel, even if defendants had put themselves in a position to raise such a question, by pleading it, which they did not: Day v. Day, 17 A. R. 157. . . .

I see no room upon the evidence to seriously doubt the learned Judge's conclusion that the work and services and the goods in question were actually supplied by plaintiff to deceased, and that they have not been paid for. . . . The action was begun on the 4th May, 1901. Marvin Howe died on 17th March, 1895, and probate of his will was granted to defendants on 5th April, 1895. . . . The plaintiff was married to a daughter of deceased, and commenced business after his marriage in April, 1888. He began on a small capital, said to have been only about $200. Early in his business career the deceased, who was a customer of plaintiff, proposed that plaintiff should keep the account against deceased separate from his other accounts, that he should try, if possible, to get on without it, and to leave it in the hands of deceased—the deceased saying, "I will save it for you and put it in a house," and that he would give the house to either plaintiff or his wife, and to this proposal plaintiff apparently acceded.

He kept the account by itself in separate book, produced at the trial, and he never rendered the account or demanded payment from the beginning in 1888 till he sent in the account to defendants' solicitor on 16th May, 1895. . . .

With reference to the question of corroboration, there is, in my opinion, sufficient and indeed ample corroboration of plaintiff's account of the matter. There is no necessity in law to corroborate each and every item of the account, or each and every material term of the special contract between the parties. All that is necessary is, to shew by some evidence in addition to plaintiff's that his statement of the matter is true or probably true: Radford v. Macdonald, 18 A. R. 167; Green v. McLeod, 23 A. R. 676.

Now, there is no reasonable doubt about the fact that Marvin Howe dealt with plaintiff from 1888 till his death in 1895, and that his account from the beginning was kept in a separate book or books. Both the general and the separate books were produced at the trial and before us, and this fact is apparent. Some explanation of this unusual condition is at once naturally sought, and is found, I think, in the depositions of the plaintiff and his wife, the latter stating that "father said to put the account separate into a small book, not in a large book—if my husband got into trouble he could have this." "Father said he would keep the money until the house was bought." And Samuel Holmes, called for the plaintiff, says that deceased told him about a year and a half before his death that he had requested plaintiff to keep the account between them in a little book at home, not in the regular day book, so if anything happened the account would not go into the wholesale men, and that he intended to buy a house for plaintiff's wife. And similar evidence, although less distinctly, was given by the witness Woods. So that, upon the whole evidence, it appears to me that plaintiff's account of the matter is sufficiently corroborated even without the evidence of his wife. But I do not understand the learned Judge to have disbelieved either plaintiff or his wife. On the contrary, he appears to have accepted both as credible witnesses, and to have treated the case as failing because no definite agreement for credit was proved, or, if proved, sufficiently corroborated. . . . The real question is, was there credit given at all, upon any terms, definite or otherwise, and I think there clearly was, and therefore plaintiff could not have sued Marvin Howe successfully until the term of that credit, whatever it was, had expired, or in some way been determined. The statute begins to run from the breach, not from the promise: East India Co. v. Raul, 7 Moo. P. C. 85.

Then, if the dealings between the parties were upon a footing of credit instead of cash, even if the actual term of such credit is not clear upon the evidence, a demand of payment would, I think, be necessary before action. Such a demand would seem to be involved as a necessary or implied term in the contract, which is practically one to pay upon request, just as in the case of money sued for as paid in mistake: see Freeman v. Jeffries, L. R. 4 Ex. 189.

But, in my opinion, the plaintiff is not obliged to rest upon an implied promise to pay upon request. If his story is believed and accepted, as I think it should be, there was an express agreement between them that Marvin Howe was to hold the money at least till the plaintiff demanded it. It did not and could not, having regard to this agreement, have become due and payable until so demanded, with the result which I think inevitable, that, as there was no demand it proved prior to 16th May, 1895, the action was in time, and, therefore, that the appeal must be allowed, and judgment granted in plaintiff's favour for the amount found to be owing, with interest, and with costs in this Court and the Court below.

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JANUARY 26TH, 1903.

C.A.

## RE CITY OF KINGSTON AND KINGSTON LIGHT, HEAT AND POWER CO.

*Company—Sale to Municipality of "Works, Plant, Appliances and Property"—Franchise or Value of Earning Power—Arbitration and Award—Ten Per Cent. Addition.*

Appeal by the company from an order of LOUNT, J., in Court (3 O. L. R. 637, 1 O. W. R. 194) dismissing an appeal by the company from an award.

R. T. Walkem, K.C., and J. L. Whiting, K.C., for appellants.

D. M. McIntyre, Kingston, for the city corporation.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

MOSS, C.J.O.—The main question in this appeal turns upon the proper construction of an agreement entered into between the company and the city corporation on the 14th July, 1896.

The City of Kingston Gas and Light Company was incorporated by Act of the Legislature of the Province of Canada, 11 Vict. ch. 13, with extensive but not exclusive rights with regard to the manufacture and supply of gas in the city of Kingston. Under sec. 35 of the Act, the company and its powers were to end at the expiration of 50 years, i.e., on the 3rd March, 1898.

In 1891, that company having in the meantime entered into an arrangement with the Kingston Electric Light Company for the purchase of its plant, an Act of the Legislature of Ontario, 54 Vict. ch. 107, validated the agreement and changed the name of the City of Kingston Gas Light Company to the Kingston Light, Heat and Power Company. By sec. 10 it was enacted that sec. 35 of 11 Vict. ch. 13 be repealed, thus extending the duration of the company. But it also placed a limit to its existence by providing that at any time from and after 20 years from the date of the passing of the Act (4th May, 1891), the City of Kingston should have the right to expropriate the works and property of the company in the manner specified. By this enactment the company was protected against compulsorily parting with its works and property to the city until May, 1911. But in 1896 the company entered into the agreement now in question, by which it gave to the city a new right to acquire the works and property at an earlier period. The agreement is a lengthy instrument, dealing with several matters; but, as regards the acquisition of the property by the city, the substance of it is, that upon the city giving one year's notice previous to the 1st January, 1896, it should have the option of purchasing and acquiring all the works, plant, appliances, and property of the company, used for light, heat, and power purposes, both gas and electric, at a price to be fixed by arbitration; and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business.

The city having exercised its option, it was contended before the arbitrators, on behalf of the company, that in ascertaining the price to be paid by the city the arbitrators should allow for the value of the earning power, or franchise or rights of the company, under 54 Vict. ch. 107, or otherwise. The majority of the arbitrators held that the company was not entitled to any allowance in respect of this claim. Their decision was upheld by Lount, J., and the company has renewed its contention in this Court.

We think the arbitrators placed the correct construction upon the agreement. What the company asks is, in effect, that it shall be compensated for the termination of the right which, but for the agreement, it would have of carrying on the business until 1911. That is to say, the company is claiming, not merely the price of the works, plant, appliances, and property of the company used for light, heat, and power purposes, but this price and the price of something else in addition.

No objection has been taken to the amount allowed as the price of the works, plant, appliances, and property, and we

must assume that, after due consideration of their value, having regard to their purposes and use, there was fairly allowed for them all that should have been allowed. But the company seeks to add to the sum so allowed something as the value of the earning power which these works, plant, and property might have in its hands if retained until 1911. There is no language in the agreement to justify this contention.

The company claims that the right which is thus ended by the agreement is a franchise, and passes under the term "property." But it is manifest that the word is not used in its widest sense—and it was not the intention of either party that it should be so read. Its meaning is restricted by the words which precede it, as well as by those which follow it. It was evidently not intended to comprehend everything the company possessed. The so-called franchise is no more included in the word "property" than the money in the bank, or the book debts or assets of a like nature, belonging to the company. It is far from clear that the company parted with anything in the nature of a franchise which it would be of any value to the city to acquire. The company could not, and did not, part with its corporate franchise. The privilege of using the streets for the purposes of the business ended naturally with the purchase of the works, plant, appliances, and property; and it was not needful for the city to acquire either one or the other to enable it to carry on business.

A good deal was said in argument about the justice of the city paying for all it acquired under the agreement; but the real question on the construction of the agreement is, for what did the city agree to pay? And upon this question the arbitrators came to the proper conclusion.

The appeal also fails as to the claim to add 10 per cent. to the amount of the price found by the arbitrators. There is nothing in the agreement, or in the circumstances, to warrant the arbitrators dealing with the case as one of expropriation under the statute. And, doubtless, the arbitrators in arriving at the price took all the circumstances into consideration, and made every reasonable allowance.

The appeal should be dismissed.

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JANUARY 26TH, 1903.

C.A.

McKAY v. GRAND TRUNK R. W. CO.

*Railway—Injury to Person Crossing Track—Speed of Train in Town —Fences—Warnings—Statutory Provisions—Findings of Jury.*

An appeal by defendants against the judgment for plaintiff at the trial before MACMAHON, J., and a jury.

The action was for negligence in the operation of an engine and passenger train at a crossing over Main street, in the town of Forest, on the evening of 9th October, 1901.

On the evening in question, about 6 o'clock, the plaintiff, a farmer, with his wife and two very young children, was driving home from an agricultural fair in the town of Forest, which they had been attending. The evening was rather wet, and the plaintiff had, in consequence, put up the sides of the covered buggy in which he and his family were driving, which interfered to some extent with his seeing and hearing. He left the hotel on King street, drove to Main street, and then along Main street to the crossing where the collision took place by which the plaintiff himself was severely injured, his wife and two children were killed, and his horse and buggy destroyed. The track crosses Main street, a leading street in the town, on the level, and is not protected by any gate or by a watchman; although on the day in question one Hallisey, employed by the town corporation, was stationed at this crossing as watchman, owing to the number of people who would probably cross to attend the fair. Hallisey saw plaintiff approaching. He knew the train was about to cross, and he called out to warn plaintiff of his danger, but without effect. Others also called out to plaintiff to beware of the approaching train equally without effect; plaintiff's explanation in the witness box being that he heard none of these warnings. Plaintiff said he looked to see if the train was in sight, and could not see it. He also said he heard no warning whistle nor the ringing of the bell. The evidence was clear and distinct that the plaintiff could have seen the approaching train for at least a distance of 40 feet before he reached the track in question, and if he looked he must have looked too soon or imperfectly, and there was no doubt that for at least 8 to 10 rods before the crossing the bell was rung, and the whistle was also sounded at what was called the whistling post. The plaintiff did not stop and listen, but drove on in a hurry to get home to his farm, as he said, and knew nothing about the approach of the train until the moment of the collision.

The jury, after a very fair and full charge, practically unobjected to by either counsel, except upon one point, found that the whistle was blown at the whistling post, the bell commenced to sound 8 to 10 rods east of Main street, and rang continuously; that Main street crossing is in a thickly peopled portion of the village; that the engine was proceeding at a speed of 20 miles an hour; that such speed was a dangerous speed in that locality; that the death of Mrs. Mc-

Kay and the injury to plaintiff were caused by the negligence of the defendants in running too fast, and by reason of the want of a flagman or gates; that no sufficient warning was given to plaintiff in time to have enabled him to have avoided the accident; and that plaintiff was not guilty of contributory negligence; and they assessed the damages at $1,300 in all, namely, $800 for the death of the wife, $400 for plaintiff's own injuries, and $100 for the horse and buggy.

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

I. L. Hellmuth, K.C., for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

GARROW, J.A.—Counsel for the defendants objected, not so much to the charge as to one of the questions, as follows: "Mr. Riddell . . . Then I object to the question of the rate of speed being a dangerous rate for the locality. I object to that being put to the jury. I do not know that it will have any great effect on the verdict one way or the other, but I submit that is a question that they should not be asked." His Lordship: "How would you frame it?" Mr. Riddell: "I would not ask it at all. It is not the phraseology I object to. However, that is a question probably more of law than of fact."

I can see no force in the objection thus rather faintly urged; on the contrary, the question was, I think, a perfectly proper one to submit to the jury; and in any event if it is, as the learned counsel seemed to think, matter of law rather than of fact, it cannot have affected the result. The main question of this appeal arises upon the contention of the defendants' counsel that where the railway track is fenced in accordance with the statute, the maximum speed is not limited to six miles an hour at such crossing as the one in question; and that no fence according to the statute is simply to fence to the cattle guard at the side of the crossing, and to turn in the fence to such cattle guard, leaving the sides of the track where it crosses the highway wholly open, unprotected, and free of access by any one passing along the highway, and that any additional restriction upon the rate of speed must be secured by an application to and an order by the Railway Committee of the Privy Council under the Railway Act.

The statutory provisions seem to be as follows. By the Railway Act, 1888, 51 Vict. ch. 9, sec. 197, it was provided that at every public road crossing a railway at the level, the crossing is to be sufficiently fenced on both sides, so as to allow the safe passage of trains. By 55 & 56 Vict. ch. 27,

sec. 6, this section 197 was repealed, and a new section substituted, which reads as follows: "At every public road crossing at a rail level of the railway, the fence on both sides of the track shall be turned in to the cattle guards, so as to allow of the safe passage of trains." Then by the Railway Act, 1888, sec. 259, it was further provided that "No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is properly fenced." This also was repealed by 55 & 56 Vict. ch. 27, and a new section substituted, the only change thus made consisting in the substitution of the words "unless the track is fenced in the manner prescribed by this Act," for the words in the former section, "unless the track is properly fenced."

Under the law as it stood before the amendment of 55 & 56 Vict. ch. 27, protection was secured by directing, in plain words, that the track should be "properly fenced;" otherwise the speed of the train was not to exceed six miles an hour in such places. "Properly fenced" had the same meaning, I take it, as efficiently fenced to accomplish the purpose intended, and must, therefore, have included and been intended to include the crossings themselves, the only points at which collisions were reasonably to be expected to occur, and not merely the side fences along the railway, which end at the crossings. The language of the new section is not by any means as clear and as easily understood as that contained in the old; but the purpose and avowed intention is apparently the same, namely, to allow the safe passage of the train at these crossings; and safe passage, of course, must include safe for the crossing public as well as for the passing train. No one in crossing the track would be likely to attempt to cross the cattle guards which are so placed as to be completely out of line of ordinary travel, so that the new direction to turn the fences in to the cattle guards is obviously not intended to keep back or protect people crossing the railway track, although fences so turned in would prevent cattle and horses from straying upon the track at these crossings, and that may have been the object of the change. But, whatever was its object, it appears to me impossible to read it as defendants' counsel contends, as giving to railways a right to cross highways in thickly populated centres at any speed they may choose, provided they have turned in the fences to the cattle guards, leaving the highway as it crosses the track wholly open and unprotected. This contention, if successful, would render senseless sec. 259. The object of that section plainly is one of protection at the crossings; such protection can only

be secured against rapidly moving trains, by fencing or some similar protection; and such fencing must, to be any protection at all, cross the highway at the crossing and so retain the travelling public in a place of safety while a train is passing or immediately about to pass.

There is, of course, another view. By the new section 259, the Legislature clearly intended a fence of some kind to be maintained, and as clearly intended that if no fence was maintained at these crossings then the speed should not exceed six miles an hour; but it has perhaps failed to prescribe the kind of fence which shall be built, because it is clear that a fence leaving the crossing itself entirely open, such as that apparently prescribed by the new sec. 197, could not possibly meet the case of protecting the crossing, and no other fence is specifically prescribed, so far as I can find, in the railway legislation of the country. Now, in such a condition of things, and from this point of view, the railway company has one of two courses open. It may at such crossings station a watchman or maintain a reasonable fence sufficient for the purpose, or it may reduce its speed to the permitted maximum of six miles an hour. The defendants do not choose to adopt either course. They say, in effect, the sections in question, as they now stand in the Railway Act, are not at all intended for the protection of the public, but solely in the interests and for the protection of the railway companies; and that they, the railway companies, are subject only to the orders and directions of the Railway Committee as to such crossings as the one in question. But not even the Railway Committee has power to authorize a speed exceeding six miles an hour, unless the track is "properly fenced:" see sec. 10 of the Railway Act, 1888; the retention of the latter words, "properly fenced," aiding, I think, very materially in the conclusion which I have reached, namely, that unless the track, including the crossing, is properly fenced or otherwise protected so as to efficiently warn or bar the traveller while a train is crossing, or immediately about to cross, the maximum speed at which a train may cross in thickly peopled portions of cities, towns, and villages, is six miles an hour.

So that we have in the present case an undisputed finding by the jury that the train in question was travelling at what, if I am right, was the unlawful and highly dangerous speed of 20 miles an hour over a main street in an incorporated town, and that the injury complained of was caused by this excessive speed, coupled with the absence of proper protection at the crossing, and without negligence on the plaintiff's part. I am of the opinion that there was evidence, I am inclined to

think strong evidence, of contributory negligence on plaintiff's part; and if the jury had found against him on that question I would certainly not have interfered. But while not yet laid down as matter of law that a person approaching a crossing is bound to stop, look, and listen, he is of course bound to exercise his senses, and to act with reasonable care. The plaintiff says he did look and did not see the approaching train, that he heard no warning of any kind, and he had a right to assume not merely that the ordinary statutory warnings would be given, such as ringing the bell and blowing the whistle, but that the speed of the train at the crossing in question would be a lawful speed, in which latter event he could probably have escaped from the collision, notwithstanding his own previous want of care. The whole matter was one, in my opinion, which could not have been properly withdrawn from the jury, and the appeal therefore fails.

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C.A. JANUARY 26TH, 1903.

WEBB v. OTTAWA CAR CO.

*Contract—Novation—Consideration—Collateral Promise—Oral Evidence to Alter Writing.*

Appeal by the third party Campbell from the judgment of a Divisional Court (1 O. W. R. 90) holding him liable to pay to the defendants the amount for which they were held liable to the plaintiff. The plaintiff sued and recovered judgment against the defendants for a claim for certain brick work done in and about the installation in a boiler house belonging to the defendants of certain boilers which were supplied and put in place by Campbell. The defendants, claiming that Campbell was liable to indemnify them, caused him to be brought in as a third party.

LOUNT, J., by whom the action was tried without a jury, held that Campbell was not liable to the defendants. Upon appeal the Divisional Court was of the contrary opinion.

J. Bishop, Ottawa, for appellant.

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

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—I am of opinion that the decision of the Divisional Court ought to be affirmed.

Some time before the brick work in question was done, Campbell had, under contract with the defendants, put in certain boilers spoken of as Kingsley boilers, and, these not proving satisfactory, he bound himself to the defendants to put in other boilers free of charge to them. This agreement is in writing in the form of a letter and acceptance dated the

27th December, 1899. By that agreement he undertook to replace the Kingsley boilers by others of the same capacity to do the work, the "alterations or changes to be done free of charge" to the defendants.

He now seeks to shew by parol that the words "free of charge" did not refer to the brick work which formed part of the installation of the new boilers, and without the doing of which they could not be placed in working order. It is not pretended that under ordinary circumstances the replacing of the Kingsley boilers would not mean the doing of the brick work as well as the other work, but it is sought to be shewn that before the writing was signed by Campbell it was understood and agreed that he was not to bear the cost of the brick work, but that defendants were to have it done, Campbell giving them or allowing them to use the old bricks connected with the Kingsley boilers.

To allow the parol evidence for this purpose would be to sanction its receipt for the purpose of varying, qualifying, adding to, or subtracting from, the contract which the parties have put into writing. Campbell's undertaking is plainly expressed. If he could not make the Kingsley boilers satisfactory, that is, to perform their work to the defendants' satisfaction, he would replace them by others capable of doing the work, free of charge to the defendants. It is urged that the parol evidence was not objected to at the trial, and, having been received there, it cannot now be objected to. While that seems to be the general rule where there is a trial with a jury, a different rule is recognized where there is a trial by a Judge without a jury: Jaekers v. International Cable Co., 5 Times L. R. 13; Phipson's Law of Evidence, p. 9.

Campbell having rendered himself liable in that way, what, if anything, afterwards transpired to relieve him of that liability?

He complains that the defendants, through their vice-president and managing director, Wylie, assumed to make the plans, engage the plaintiff, and direct the doing of the brick work in question. There appears to be some good reason for that course, inasmuch as there was a good deal of work to be done beyond the mere brick work for the boilers. An entirely new boiler house was being built, the expense of which the defendants were bearing, and the plans covered the whole work.

If Campbell was not satisfied with what was being done by the defendants, he might have protested against the work being taken out of his hands and notified the defendants that he was not to be held liable to pay for work which he

was not allowed to provide for or superintend. He should have insisted upon being allowed to take the matter into his own hands, and have made the defendants understand that unless he was allowed to do so he was to be relieved and discharged from liability for this part of the work. He did not take this course. Though he was aware of the work that was being done, all he did was to object to Webb that it was too heavy and expensive, and to go, accompanied by Webb, to the defendants' office to see if the plans could not be altered. This action was quite consistent with his considering himself liable; otherwise why interfere at all?

His liability to replace the Kingsley boilers, free of charge to the defendants continued notwithstanding the manner in which the brick work part was carried out. Neither by agreement or conduct on their part did the defendants discharge him from such liability.

Then, when the time came for settlement upon his contract with the defendants, the question of the payment for the brick work in connection with the new boilers was brought up, in consequence of Wylie having learned that Campbell had refused to recognize his liability to pay Webb, and that the latter was looking for payment to the defendants. A dispute arose, and the matter was compromised by the defendants agreeing to pay Campbell the whole of the $962 balance of the contract and other work, and Campbell agreeing to pay Webb the amount of his claim, and this arrangement was put into writing and signed by Campbell. The compromise and the payment in pursuance thereof was sufficient consideration. But there was also the previous existing liability as between him and the defendants arising from his agreement to replace the boilers free of charge to the defendants.

Campbell testified that when he signed the paper of the 17th November, 1900, containing this arrangement, Wylie assured him that he would get the defendants to make an allowance in respect of the brick work, and that he signed on that condition.

In view of his existing liability, his signature to that paper was not necessary. But, whether or not that is so, his evidence shews that he understood the effect of the paper. What he now seeks to prove is inconsistent with its terms, but in any case all he proves is that, wisely or unwisely, he was willing to trust to Wylie's good offices with his co-directors and to take the money upon the terms stated in the writing.

The appeal should be dismissed.

JANUARY 26TH, 1903.

C.A.

## RE PUBLISHERS' SYNDICATE.

## PATON'S CASE.

*Company—Winding-up—Subscription for Shares—Transfer of Shares by Old Subscriber to New Subscriber—Relief from Liability—Illegal Payment to Director.*

Appeal by J. H. Paton and cross-appeal by liquidator from order of MEREDITH, C.J., varying judgment of Winchester, Official Referee, and settling the appellant on the list of contributories of the Publishers' Syndicate. The syndicate, finding that some of their shareholders were not in a financial position such that they could meet their liabilities upon unpaid stock, sent out their agents to procure subscriptions for stock, arming the agents with powers of attorney in blank or to themselves. One Moorehouse and one Brodie signed such powers of attorney authorizing one Stark, an agent, to "receive from the vendor" three shares and five shares respectively. Moorehouse subsequently signed a second document whereby he applied for three shares of stock in the company. The company allotted three shares to Moorehouse upon the application and allotted two shares to Brodie. These five shares were paid for in full to the company. Brodie subsequently paid three instalments of $300 each in respect of the other three shares mentioned in the power of attorney. Some months afterward the appellant, who was the owner of 30 shares in the company, upon which he had paid $1,300, having had his attention called to the fact that Moorehouse's and Brodie's powers of attorney were pasted in the transfer book without any transfers opposite them, directed three of the shares standing in his name to be transferred to Moorehouse and two to Brodie, altering the accounts to make it appear that the moneys paid for the shares issued to these subscribers by the company were in fact paid for the purchase of shares from him, the appellant. It was held below that the appellant had no right, so long after the date of the powers of attorney, to take advantage of their form and procure the attorneys thereunder to accept shares standing in his name. Paton's appeal was taken upon the ground that there had been an absolute and formally regular transfer from the appellant to Moorehouse and Brodie, duly accepted by the attorneys of the latter. The liquidator of the company opposed the appeal, and cross-appealed in respect of three other shares transferred from the appellants to other persons under circumstances similar to those under which the transfers already referred to took place, in respect of the

mode in which the appellant should be charged on his shares, and in respect of a payment of $300 authorized to be made to the appellant for his services to the company under a resolution of the shareholders, which sum was placed to the appellant's credit on his debt for unpaid stock. The liquidator objected to this payment on the ground that no services had in fact been performed, but the Judge below held in favour of the appellant.

E. B. Ryckman and A. T. Kirkpatrick, for Paton.

C. D. Scott, for the liquidator.

The judgment of the Court (MOSS, C.J.O., MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

GARROW, J.A.— . . . In my opinion, the evidence shews clearly that the real transaction between the company on the one hand and Moorehouse and Brodie on the other, were that the latter should become shareholders in the company and that the powers of attorney given by them were taken instead of ordinary applications for stock, at the instance of the company, under the mistaken belief that there was at that time no treasury stock to meet such applications, and that it would be necessary to receive transfers of shares which had been allotted to prior applicants who were unable to pay for them. Moorehouse and Brodie having paid the company for the five shares in question, and having received their stock certificates for them some time previous to the transfers from Paton, the latter could not relieve himself from liability by attempting to transfer his unpaid shares to these parties, when he did not and could not make them liable to the company for their payment. It may be noted that the motion for the allotment of the three company shares to Dr. Moorehouse was made at the meeting of the board by Paton himself.

It was strongly argued before us on behalf of Patton that he could transfer his unpaid shares, even although his object might be to escape liability, and that we should accept as conclusive the entries in the books. I do not consider the authorities cited to us on this point to be applicable to the present case. It was known to the company and to Paton that these applicants did not apply for or desire more shares than mentioned in the powers of attorney. After they had paid the company for and accepted certificates of paid-up shares in fulfilment of their contracts, Paton could not effectually transfer to them his unpaid shares without their knowledge or consent, and I do not think that the old powers of attorney could properly be used to accept transfers of these shares under the circumstances. In my opinion the judg-

ment appealed from is in this respect correct, and the appeal of Paton should be dismissed. . . .

The sum of $300 was voted to Paton, and a like amount to each of the other provisional directors, for alleged services as such directors. It was done at what was called a joint meeting of shareholders and provisional directors, held for organization, sixteen days after the date of the letters patent, the provisional directors being the only shareholders at the time.

These directors were not servants of the company, but managers; and, apart from contract or agreement, could not claim remuneration for their services, so that such a payment would be in the nature of a gratuity, and should be authorized by by-law. Section 46 of the Ontario Companies Act, 1897, under which the company was incorporated, provided that no such by-law should be valid or be acted upon until it had been confirmed at a general meeting of the shareholders. I am of opinion that the resolution in question was not a sufficient compliance with this section, even although it formed part of the minutes which were read at the annual meeting held the following year, and which were confirmed in the ordinary way. It is further to be observed that no profits had been made at this time, and, according to the books, nothing had been paid in by any person on account of his stock. I think this case is clearly distinguishable from Re Lundy Granite Co., Lewis's Case, 26 L. T. 673 (1872), to which we have been referred. There the payment in question was expressly authorized by the articles of association of the company. Here there is no such provision in the Act or the letters patent, and nothing to take it out of the general rule laid down by Lord Lindley in Re George Newman & Co., [1895] 1 Ch. at p. 686, that the remuneration of directors for their trouble as such, even when authorized by the shareholders, can only be made out of assets properly divisible among the shareholders themselves, and not out of capital.

The liquidator has also appealed to this Court against the decisions . . . refusing to place Mr. Paton on the list of contributories with respect to nine other unpaid shares which he transferred to certain other persons . . . I am unable to find anything in the circumstances relating to these nine shares to place them on a different footing from the five shares transferred to Moorehouse and Brodie, and the same rule should be held to apply.

The cross-appeal with respect to the $300 and to these nine shares should, therefore, be maintained, and Mr. Paton

placed on the list of contributories for $1,700. The liquidator to have the costs of this appeal and cross-appeal, and the costs below in respect of the cross appeal.

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JANUARY 26TH, 1903.

C.A.

## FITZGERALD v. FITZGERALD.

*Dower—Equity of Redemption—Conveyance of by Husband to Defeat Claim of Wife—Dower in Equitable Estate—Statute.*

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., dismissing without costs an action brought by the plaintiff, as widow of James W. Fitzgerald, against his son, and plaintiff's stepson, to recover dower out of certain lands conveyed by the deceased to defendant, subject to existing mortgages, the grantor retaining a life estate, and taking back a mortgage for an amount which, with the existing mortgages, made up the whole consideration. Plaintiff also asked to have this conveyance declared null and void as against her right to dower.

A. B. Aylesworth, K.C., and J. W. Bennet, Peterborough, for appellant.

G. H. Watson, K.C., and E. B. Edwards, K.C., for defendant.

OSLER, J.A.— . . . When the plaintiff married her now deceased husband, she being then about 16 and he about 57 years of age, he was possessed of the equity of redemption in certain lands subject to two mortgages which he had created thereon. After the marriage he paid off these mortgages, and made a further mortgage of the same lands, in which the plaintiff joined for the purpose of barring her dower. Some time afterwards the parties disagreed, and the wife left her husband, and with the exception of a very short interval they never lived together again. About three years before his death, the husband conveyed his equity of redemption in these lands to the defendant, a son by a former marriage, for the expressed consideration of $10,000, which was not in fact paid. There seems little reason to doubt that this conveyance was really made in order, if possible, to prevent the plaintiff from ever becoming entitled to dower in the land. It may be taken, so far as the relief sought in this action is concerned, to have been a mere gift to the defendant.

The question is, whether the plaintiff is entitled to say that, notwithstanding this conveyance, her husband died beneficially entitled to an equitable estate in respect of which she

may be dowable out of the land, under the provisions of R. S. O. ch. 164, sec. 2.

The case was argued, as it seemed to me, very much upon the assumption that by analogy to the wife's inchoate right to dower in land in which the legal estate is in the husband, there was a similar inchoate right in respect of dower out of an equitable estate. There is, of course, no such analogy. In the one case there is the common law right arising out of the marriage relation, of which the wife cannot be deprived by the act of the husband in alienating the land during their joint lifetime; in the other the wife has a mere chance or possibility of being dowable, depending under the statute upon whether the husband does or does not die beneficially entitled to the land for such an estate or interest as is mentioned therein.

Bateman v. Bateman, 2 Vern. 436, distinguished. . . .

In this case the wife had no interest, no estate, inchoate or otherwise, unless the husband had died beneficially entitled to an inheritable estate in possession. While he lived, the estate or interest he had in the land was his own, unaffected by any interest or estate of the wife. He was at liberty to sell or give it away as he pleased, even for the express purpose of defeating the wife's chance or possibility of becoming dowable in respect of it. She might, no doubt, have proved, if she could, that notwithstanding the deed there was a secret trust in favour of the grantor, so that he still remained beneficially entitled. But the evidence seems to me reasonably clear that, beyond right to maintenance provided for the father, the deed to his son, the defendant, was intended to be absolute and free from any other trust or reservation in his favour.

The appeal must, therefore, be dismissed.

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

MOSS, C.J.O., concurred.

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JANUARY 26TH, 1903.

C.A.

RAYFIELD v. TOWNSHIP OF AMARANTH.

*Municipal Corporations—Drainage—Non-repair of Drains—Injury to Property of Private Person—Damages—Lack of Repair not Cause of Injury—Findings of Drainage Referee—Affirmance on Evidence—Necessity for Notice of Non-repair where Damages Claimed.*

Appeal by plaintiff from judgment of the Drainage Referee, to whom the action was referred by BOYD, C., dismiss-

ing it with costs. The action was brought for damages for injury to the plaintiff's land through being flooded with water, consequent, as he alleged, on the respondent's failure to repair certain drains, as it was their duty to do. The Referee found that the plaintiff had not shewn that defendants had failed to repair, and further, that plaintiff, by burning away the brush and vegetable mould on his land to a depth of 18 inches, and thus destroying the sides of the drain, had himself to blame for his damage.

The Referee held that the by-laws of the defendants directing that landowners should not permit obstructions to collect, and should clear them away when they did so, had not been observed, and that their provisions had been familiar to the plaintiff.

M. Wilson, K.C., and J. N. Fish, Orangeville, for appellant.

J. P. Mabee, K.C., and A. A. Hughson, Orangeville, for defendants.

Garrow, J.A.—The main issue between the parties was one in fact. The plaintiff claimed that his lands, crops, etc., were injured because defendants neglected their statutory duty to maintain the drain. . . . The burden upon the plaintiff was to prove that the drain was out of repair, that the defendants neglected their statutory duty to remedy such lack of repair in time to have prevented the injury, and that the lack of repair was the cause of the injury. . . . The defendants allege that the lack of repair was not the cause of the injury, if any . . . I am quite satisfied that the Referee's judgment is correct and based upon the very decided preponderance of the evidence appearing in the case. . . . Upon the facts it appears to me clearly that the plaintiff has failed to prove that his damages, whatever they were, can be in any way attributed to the alleged neglect by defendants of their statutory duty to maintain the drain in question. . . .

I have serious doubt as to whether, in any circumstances the defendants could have been held liable, it appearing that they had no notice or knowledge of the alleged defects or lack of repairs till about the beginning of July in the year 1899, after all the injury complained of had been done. Failure to repair in a mere private matter, such as these drains are, in which the municipal corporation only acts as part of the machinery to accomplish wholly private ends, should not be put, one would think, on a higher or more imperative footing than a failure to repair a public highway, in which the whole public is interested; and in the case of the

latter it is well recognized law in this Province that before the defendants can be held liable there must be either notice of the defect or circumstances shewing negligent ignorance of it. . . . Then, in the case of a highway, not only must there be a notice or the equivalent of notice, but a reasonable time to make the necessary repairs must have elapsed before the negligence which gives a good cause of action is complete. . . .

Then, looking at the sections of the statutes, sec. 606 of the Municipal Act, R. S. O. 1897 ch. 223, provides for the repair of highways by the municipal corporation, and secs. 68 and 73 of the Municipal Drainage Act, R. S. O. 1897 ch. 226, for the maintenance of drains such as the one in question. Liability for damages under the first named statute is certainly not less clearly, peremptorily, and unqualifiedly stated than under sec. 73 of the Drainage Act, and yet, as we have seen, notice to the defendants is necessary under the former to perfect the liability. The latter section (73) makes provision, it is true, for the remedy by mandamus, as well as for the liability in damages for a neglect of the statutory duty to maintain, in the case of the former clearly, and in the case of the latter probably, requiring not merely that there shall be notice, but that the notice shall be in writing. My own impression is, that the proper construction of this section, as it now stands, is that notice in writing is necessary where the claim is for damages, as well as where it is for a mandamus. But, whether that is so or not, I think that there is no legal liability on the part of a municipal corporation for damages for neglecting this duty until notice of some kind of the alleged defect is given to the corporation or to its proper officer, and a reasonable time allowed to remedy the defect. In the present case the evidence shews that immediately after plaintiff notified defendants of the facts, defendants proceeded at once to make the necessary repairs. It is not contended that defendants acted negligently after notice. . . .

Raleigh v. Williams, [1893] A. C. 540, considered and distinguished.

The appeal, however, fails upon the merits and should be dismissed with costs, quite apart from the important question of the want of notice.

Moss, C.J.O.—I think the learned referee reached the proper conclusion, and that the appeal should be dismissed. On the question of what, if any, notice a municipality should receive of want of repair of a drain constructed under or subject to the provisions of the Drainage Act, I express no opinion.

Much may be said in favour of the convenience of requiring notice to be given in writing, but there are cases such as that of a person who is not aware of the condition of want of repair before it has inflicted damage upon him, which have to be considered, and I prefer to withold for the present any expression of opinion on the subject.

MACLENNAN and MACLAREN JJ.A., concurred.

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C.A. JANUARY 26TH, 1903.

## CLARK v. WALSH.

*Specific Performance—Contract for Sale of Mining Land—Formation of Company—Construction of Contract—Rectification—Delivery of Fully Paid-up Shares—Shares Left in Treasury for Development purposes—Breach of Contract—Time—Forfeiture—Waiver—Counterclaim—Work and Labour—Assignment of Chose in Action—Notice—Contract—Part Performance—Abandonment.*

Appeal by plaintiffs from judgment of FALCONBRIDGE, C.J., (1 O. W. R. 228) dismissing the action, which was brought for specific performance of an agreement with respect to certain mining lands, and allowing defendant's counterclaim for $975, with costs of action and counterclaim to defendant.

A. B. Aylesworth, K.C., and N. W. Rowell, K.C., for appellants.

R. C. Clute, K.C., for defendant.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

MOSS, C.J.O.—The appellants (plaintiffs in the action) seek specific performance of an agreement made between the defendant of the one part, and the plaintiff Clark of the other part, for the sale to the latter of certain mining locations in the Rainy River district. By the original statement of claim, the plaintiffs alleged that the agreement was contained in a writing signed by the parties and dated 16th November, 1899. But at the trial before Falconbridge, C.J., questions were raised as to the proper construction of the writing, particularly with reference to the extent to which it was agreed, or intended to be provided therein, that the shares of the company mentioned in the writing should be fully paid-up and non-assessable shares. For the plaintiffs it was argued, that upon the proper reading of the written agreement, only the 100,000 shares agreed to be delivered to the defendant were required to be fully paid-up and non-assessable; whereas the defendant contended that the true reading was that the whole of the capital stock was to be fully paid-up and non-assess-

able at the time of the delivery of the 100,000 shares for the use of the defendant. The plaintiffs applied to be allowed to amend the statement of claim by alleging that the true agreement was that only the 100,000 shares to be delivered to the plaintiffs were to be fully paid-up and non-assessable. After some discussion the plaintiffs were given leave to prepare and file the proposed amendments, the evidence being proceeded with in the meantime. Leave was also given to include in the proposed amendments a claim, that at the time of making the agreement it was understood and agreed that the company to be incorporated should be an American company, and that it was to be left wholly with the plaintiff Clark to determine whether any of the shares of the company should be left in the treasury for development purposes. The amendment subsequently filed set forth these matters in detail; and also made some further allegations, not necessary to be detailed. After hearing the evidence and argument, the learned Chief Justice refused to allow the amendments, and dismissed the action. It was suggested that the plaintiffs could not in the same action obtain rectification of a written document, and specific performance of the contract as rectified. But there is now no objection to such proceeding: Olley v. Fisher, 34 Ch. D. 367; Carroll v. Erie County Natural Gas Co., 29 S. C. R. 591, 594.

I am of opinion that according to the true agreement between the parties only the 100,000 shares to be delivered to the defendant were to be fully paid-up and non-assessable. I should be in favour of this conclusion upon the language of the signed document, awkwardly expressed though it be, but the evidence upon which it is sought to rectify it leaves no doubt on the point. . . . And I think that a case for rectification to that extent was made out. But I do not think the plaintiffs have established that it was agreed that it was to be left with the plaintiff Clark to determine whether any shares were to be left in the treasury for development purposes; that is to say, that the defendant agreed that, for a transfer to the company (intended to be formed) of the locations the defendant was to assign to the plaintiff Clark, he was to be at liberty to receive from the company all the shares except the 100,000 to be delivered to the defendant without any further payment to the company for such shares, thus leaving the company possessed of the locations but without one dollar of capital in the treasury for development or any other purpose. There is nothing in the preliminary memorandum or the signed agreement from which an agreement to that effect can be gathered. And it lies upon the plaintiffs to

make out, by what has been termed irrefragable evidence, that neither of the parties intended the agreement to be such as the writing expresses it to be: Campbell v. Edwards, 24 Gr. 152, 171.

It was argued that the testimony of the plaintiff Clark, and of Morris, proves an agreement to the effect contended for, and that Walsh admitted the same thing. But what Clark and Morris say is far from sufficient to form the basis for insertion into the writing of an additional term. . . .

In this state of the evidence it would be impossible to rectify the writing by introducing into it a term binding the defendant to an agreement that the company should hand over the whole of its shares as paid-up and non-assessable, for no other consideration than the transfer to it of the mining locations. In the absence of an agreement to that effect, the defendant was entitled to expect that the shares to be delivered to her would be shares in a company which would have a large number of shares to dispose of, and that when they had become fully paid-up, the money or other consideration received for them would form a fund for the development of the property, and the enhancement of the value of the defendant's shares. Whereas, as it appears on the plaintiffs' own shewing, before the defendant's shares were deposited for her, the company had assumed to allot to the plaintiff Clark all the shares of the capital stock as fully paid-up and non-assessable, for no consideration except an assignment of Clark's right to a conveyance of the mining locations. So that the plaintiffs are calling upon the defendant to accept shares in a company which has no capital stock in the treasury, and no assets except the mining locations. Substantially this is a sale by the defendant of the locations for $2,000, for, as respects the value of her shares, she is altogether dependent upon the goodwill of the plaintiff Clark, and the desire and ability of certain persons whom he has associated with him and to whom he has sold or transferred portions of his stock, to expend money upon the locations. The plaintiff Clark claims that any such expenditures would be loans or advances to the company, and would form a charge upon its assets. If so, the defendant would be obliged to contribute towards their payment, and so, in reality, she would not be getting fully paid-up and non-assessable shares, having the value she was entitled to expect them to have. On this ground alone I think the plaintiffs have failed to shew that they have performed the plaintiff Clark's part of the agreement, and they are, therefore, not entitled to the relief they claim. But the defendant's conduct, through

her husband and agent, in the dealings and correspondence with the plaintiff Clark after the certificates of the transfer of shares were deposited, and in treating him as still entitled to deal with the locations under the agreement, notwithstanding the expiry of the date fixed for the deposit of proper shares, constitutes a waiver of time as the essence of the contract, and disentitles the defendant to insist upon the forfeiture of the $2,000.

I also think that judgment should have been in favour of the plaintiffs upon the counterclaim. It was contended that the assignment of the claim to the defendant was not sufficient in form to entitle her to maintain an action thereon in her own name; and that no proper notice thereof was given to Walsh prior to the counterclaim. But I think both these objections fail. The assignment is to the defendant absolutely, and there is nothing on its face to shew that it was intended to operate otherwise. As to notice, the assignment bears date 30th April, 1901, but was executed some time in May. The action was commenced on the 5th June, 1901, the statement of claim was filed on the 6th July, and the counterclaim was filed on the 9th July, 1901. On the 6th July, 1901, a notice of the assignment was mailed at Port Arthur, addressed to the plaintiff Clark at Boston, where he resides, and from which he directs his correspondence. The notice reached Boston on the 9th July, but Clark was not there, and it was forwarded to Owen Sound, and was not received by him until after he had testified at the trial. I think this was a sufficient giving of notice under the Act.

But the defendant is seeking payment in respect of an entire contract, which has only been partly performed. She sets up that the plaintiff Clark, by stopping payment of a cheque which he had given in payment of a percentage of the work done in pursuance of the contract, discharged Walsh from obligation to proceed further with the work. But the stoppage of payment was the result of the attitude taken by Walsh that he did not recognize Clark as longer entitled to any interest in the property, and that he would not continue to work for him under the contract, unless Clark agreed to his proposals. Clark offered to pay the cheque, and to continue paying if Walsh would go on with the work, but Walsh refused. He says that he commenced work about the 2nd February, and continued until the 23rd April, when he had gone down about 39 of the 50 feet to be sunk, under the contract. On the 17th March, when he had sunk about 20 feet, he quitted working for Clark, and after that was working for himself; but the claim is for payment for the 39 feet.

It appears, therefore, that he deliberately decided to abandon the contract, and to work for himself or for his wife, and he refused Clark's offer to pay if he would proceed with the work for him.

In no case could there be a recovery for more than 20 feet, but I think that there can be no recovery.

The appeal as to the counterclaim should, therefore, be allowed.

As to costs, the defendant is entitled to the costs of the action; the plaintiffs to the costs of the counterclaim, and to such costs of the appeal as relate thereto; the defendant is entitled to the other costs of the appeal; the costs to be set off.

The defendant is to pay to the plaintiffs the remainder of the $2,000, after deducting therefrom any balance of costs to which she may be entitled, and there is to be a lien on the locations for the amount payable by her to the plaintiffs.

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JANUARY 26TH, 1903.

C.A.

BLAIN v. CANADIAN PACIFIC R. W. CO.

*Railway—Carriers of Passengers—Duty to Protect from Assault—Negligence—Evidence of Justification for Assault—Mitigation of Damages—Excessive Damages.*

Appeal by defendants from judgment of FALCONBRIDGE, C.J., in favour of plaintiff for $3,500 upon the findings of the jury in an action (tried at Toronto), brought by Thomas Joseph Blain, a barrister, of Brampton, to recover damages for injuries sustained by him upon a train of defendants on the 10th October, 1901. The plaintiff, as he stated, shortly after entering a car in a train going from Toronto to Brampton, was assaulted by one Anthony, a passenger upon the train, who threatened then and there to renew the assault. Immediately after this assault, and prior to the train leaving the station, the plaintiff informed the conductor of the train of the assault and of the threats that it would be renewed, and requested the conductor to remove Anthony, but the conductor did not do so, and the plaintiff was again twice assaulted and beaten by Anthony. The plaintiff alleged a duty on the part of the defendants to the plaintiff as a passenger to carry him peaceably and free from violence, and the breach of such duty. The jury found the defendants guilty of negligence and assessed the damages at $3,500, for which amount and costs judgment was entered.

E. F. B. Johnston, K.C., and Shirley Denison, for the appellants.

W. R. Riddell, K.C., D. O. Cameron, and J. G. O'Donoghue, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, JJ.A.) was delivered by

MOSS, C.J.O., (after stating the facts and evidence at length) :—The duty or obligation which defendants owed plaintiff was to carry him to his destination, and to use reasonable care and diligence in providing for his comfort and safety while being conveyed by them. How far they used such reasonable care and diligence depends upon the circumstances which arose, and the extent of their notice or knowledge of them in time to prevent them or protect plaintiff from their consequence.

In East India R. W. Co. v. Kalidas Innkerjee, [1901] A. C. 396, the Judicial Committee rejected the argument that it may be regarded as settled law that in the case of carriers of passengers under statutory powers there exists an express duty, independently of any implied contract, to carry them safely. . . .

Cases have been referred to, English as well as American, in which the broader rule has been acted upon, but for the purposes of this case it may be taken that the law is, that in order to succeed plaintiff must prove negligence. It follows, of course, that proof of notice or knowledge, or reasonable opportunity of knowing of the acts complained of, is essential to establish the negligence.

I find it impossible to say that there is not evidence upon which the jury might reasonably find defendants guilty of negligence.

If the conductor had been present when the assaults were committed and took no steps to protect plaintiff or to prevent their recurrence, it could scarcely have been argued that defendants would not be liable. [Pounder v. North Eastern R. W. Co., [1892] 1 Q. B. 385, Cobb v. Great Western R. W. Co., [1893] 1 Q. B. 459, [1894] A. C. 419, and Beven on Negligence, 2nd ed., pp. 1209, 1212, 1213, referred to.]

There is ample evidence that plaintiff was assaulted and ill-used on the train, and that the conductor was told of Anthony's conduct and threats to continue it. It was for the jury to judge whether, with the knowledge he had, he acted reasonably and diligently, or whether, after being told, as he was, by plaintiff and others of Anthony's condition and the assaults he had committed on plaintiff and other passengers before the train left the Union Station, and after being again warned at Parkdale, the conductor acted unreasonably and negligently in refusing and failing to take reasonable steps to prevent the after assaults. . . .

The evidence tendered as to the supposed relations be-

tween plaintiff and Anthony's wife was, I think, properly rejected. Even assuming what was sought to be proved to have been shewn, it could not justify defendants' failure to adopt proper means for preventing Anthony from misconducting himself on the train. . . . Nor was it proper to submit to the jury on the question of damages. Plaintiff was not seeking damages for injury to his personal character and reputation.

It was strongly contended that the amount of damages was excessive. Plaintiff conceded, and the Chief Justice directed the jury, that defendants were not responsible for the first assault at the Union Station. But for the defendants it was urged that in any case they were not liable for the second assault, in which the most serious injuries were inflicted. If the jury were of opinion, as they must have been, that the conductor, after the notice and knowledge he had from what he was told at the Union Station and Parkdale, did not act reasonably and diligently, but, on the contrary, was negligent in taking proper steps to secure plaintiff against further molestation, it cannot be said that they erred in awarding a fairly large sum, in view of the evidence as to the nature of the injuries inflicted and their permanent effect.

The learned Chief Justice fully directed the jury on the question, drawing their attention to all the points that were urged in mitigation of damages, and under the circumstances the amount does not appear so large as to warrant interference on that ground.

The appeal should be dismissed.

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C.A. JANUARY 26TH, 1903.

## DILLON v. MUTUAL RESERVE FUND LIFE ASSN.

*Life Insurance—Misstatements of Insured as to Age and Disease—Rejection of Evidence as to Actual Belief and Good Faith—New Trial—Questions for Jury—Materiality of Misstatements.*

Appeal by defendants from judgment of BRITTON, J., in favour of plaintiff upon the findings of the jury, in an action upon a policy of insurance for $2,000 on the life of John Dillon.

E. D. Armour, K.C., and R. B. Henderson, for appellants.

I. B. Lucas, Owen Sound, and W. H. Wright, Owen Sound, for plaintiff.

The judgment of the Court (MOSS, C.J.O., GARROW, MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—The main defences to this action were that in his application made on the 27th January, 1891, the in-

sured John Dillon untruly stated that he was born on the 24th August, 1850, and was then 41 years of age, the fact being that he was nearly 44, and further, that in the same application he untruly stated that he had not at the date of the application and never had the disease of abscess or of open sore, the contrary being the fact.

At the trial the defendants proved beyond reasonable doubt that the insured was, in fact, nearly 44 years of age at the date of the application, instead of 41, as therein stated.

Counsel for the plaintiff was proceeding to elicit evidence from James Clark, a witness called for the defendants, as to statements made by the insured many years before the application, tending to shew his belief that he was born in 1850, but objection was taken by counsel for the defendants, and the learned trial Judge having indicated his view as in favour of the objection, the witness was not allowed to answer fully.

We think that the evidence sought to be elicited was admissible for the purpose of shewing that the statement regarding his age made by the insured in the application was made in good faith and without intention to deceive, and that the witness ought to have been allowed to answer fully. There seems to us to be no valid objection to the admissibility of such evidence on the question of good faith, and the jury should have been allowed to hear all that the witness could say: Fellows v. Williamson, Moody & Mal. 306; Vaehy v. Cocks, Moody & Mal. 353; Cerri v. Ancient Order of Foresters, 28 O. R. 111, 25 A. R. 22-23; Hargrove v. Royal Templars, 2 O. L. R. 126.

Upon the appeal the defendants contended that the jury having by their answers to the 2nd and 8th question found that the statement made by the insured as to his age was material, and there being no evidence to support the finding of good faith and want of intention to deceive, judgment should have been entered for the defendants. Plaintiff's counsel took the position that under the pleadings, and in view of sec. 149 of the Insurance Act, the onus was on the defendants to shew want of good faith and an intention to deceive. But we do not think the language of the section warrants this contention. We think that where the statement as to the age is found to be material and untrue, an avoidence of the contract follows, unless that result is prevented by its being made to appear that the statement was made in good faith and without intention to deceive. And it must lie upon the person seeking to uphold the contract to make proof of it.

The jury found that the statement was material and un-

true, and on those findings the defendants were entitled to judgment in their favour if the jury could not properly find that the statement was made in good faith and without intention to deceive.

But the plaintiff was interfered with and prevented from eliciting evidence on the point. And we think there should be a new trial to afford the plaintiff an opportunity of adducing evidence on that point.

As there is to be a new trial, we do not enter upon a discussion of the other branch of the case further than to say that we think it would have been more satisfactory if, in addition to or in lieu of some of the questions put to the jury, other questions framed in such manner as to obtain direct findings on the point of whether or not the statements made by the insured that neither at the date of the application nor previously thereto had he the disease of abscess or open sore were untrue, and if so, whether such statements were material, had been submitted to the jury. The question in the application is not whether the insured ever had an abscess or an open sore, but "Have you now (i.e., at the date of the application) or have you ever had any of the following diseases or complaints?" And amongst others enumerated are "abscess" and 'open sore."

And the opinion of the jury might very properly be taken upon the point of whether the existence of an abscess or open sore in earlier years was something material to be stated by the insured in answer to the interrogatories: Moore v. Connecticut Ins. Co., 41 U. C. R. 497, 3 A. R. 230, 6 App. Cas. 644.

We may say further, that we think the question of materiality was properly left to the jury.

There will be a new trial; the costs of the former trial and of the appeal to be costs in the action.

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C.A. JANUARY 26TH, 1903.

## HOLDEN v. GRAND TRUNK R. W. CO.

*Master and Servant—Injury to Servant—Death—Action by Widow under Fatal Accidents Act—Workmen's Compensation Act—Railway—Engine-driver—Disobedience of Rules—Nonsuit.*

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., at the trial at Hamilton, dismissing the action, which was brought by the widow of Walter Holden to recover damages for his death. He was an engine-driver of a passenger train of defendants, which was alleged to have been derailed at the smelting works crossing near the city of Hamilton, owing to the negligence of defendants' servant in charge of the points and signals there, whereby Walter Holden was

killed. The trial Judge held that there was no case of negligence for the jury on the undisputed facts, and that, by reason of deceased having been a member of an insurance and provident society to the funds of which defendants contributed, and being bound by defendants' rules and contracts, he could not have maintained an action for his injuries had he survived, and no more could plaintiff for his death.

G. Lynch-Staunton, K.C., for plaintiff.

W. Cassels, K.C., and W. Nesbitt, K.C., for defendants.

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

Osler, J.A. (after stating the facts and evidence at length):—The plaintiff's case is that the proximate cause of the accident was the negligence of the defendants in not having the switch points spiked over or otherwise properly secured. The defendants, while not denying that they were not in fact secured as they ought to have been, contend that the accident is to be attributed to the unfortunate engine-driver's own breach of duty in neglecting rules of the company which he was bound to observe, and running his train on to the crossing when the signals were in such a condition as to be a warning to him not to proceed with his train until he was signalled that the line was safe.

There would, in my opinion, be no difficulty in holding that, if the signals displayed had been such as to have warranted the deceased in running through the crossing, or if the signal man had flagged him to proceed, there was ample evidence of negligence in the condition of the switch to have justified a verdict for the plaintiff under sub.sec. 1 of sec. 3 of the Workmen's Compensation Act. There was a plain defect in the condition of the way which was the immediate cause of the derailment of the engine.

In actions of this nature, however, under the Fatal Accidents Act, the plaintiff, as administratrix of the deceased, can only recover if the deceased could himself, had he lived, have maintained an action against the defendants for the alleged negligence: Senior v. Ward, 1 E. & E. 385. And if the injury happened in consequence of the deceased's own neglect of orders or other breach of duty, it is clear that, had it been one falling short of causing his death, he could not have sued, being himself the author of the wrong complained of.

It appears to me that this is one of the plaintiff's difficulties in the present case.

The rules under which the deceased was working, and to which he was bound to conform, at the time of the accident, were those which came into force and were relative to

the order he had received on the 27th October in respect of the new signal system. He had no right to pass the signals unless the main line was clear. Necessarily he had to observe or take notice of both these signals. If both arms of the semaphore were down, they conveyed no intimation to him except that the signals were inconsistent, and therefore that from some cause or other the interlocker was out of order or not working properly. He could not regard the main line signal as a safety signal, because the siding signal as displayed was inconsistent with it, and the evidence is all one way that these signals as they stood were inconsistent and imperfectly displayed. Rules 59, 60, 187, and 233, and the rule cited from his time table, map out the clear and simple course he should have taken in such circumstances. It has not been contended that in the absence of signals of some kind shewing safety for the main line he was right in proceeding to the switch. Except these imperfect signals he received none, as the signal man displayed none, and did not flag him through, which, in the alternative, he should have looked for before he went through. It was urged by Mr. Lynch-Staunton that deceased was justified in inferring safety from the fact that the signal for the main line was down, and that the man standing near whom he might have seen was a signal man who did not warn him of danger or give a signal of any kind, but if the rule requires, as it does, that he should be signalled or flagged through the switch, if the semaphore signals are imperfectly displayed, I do not see how the omission to signal at all relieves him of the imputation of neglect of orders in proceeding without being signalled.

It is said that the fact of the signal or tower man not having taken charge of the interlocker, because of the switch company having for some unexplained reason continued to work at it, makes a difference, but I do not think so. The deceased did not know that. The orders under which he was working required him to act as if the new system was in operation, and had he done so the accident would probably not have happened. To him the only information conveyed by the facts was that the interlocker was not in order, and the proper course to be adopted in that case was defined for him by the rules.

I am therefore of opinion that, for the reasons I have stated, the action was properly dismissed, and that being so, it becomes unnecessary to consider the other ground of defence arising out of the plaintiff's acceptance of the insurance money paid to her by the Grand Trunk Railway Insurance and Provident Society.

JANUARY 26TH, 1903.

C.A.

## MOYER v. GRAND TRUNK R. W. CO.

*Railway—Injury to Person Crossing Track—Negligence of Railway Company —Train Running Backwards—Rate of Speed in City—Statutes—Warning—Contributory Negligence—Findings of Jury.*

Appeal by defendants from judgment of MACMAHON, J., upon the findings of the jury, awarding plaintiff, the widow of Ryerson Moyer, deceased, $1,200 damages for the death of her husband, who was run over by an engine and tender of defendants while passing over the Jarvis street crossing of the Esplanade, in the city of Toronto, on 21st January, 1901. The jury found (one juror dissenting) that the death was caused by defendants' negligence in omitting to sound the whistle and apply the brakes, and in not having proper protection when running backwards ; that the engine and tender were running at the rate of six miles an hour, contrary to statute ; that the deceased was guilty of contributory negligence, but that defendants could have avoided the accident by the exercise of reasonable care. The appeal was on the grounds, inter alia, that plaintiff should have been nonsuited, and that neglecting to sound the whistle does not give a cause of action.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.

Wallace Nesbitt, K.C., and H. E. Rose, for appellants.

I. F. Hellmuth, K.C., and D. W. Saunders, for plaintiff.

GARROW, J.A.—I do not see how the case could have been withdrawn from the jury. It is quite true that, had deceased looked easterly, he could have seen the engine approaching, in time to have avoided it, and it is also true that the evidence strongly suggests, although it does not absolutely establish, that he did not look, or, if he looked, that he did so too late to avoid the injury. But not looking is not per se negligence, though it may be strong evidence of it, and the matter was therefore one for the jury to consider in the light of all the surrounding circumstances. Deceased was an elderly man, and, although in possession of sight and hearing, his apprehension was, doubtless, not quite so acute as in a younger person. His attention was directed to the passing train on the Canadian Pacific track, which had interrupted his course, and but for which he would have passed on easily out of all danger. The ringing of a bell more or less might well be overlooked by the most cautious at such a place, where there are doubtless much bell-ringing and other

noises incidental to a much used railway crossing ; indeed at this very time the bell on the Canadian Pacific train was ringing. Even if he had looked . . . he might well in a merely casual or momentary glance have been deceived as to the track on which the engine was approaching, or even as to whether it was really approaching or not, in view of the fact that it was in the unusual position of backing up, with the tender instead of the engine in front. These were all, I think, proper subjects for the consideration of the jury in weighing the question whether the deceased was himself the author of his injury or guilty of contributory negligence, in case they found that defendants had been negligent, of which latter proposition there certainly was some evidence in the fact that they were running an engine in an unusual manner, at an unlawful speed, over a much used and highly dangerous crossing.

It is proper to notice that defendants contend that the speed was not unlawful ; that the provisions of 18 Vict. ch. 34, sec. 7, have been superseded by the general Railway Act, 51 Vict. ch. 29, sec. 259, and 55 & 56 Vict. ch. 27, sec. 8, which allow a speed of six miles ; but these latter provisions cannot, I think, be held to have repealed the special provision contained in the earlier Act, as applied to the Esplanade, especially as, at the time the latter Act was passed, the provision as to speed in the general Act was practically as at present : see C. S. C. (1859) ch. 66, sec. 144.

Nor can it be said that it is sufficient in every case to prove compliance with the statutory provisions as to the ringing of a bell or the blowing of a whistle as a warning. The special circumstances may call for something in addition ; Lake Erie and Detroit River R W. Co. v. Barclay, 30 S. C. R. 360 : and what that something is, is, on the evidence in each case, a question of fact for the jury. The jury has, in effect, found, and I think the finding is amply warranted, that it was negligence to propel this engine backwards without "proper protection," which would include a look-out upon the tender. Had such a look-out been established, it is reasonably certain that the injury complained of would not have happened. They have also found that the whistle should have been blown and the brakes applied. I cannot say that they were not justified upon the evidence in making this finding also. Indeed had they found that the fireman should have called to deceased to warn him when so near him, the finding would have had some justification, for deceased was easily within reach of the fireman's voice when only between 30 and 40 feet away.

I think the appeal fails and should be dismissed with costs.

Osler, J.A.—I agree in dismissing the appeal, and with the reasons assigned therefor in the judgment of my brother Garrow. I do not think the case can be distinguished favourably for the defendants from our recent decision (April 10, 1902) in Bonnville v. Grand Trunk R. W. Co., 1 O.W.R. 304.

Moss, C.J.O., and Maclennan, J.A., concurred.

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January 29th, 1903.

C.A.

## FARRELL v. GRAND TRUNK R. W. CO.

*Way—Bridge—Injury to Infant Playing thereon—Notice to Public that Bridge not to be Used—Action for Death of Infant—Nonsuit.*

Appeal by defendants from judgment of Falconbridge, C.J., at Hamilton, upon the findings of the jury, in favour of plaintiff for $800 in an action for damages under Lord Campbell's Act by the father of a boy who was killed by falling from the McNab street bridge in the city of Hamilton, for repair of which the defendants were responsible, and which was under repair on the 4th July, 1901, when the boy fell. The bridge was barricaded; and there was a notice posted that it was "no thoroughfare," but the boy, with two others, clambered over the barriers, and got upon the bridge. The boy went to the edge of the bridge and upon a loose plank, which tipped up, and he fell forty or fifty feet upon the railway track, and was instantly killed. The jury found that there was no negligence on the part of the boy, and that there was negligence on the part of the company in not having a watchman at the approach to the bridge, and assessed the plaintiff's damages at $800. The event occurred early in the evening, after the workmen had stopped work for the day, and while it was still light.

A. B. Aylesworth, K.C., for the defendants, contended that there should have been a nonsuit, or at all events that the verdict was perverse.

D'Arcy Tate, Hamilton, for plaintiff, contra.

The Court (Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.) held that there was sufficient notice to the public that the bridge was not to be used, and that the presence of a watchman was not necessary, and therefore defendants were not liable. In the course of the argument Ricketts v. Village of Markdale, 31 O. R. 610, was cited, and doubted by some of the members of the Court.

CHAMBERS.

## BEDELL v. RYCKMAN.

*Discovery—Examination of Party—Affidavit of Documents—Action by Shareholder against Directors of Company for Discovery and Account—Fraud—Parties—Company—Plaintiff or Defendant—Statement as to Plaintiff Suing on Behalf of All Shareholders—Waiver—Amendment.*

Motion by plaintiff for an order directing defendant George A. Cox to file a further and better affidavit on production and to attend at his own expense and submit to be examined and answer certain questions which he refused to answer upon the advice of counsel upon his former examination for discovery in this action. The plaintiff, as a shareholder of the Canada Cycle and Motor Company, sued certain directors of the company to obtain (1) full discovery of the true price at which certain businesses were acquired and of the sums obtained from the company in connection with certain contracts mentioned in the statement of claim and of the sums paid in connection with the same, and generally of their dealings with the company and the five companies in connection with these contracts; (2) judgment for $342,500 or other greater sum to be paid defendant company; (3) the return to the company of 30,000 shares of common stock, or, in the alternative, for a declaration that defendants the directors hold the shares for the company, and an account of shares sold or disposed of; (4) a declaration that such sum and such shares were received by defendants unknown to plaintiff and to the shareholders of the company, and to the company; (5) for the repayment of such further or other profits as defendants may upon the trial of this action be shewn to have made. The questions which defendant Cox refused to answer related to the amounts paid to the five companies whose businesses were transferred, and to the underwriting of this company by this defendant, and to his shares. The objection to answering was upon the ground that plaintiff must first shew that he is entitled to the account sought before he can obtain discovery in respect thereof. Upon this motion it was objected by defendants that the company should be a party plaintiff, and that plaintiff was not suing on behalf of himself and all other shareholders of defendant company other than the defendants the directors.

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

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

THE MASTER referred to Alexander v. Automatic Telephone Co., [1900] 2 Ch. 56, and said that the facts as set out in the pleadings and proceedings in this action brought the case within the class of cases which permit plaintiff to use the company's name by making it a defendant, and that the company was properly made a defendant.

With reference to the objection that plaintiff was not suing on behalf of himself and all other shareholders, the Master referred to paragraph 7 of the statement of claim, in which the plaintiff stated that he is so suing, though it was not so stated in the writ of summons. Referring to In re Tottenham, [1896] 1 Ch. 628, and McNab v. Macdonnell 15 P. R. 14, the Master held that, as no objection was taken to the irregularity of the statement of claim, but defendant filed a defence to it and thus waived the irregularity, leave to amend should be given so as to make the statement in the intituling of the statement of claim.

Upon the main question of discovery, the Master followed Gluckstein v. Barnes, [1900] A. C. 240, and other cases, and held plaintiff entitled to the fullest discovery. Fraud is sufficiently charged, the accounts are not intricate or voluminous, the defendant Cox admits that he can give the discovery without difficulty, and the discovery, if given, will enable the Court at the trial to give plaintiff judgment without any reference, if defendants are found liable.

Order made directing defendant Cox to attend for re. examination at his own expense and answer all proper questions that may be asked of him, including those he refused to answer ; also directing him to file a further affidavit on production setting forth documents, which he admits he has in his possession, relating to the matters in question, and not already produced. Costs to plaintiff in any event.

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FALCONBRIDGE, C.J. JANUARY 27TH, 1903.

TRIAL.

## KROLIK v. ESSEX LAND, LOAN, AND IMPROVEMENT CO.

*Vendor and Purchaser—Contract for Sale of Land—Action to Rescind—Fraud—Representations of Agent for Vendors as to Value—Large Commission Paid to Agent--Laches and Acquiescence.*

Action for rescission of agreement for sale of land, tried without a jury at Sandwich. The agreement in question was dated and entered into on 6th April, 1892, respecting a block

of 11 2-10 acres of land in the city of Windsor. Plaintiffs endeavoured during eight years thereafter to sell off the property in small lots, with indifferent success, and they held an auction sale on the 17th July, 1900, which was advertised as a sale without reserve, and which proved wholly abortive A day or two later plaintiffs professed to discover for the first time that a fraud had been practised on them by the alleged concealment by the vendors (the defendant company) of the fact that they were paying to defendant McMath a commission of $1,000 on the sale of the property, and that there had been fraudulent misrepresentations by McMath of the value of the land, for which defendant company ought to be held responsible. By notice dated 10th August, 1900, plaintiffs assumed to rescind and repudiate the agreement, and demanded repayment of the moneys and interest paid and expended by them under the terms of the agreement. Defendant company did not recognize the attempted rescission, but continued to claim payment of the balance due to them under the agreement, and this action was not brought until 5th June, 1902.

J. L. Murphy, Windsor, and J. E. O'Connor, Windsor, for plaintiffs and some of the defendants.

R. F. Sutherland, K.C., for defendant company.

Falconbridge, C.J.—It cannot be found on the evidence that the alleged misrepresentation as to value was anything more than a statement of opinion, nor that any statement made by McMath reached the limit of exaggeration. The year 1892, was a "boom time" for Windsor. Prices were, no doubt, beyond actual values for any immediate purpose except to sell again, but still higher prices were looked for. The purchasers could have no ground for neglecting to examine for themselves property so accessible, and to ascertain its real condition. No fraudulent suppression of the fact that McMath was getting a commission from defendant company was brought home to any officer or member of the company. The amount of the commission was large in proportion to the amount of the purchase money, $11,500, but this was explained by the fact that defendants (who were interested in other adjoining properties) thought they were securing purchasers who would advertise, develop, and "boom" the property. It is a fact that defendant company, being moved by these considerations, refused an offer which would have netted them $700 more than plaintiffs agreed to pay. If plaintiffs ever had any rights, they have lost them by delay and acquiescence.

Action dismissed with costs. Judgment for defendant company on counterclaim for balance due under the agreement, with costs. Amount of balance to be ascertained by Master if parties cannot agree.

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STREET, J. JANUARY 29TH, 1903.

TRIAL.

## PERRY v. CLERGUE.

*Constitutional Law—Right of Dominion Government to Grant Lease of Ferry—River Separating Canada from the United States—B.N.A. Act, sec. 109—"Royalties"—B. N. A. Act, sec. 91, sub-sec. 13—Legislative Authority over Ferries—Distinction between Right of Property and Legislative Power—Public Harbour—Improvements—Rights Arising from.*

Action by Robert Davey Perry and the Sault Ste. Marie Ferry Company against F. H. Clergue, W. B. Rosevear, the International Transit Company, and the Algoma Central and Hudson Bay Railway Company, to restrain defendents from infringing upon the exclusive right claimed by plaintiff Perry to a ferry between the town of Sault Ste. Marie in the Province of Ontario and the town of Sault Ste. Marie in the State of Michigan across the St. Mary's river, which passes between these places, and for damages. The plaintiff Perry claimed the right to this ferry and to prevent defendants from ferrying persons across the river from any point in the Canadian town to any point in the American town, under and by virtue of a lease made to him in the name of Her late Majesty by the government of the Dominion of Canada, dated 21st May, 1897, of the ferry right for nine years at the annual rent of $100, subject to certain conditions, one of which was that "the limits of the ferry shall be co-terminous with the limits of the town of Sault Ste. Marie, Ontario, to a point in the town of Sault Ste. Marie, Michigan, to be fixed by the municipal authorities of that place." It was admitted that defendants the Algoma Central Railway Company had since the month of August, 1902, been running a steamboat regularly every half hour from their dock in the Canadian town across the river to a point in the American town, and had advertised it as a ferry. These defendants denied plaintiffs' title to the ferry, and claimed the right to run this steamer under one of the provisions of their charter as a railway company.

G. H. Watson, K.C., for plaintiffs.

W. Nesbitt, K.C., and J. E. Irving, Sault Ste. Marie, for defendants.

W. R. Riddell, K.C., for the Attorney-General for Ontario.

The Dominion authorities were not represented, though notified.

STREET, J., held, that plaintiffs had failed to shew that the defendants other than the railway company had done anything to intefere with the rights claimed by plaintiffs. The railway company were alone liable, if any one was, for what had been done. Various defences were set up by the railway company, but it was necessary to consider only that which denied that the Dominion Gevernment ever became possessed of the right to grant a lease to plaintiff Perry of the ferry in question, and asserted that right as existing only in the Provincial authorities. By sec. 109 of the British North America Act, it is provided that "all lands, mines, minerals, and royalties belonging to the several Provinces . . . at the Union . . . shall belong to the several Provinces . . . in which the same are situate or arise, subject to any trusts existing in respect thereof and to any interest other than that of the Province in the same." The meaning to be attached to the word "royalties" in this section includes not only those jura regalia connected with lands, mines, and minerals, but also those which are not so connected, and it includes the right to grant ferries. Reasons suggested by Lord Selborne in Attorney-General v. Mercer, 8 App. Cas. 767, 778, specially referred to.

It was argued that under s.-s. 13 of s. 91, by which the legislative authority of the Dominion Parliament over "ferries between a Province and any British or foreign country or between two Provinces" is declared to be exclusive, the right of the Dominion Government to grant this ferry could be supported. The difference between the right of property in and the power of legislation over any particular matter dealt with by the British North America Act is conclusively settled, and a right of property in the Province is quite consistent with the right of the Dominion to legislate: The Fisheries cases, [1898] A. C. 700; St. Catharines Milling Co. v. The Queen, 14 App. Cas. 46; Ontario Mining Co. v. Seybold, 87 L. T. 449.

Even if the St. Mary's river at the point in question was a public harbour, the Dominion Government would not therefore have the power to grant the right of ferry over it. Something more is necessary to convert an open river port into a public harbour, within the meaning of the British North America Act, than the erection along it of four or five wharves projecting beyond the shallows of the shore for the convenience of vessels receiving and discharging passengers and goods. Nor does the existence of the improvements

made in the river bed in front of the town by the dredging operations carried on by the Dominion Government for the purpose of deepening the channel leading to and from the ship canal, afford a reason why the entire control over the ferry across the river should be held to be in the Dominion Government. That government has undoubtedly a right to make rules with regard to this and other ferries for the purpose of regulating them and of preventing them from interfering with the public harbours and river and lake improvements of the Dominion, but the right to create and grant the right to a ferry is a right which belongs to the Provincial and not to the Dominion authorities. Action dismissed with costs as against all the defendants.

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WINCHESTER, MASTER. JANUARY 30TH, 1903.

CHAMBERS.

## EVOY v. STAR PRINTING AND PUBLISHING CO.

*Security for Costs—Libel—Newspaper—Mistake—Apology—Good Defence—Grounds of Action Trivial or Frivolous.*

Motion by defendants for security for costs in an action for libel against the publishers of the Daily Star, a newspaper published in the city of Toronto. The writing complained of appeared in defendants' issue of 2nd April, 1902, in a report of proceedings before the police magistrate for the city of Toronto, as follows: "A year ago last August Matthew Evoy was thought to have been a frequenter of a disorderly house, and a warrant was issued for his arrest. But he disappeared as mysteriously as though he had ascended to some other clime, and the warrant could not be executed. He was in Court this morning, and affirmed that he had been in the city all the time and working. 'I think you have earned your discharge,' said his Worship. The inference might be that he was to be complimented for eluding the police so successfully." It appeared from an affidavit filed on behalf of defendants that the plaintiff was not the man who had disappeared and to whom the magistrate had made the remark quoted, but another man; that the defendants had published a correction; and that plaintiff had in fact been before the magistrate on some charge on the day in question, and had been confused with the other man by defendants' reporter. The application was made under R.S.O. ch. 68, sec. 10. It was admitted that plaintiff was not possessed of sufficient property to answer costs, but it was contended that defendants had not a good defence on the merits and that the grounds of action were not trivial or frivolous.

J. B. Holden, for defendants. G. P. Deacon, for plaintiff.

THE MASTER.—Privilege cannot be successfully claimed unless the report is "fair and authentic." It is admitted by defendants' manager that the report was a mistake, and being so there can be no privilege under sec. 9 of ch. 68: Ashmore v. Borthwick, 2 Times L. R. 113, 209; McNally v. Oldham, 8 L. T. N. S. 604; Gywnn v. South Eastern R. W. Co., 18 L. T. N. S. 738; Shepheard v. Whittaker, L. R. 10 C. P. 502. However, defendants' defence that the report was published in good faith and without malice and that a correction or apology was published, is a good defence, and, under the circumstances, the grounds of action are trivial or frivolous. As to the defence of apology, see Odgers on Libel and Slander, 2nd ed., p. 524; Lafone v. Smith, 3 H. & N. 735; Risk Allah Bey v. Johnstone, 18 L. T. 620; Oxley v. Wilkes, [1898] 2 Q. B. 56.

Usual order for security for costs granted.

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STREET, J.

JANUARY 27TH, 1903.

CHAMBERS.

RE WARING v. TOWN OF PICTON.

*Prohibition — Division Court — Title to Land — Trial — Certiorari.*

Motion by defendants for prohibition to a Division Court, on the ground that the title to land is in question, or for a certiorari to remove the action into the High Court.

A. H. Marsh, K.C., for defendants.

W. E. Middleton, for plaintiff.

STREET, J.—The action not having been tried, although plaintiff's ownership of a certain house is the foundation of her action, and the damage done to the value of the property by the acts of defendants is that which she seeks to recover, the title to her land is not necessarily brought in question, for defendants may not dispute it at the trial. Should it appear at the trial that there is a bona fide dispute raised as to it, the Judge should refuse to proceed with the trial, and if he proceeds, prohibition will lie. At present it is not made to appear that the title is brought in question or that the Division Court has not jurisdiction: Re Moberly v. Town of Collingwood, 25 O. R. 625; Re Emery and Barnett, 4 C. B. N. S. 423.

There is no reason for removing the action from the Division Court and exposing plaintiff to the risk of the heavy costs of proceedings in the High Court, when she is willing to limit her claim to a sum within the jurisdiction of the Division Court, and that Court has power to try her claim.

Motion dismissed with costs.