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HON. MR. JUSTICE MIDDLETON. JUNE 15TH, 1912.

RE ELIZA ANNE GWYNNE ESTATE.

3 O. W. N. 1428.

Will—Construction—Charity Bequest—Fee of "Legacy Duty"—Succession Duty"—9 Edw. VII. c. 12, s. 6 (2).

Application by executors for determination of certain questions arising under a will whereby the testatrix bequeathed "unto the society called the British Union for the abolition of Vivisection $75,000 free of legacy duty."

MIDDLETON, J., *held*, in answer to the first question propounded, that 9 Edw. VII. c. 12, s. 6 (2), absolving from succession duties "property devised or bequeathed for religious, charitable or educational purposes to be carried out in Ontario," only applied to objects which must of necessity be carried out in Ontario, not to those which might be carried out in Ontario without occasioning a breach of trust.

That in answer to the second question propounded, that as Ontario Statutes impose no legacy duties proper, and the only duties payable on Ontario estates are succession duties, the expression "legacy duty," in the will, must be interpreted to mean "succession duties."

Costs to all parties out of estate to executors, as between solicitor and client.

Motion under Consolidated Rule 938, by the executors of the late Eliza Anne Gwynne, for the determination of certain questions arising under her will.

By the will in question the testatrix bequeathed "unto the society called the British Union for the Abolition of Vivisection the sum of $75,000 free of legacy duty."

The British Union for the Abolition of Vivisection, is an English organization having for its object "by means of active and systematic propaganda throughout the United Kingdom to secure the abolition of vivisection," and "to influence in favour of the object of the Union candidates at elections, Parliamentary or municipal, and for country or parish councils, and to assist if advisable in the financial support of a direct Parliamentary representative."

The following questions were submitted to the Court: Is the legacy to the British Union for the Abolition of Vivisection subject to the succession duty payable to the province of Ontario? (2) If subject to succession duty, does the estate of the deceased bear the same or is it to be deducted from the amount of the legacy to the said British Union?

D. T. Symons, K.C., for the executors.

T. P. Galt, K.C., for the British Union for the Abolition of Vivisection.

J. R. Cartwright, K.C., for the Treasurer of Ontario.

C. A. Moss, for the residuary legatee and certain specific legatees.

HON. MR. JUSTICE MIDDLETON:—This society is a charity in the technical sense in which that term is used at law. *Re Foveaux, Cross* v. *London Anti-Vivisection Society,* [1895] 2 Chy. 501.

The first question is whether the legacy is liable to succession duty. The statute 9 Edw. VII., ch. 12, sec. 6, subsec. 2, provides that "no duty shall be leviable on property devised or bequeathed for religious, charitable, or educational purposes, to be carried out in Ontario or by a corporation or person resident in Ontario."

In order that the legacy to this British corporation should be free from duty, it is essential that the charitable purpose should be one "to be carried out in Ontario;" that is, one which must, according to the terms of the devise, be carried out in Ontario; and it is not sufficient that the money might without breach of trust be expended within Ontario.

The reason for this exception is easily found, when the history of the statute is borne in mind. By the preamble to the original Act, it is recited that "the province expends very large sums annually for asylums for the insane and idiots and institutions for the blind and deaf mutes, and towards the support of hospitals and other charities, and it is expedient to provide a fund for defraying part of this expenditure by a succession duty." It is, therefore quite logical that funds themselves bequeathed for the purpose of charities within the province should be exempt from this form of taxation.

The expression "to be carried out in Ontario," is very similar to the expression found in Consolidated Rule 162, permitting service of process out of Ontario where the action is

on a contract "which is to be performed in Ontario." This Rule has invariably been treated as applicable only where the contract expressly requires performance within Ontario.

The second question arises upon the expression used by the testatrix by which this legacy is to be "free of legacy duty." Does this shift the incidence of the duty from the legatee to the residuary estate?

It is argued that "legacy duty" is not equivalent to "succession duty;" and it is pointed out in support of this contention that in another clause of the will the testatrix has used the expression "succession duty." This clause reads: "By reason of my estate being liable to pay succession duty to the province, I do not in this my will remember other charities."

There is in England a definite meaning attached to the expression "legacy duty;" but in Ontario there is only the one inheritance tax. The statute calls this "succession duty." It is a duty imposed upon all property devolving upon death; and it is a tax which has to be borne by the legatee unless the will contains some provision casting the burden upon the residuary estate.

When the testatrix, domiciled in Ontario and speaking with reference to a bequest of property within Ontario, directs that it shall be free from legacy duty, I think I must hold that the intention was to exonerate this property from all duty payable upon the legacy. In other words, the succession duty is the only legacy duty known to Ontario law.

For these reasons I answer the questions submitted by finding that the legacy is subject to the payment of succession duty, and that the executors are not entitled to deduct the duty from the legacy.

The costs of all parties may be paid out of the estate; those of the executors as between solicitor and client.

DIVISIONAL COURT.

JUNE 17TH, 1912.

HUNTER v. RICHARDS.

3 O. W. N. 1432; O. L. R.

Water and Watercourses—Pollution of Stream—Mill owners—Prescriptive Right—Nuisance—R. S. O. (1897), c. 133, s. 35.

An action by a farmer and mill owner on Constant Creek, Renfrew County, for an injunction restraining defendants, mill owners higher up the stream, from throwing into same sawdust, bark, shingles, edgings, roots, cull shingles, and other mill refuse, thereby causing damage to plaintiffs' mill pond and rendering it impossible for him to operate his mill, and for $300 damages in respect thereof. Defendants set up that in 1854 the lands of both plaintiff and defendants had been owned by the Crown and in that year a grant had been made by the Crown of defendants' lands to defendants' predecessors in title for the express purpose of operating a saw-mill, although this purpose did not appear from the grant itself, but from the correspondence leading up thereto and other collateral documents. They also pleaded that they had, by uninterrupted user as of right, obtained a prescriptive right to pollute the stream in the manner complained of. In reply, plaintiff alleged that the user had not been as of right, defendants having paid to plaintiff, in 1896, $100 for damage done his lands, and thereafter, $10 per annum until 1903. He further set up statute R. S. C. 1906, c. 115, s. 19, forbidding the throwing of sawdust into navigable waters.

DIVISIONAL COURT *held*, that the language of the Crown grant being clear and unambiguous evidence, was not receivable to explain nor add to its meaning.

Wyatt v. *Atty.-Gen.*, [1911] A. C. 489, followed.

That to establish a prescriptive right under statute 10 Edw. VII., c. 34, s. 35, twenty years' uninterrupted user as of right immediately prior to the bringing of the action must be proven and the fact that defendants had made payments to plaintiff in respect of damage done by the alleged user, shewed that the user was not as of right.

Gardner v. *Hodgson*, [1903] A. C. 229, followed.

Review of cases as to doctrine of lost grant.

That there could be no implied grant to do an act contrary to an Act of Parliament nor which would constitute a public nuisance. *Mill* v. *Commissioners of New Forest*, 18 C. B. 60, and *Attorney-General* v. *Harrison*, 12 Grant 466, referred to.

That even if a prescriptive right to pollute the stream slightly, prior to 1896, had been established, it did not justify the greatly enlarged user since that date: *Crossley & Sons* v. *Lightowler*, L. R. 2 Ch. 478, followed.

Appeal dismissed with costs, RIDDELL, J., *dissenting*.

Per RIDDELL, J., *dissentiente*, on the principle that a vendor cannot derogate from his grant, the Crown grant gave the right to the grantee to carry on saw-milling in the ordinary way which, at that date, admittedly embraced throwing sawdust into the stream, and gave him an easement over the other lands of the Crown lower down the stream.

Hall v. *Lund*, 1 H. & C. 676, referred to.

A prescriptive right arose and was perfected before any payment by defendants to plaintiff.

Re Cockburn, 27 O. R. 450, approved.

There was no evidence that the stream in question was navigable and, therefore, the statute forbidding the throwing of sawdust into navigable waters did not apply.

An appeal by the defendant from a judgment of HON. MR. JUSTICE LATCHFORD, 18 O. W. R. 813; 2 O. W. N. 855.

The appeal to Divisional Court was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE RIDDELL.

W. N. Tilley, for the defendants, appellants.

P. White, K.C., for the plaintiff, respondent.

HON. MR. JUSTICE CLUTE:—The plaintiff is the owner of lot 10 in the first concession of Grattan through which flows Constant creek, and has had for a period of years a dam and water power on said creek, where the same crossed his said lot, from which he derives power to operate a chopping mill. The defendants own lot No. 9, in the second concession of Grattan, through which also flows Constant creek, where the same crosses their said lot, and thereby they operate a saw-mill on the said lot. The lands and mill of the defendants are higher up on the creek than the lands and mill of the plaintiff. The plaintiff claims to have the stream flow to and through his lands without obstruction or hindrance and without the same being polluted.

He charges that the defendants at various times during the years 1905 to 1909 inclusive polluted the stream by throwing into the same sawdust and other mill refuse, thereby causing damage to the mill pond and water power, preventing his running his mill and causing damage to his lands; that the matters complained of are contrary to the provisions of R. S. O. 1897, ch. 142; and that the defendants by their dam penned back the waters of the creek and prevented the free and uninterrupted flow thereof to the plaintiff's mill, whereby he was at various times unable to operate the same. The plaintiff claims damages and an injunction restraining the defendants from polluting this stream and penning back the waters thereof, and asks for a declaration of plaintiff's rights to the waters of the said stream.

The defendants deny the plaintiff's right and deny his possession and occupation of the land and of the flow of the said stream as alleged in the statement of claim. The defendants further set up that in the year 1854 the lands now claimed by the plaintiff and owned by the defendants were vested in the Crown and the Crown granted to the defendants' predecessor in title lots 7, 8, and 9 in the second con-

cession of Grattan, together with all the water powers thereon, with the right or easement to dam, divert, enjoy and otherwise use the waters of the Constant creek for mill purposes as they saw fit, and in and prior to the grant imposed upon the grantees the duty to erect, maintain and operate on the said lands a grist and saw-mill. And they alleged that before said grant and continuously since the same the defendants and their predecessors in title maintained and operated the mills as they were bound to do and as they required the right to do by virtue of their said grant, and in enjoying the said lands and in operating the said mills, they have for more than thirty years prior to the commencement of this action dammed, diverted, enjoyed and otherwise used the waters of the said creek as of right. The defendants further say that at the time complained of the defendants were and are now possessed of mills on the said lands the occupiers thereof for more than forty years before this action enjoyed, as of right and without interruption, the right of damming and diverting or using the water of the said stream and the working of the said mills, and the acts complained of were a user of the defendants of the said right. The defendants further allege that they are entitled to dam, divert and enjoy or otherwise use the waters of the said creek by virtue of their natural rights as riparian owners by virtue of the rights expressly and impliedly granted to their predecessors in title by Crown grant in or about the year 1854, and by prescriptive right at common law, and by prescriptive right under the provisions of the Revised Statutes of Ontario, ch. 133, and by reason of their rights and easements so acquired deny that the plaintiff has any cause of action and his action is barred. They further deny that they have committed a breach of the provision of R. S. O., ch. 142, and that if they have the plaintiff has no cause of action in respect thereof. The defendants further deny the rights and jurisdiction of this Court to try the matters in issue.

The grant to Duncan Ferguson, the defendants' predecessor in title of lots Nos. 7, 8 and 9 in the second concession of Grattan, is dated 8th June, 1859, and contains no special grant in respect of the water power or the building of the mill, and expressly reserves to the Crown "the free uses, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid."

It would appear from the papers put in from the Crown Land Department, that on the 14th June, 1854, a petition was presented to the Lieutenant-Governor in Council by the united townships of Bromly and Wilberforce in the county of Renfrew, setting forth that the inhabitants of these townships and of Grattan had experienced great inconvenience from the want of a supply of sawn lumber for building purposes, and stating that: "If your Excellency and Honourable Council will grant this gentleman, Duncan Ferguson, Esq., the right to purchase 300 acres of land in the newly surveyed township of Grattan he will build a saw-mill, and in the course of a short time other mills which would increase the value of the lands for miles around the locality in which they would be placed and relieve your memorialists and the inhabitants of the township of Grattan from loss and inconvenience," etc.

This was followed by a further memorial from the municipal council of the township of Admaston in the county of Renfrew to the same effect.

A copy of a report of a committee of the Executive Council dated 3rd June, 1858, and approved by the Governor in Council on the following day sets forth that the lots in question were sold as a mill site under an Order in Council on the 3rd of July, 1854, subject to the building of a saw-mill and a grist mill, and that it appears that the necessary dams and first-class saw-mill had been erected while the materials were on the ground for a grist mill. Under these circumstances he recommends the patent be allowed to issue in the anticipation of the complete fulfilment of the conditions of sale upon payment of the purchase money in full.

Since the argument the report of the case of *Wyatt* v. *Attorney-General*, 1911 Appeal Cases, 489, has come to hand. This was an appeal from the judgment of the Supreme Court of Canada. It was there contended that the letters patent should be construed having regard to the correspondence and course of dealing between the parties and the Government relating to the grant.

The judgment of the Committee was delivered by Lord Macnaghten. He repeats the closing words of the judgment delivered by Girouard, J., "Summarized," says the learned Judge, "our holdings are:—That the patent issued by the Crown is plain and unambiguous in its language; that the rights of the parties must be determined by it, and cannot

be added to, altered, or diminished by any previous negotiations written or oral leading up to its issue; that therefore the application of the patentee and subsequent correspondence between him and the Crown officials should not have been received in evidence for the purpose of explaining the patent, and, if looked at for the purpose of establishing an independent or collateral contract conferring additional rights upon the patentee, entirely failed to do so; that the legal effect of the language of the patent with respect to the bed of the river and the fishing rights therein depends upon the determination of the question whether the Moisie at and in the four or five of its miles covered by the patent is navigable or floatable within the meaning of the law of Quebec, and that, adopting the test of navigability laid down by the Privy Council . . . we concur with the findings of the trial Judge, and which findings are not questioned in the judgment of the Court of Appeal that such river at such locality and from thence to its mouth is so navigable and floatable."

The effect of this decision upon the present case is, I think, to limit the plaintiff's right to the terms of the patent which cannot be enlarged by the correspondence relating to the grant above referred to.

The trial Judge found in favour of the plaintiff for $200 and costs, and granted an injunction restraining the defendants from discharging refuse into the creek to the injury of the plaintiff, the order to be suspended for four months to enable the defendants to so alter their mill that no additional damage may be done.

The right by prescription claimed in this case under the Statute 1910, ch. 34, sec. 35 (R. S. O. 1897, ch. 133, sec. 35), is inchoate till action brought, and the user must be continuous and of right. "The periods mentioned in the act (corresponding to our statute) are periods next before some action wherein the claim or matter to which such period relates is brought into question. Consequently, although the Act apparently renders the right indefeasible after twenty years' user, the combined operation of these two provisions renders it necessary for a person seeking to establish a prescriptive claim under the statute to prove uninterrupted enjoyment for a period of twenty years immediately previous to and terminating in some action or suit in which the right is called into question." Halsbury's Laws of England, vol. 11, p. 272, sec. 542, where the authorities

are collected. *Hyman* v. *Van den Bergh* (1908), 1 Ch. 167, C. A.; *Parker* v. *Mitchell* (1840), 11 Ad. & El. 788; *Wright* v. *Williams* (1836), 1 M. & W. 77; *Richards* v. *Fry* (1838), 7 Ad. & El. 698; *Ward* v. *Robins* (1846), 15 M. & W. 237, 242. "The period is not necessarily the period before the pending action; it may be the period before any action in which the right was brought into question:" *Cooper* v. *Hubbuck* (1862), 12 C. B. (N. S.) 456.

There is no doubt that the defendants and their predecessors in title have used their saw-mill since it was erected in 1854. At that time it was a comparatively small mill. It does not appear clearly when the various improvements that now exist were made. The trial Judge thinks it fair to assume that the evolution from the one saw of 1855 to the present complex condition has been gradual and that the property of the plaintiff was not materially affected to his prejudice until 1895 or 1896. In 1896 the defendants paid the sum of $10. The plaintiff contends that these payments are a complete answer to the defendants' claim to a prescriptive right. It therefore becomes important to ascertain, with as much accuracy as possible, precisely what these payments were for.

At p. 49, one of the defendants says:—

"Q. Coming down to 1896 you made some arrangement with Mr. Hunter, senior, at that time? A. Yes.

Q. You paid him some money? A. Yes.

Q. How much? A. $100.

Q. What was that for? A. For sawdust that went down to his beaver meadow.

Q. How did it come to get there that year? A. His dam, part of his dam broke away, and the sawdust that was lodged above his dam went down over his meadow, and I paid him $100 for it.

Q. Did you make any arrangement for the succeeding years? A. Yes, he said he would put all the mill refuse and flood wood that went down the river through past him for $10 a year.

Q. And that continued until what year? A. Until 1903, until I put up my burner.

Q. You paid him that $10 a year each year? A. Yes.

* * * * * *

Q. Since 1903 what have you done with your sawdust? A. I have been burning it principally.

Q. Did you erect a modern burner? A. Yes.

Q. And it is supposed to take care of all the sawdust? A. Yes.

Q. What became of the refuse generally around the mill, the other refuse besides the sawdust? A. It went into the burner.

Q. Since 1903? A. Yes.

* * * * * *

On the 3rd of June, 1908, the defendants sent their men to remove the refuse from the plaintiff's meadow, and made a memorandum of it in the following words: "Sent John Creighton and young Franscois down to pick off our mill refuse off William Hunter's meadow, but he refused to let the men go on to pick it off. He had sent up word with Creighton on Thursday, May 28th, 1908, for me to send down men to take it off."

* * * * * *

Q. If it was not damaging him why did you send men down to take it off? A. Because he asked me to.

Q. But because he was a neighbour? A. Yes it makes a big difference.

Q. And it was not doing him any damage of course? A. Well if it was on his meadow where the hay was growing it certainly would do him damage.

Q. I should think it would have been fair enough to have said that long ago? A. The point I contend was that I paid him for that meadow, and for all the damage that was done to it, and if hay was grown since he has got the benefit of it.

Q. You paid him in 1906 and this was in 1908. You did not get a deed of the meadow? A. I didn't want a deed.

Q. But that is how you fix up your conscience to the point of saying you have done him no damage, because in 1906 you paid him too much? A. I consider that I paid him for all the damage I had done to his meadow.

Q. Or could do afterwards? A. Yes, because he claimed the meadow was useless to him.

Q. And that is the reason that you now say you have not done any damage to his meadow? A. Yes.

Q. It is not by reason of the fact that you have not put down stuff on it? A. I put a little stuff down on it, I will admit that.

Q. But you say you ought not to pay him for it, because you paid him $100 in 1896? A. Yes.

Q. Did you take a receipt for that? A. I placed it to my credit in my books.

Q. Have you got the entry? A. I will have to go out in the hall for it. My ledgers are in the hall.

Q. We will wait for you. A. 'By damage done to meadow $100' 1906 or 1904—no, I beg your pardon, 1906.

Q. You mean 1896? A. 1896, I beg your pardon.

Q. What date? A. In the spring of the year he was getting lumber right along, and there was a little contention about what we would have to pay him, and we left it open until we balanced up in the fall, and I placed it to his credit then.

Q. You allowed him $100 in the fall? A. Yes."

* * * * * *

He is then asked as to the quantity of sawdust that went down upon the meadow:—

Q. A hundred dollars' worth? A. It was the meadow that was the hundred dollars. It wasn't the sawdust was a hundred dollars. It was the damage I done the meadow that I paid the hundred dollars for.

Q. Well it did damage that cost you $100 the sawdust that went out? A. Yes."

* * * * * *

I think the plain meaning of what took place is that the plaintiff complaining of the injury to his property by reason of sawdust and other refuse being permitted to pass into the stream the defendants paid $100 in 1896 for the damages so occasioned, and paid $10 a year thereafter until 1903 when they erected their burner in order to destroy the refuse of the mill and prevent it from going into the stream. This, in my opinion, operated as an interruption to the prescriptive right.

In *Gardner* v. *Hodgson*, 1903, A. C., 229, it was held that where for more than 40 years without interruption the owner of a house used a cart-way from his stables through the yard of an adjoining inn to the public road, paying each year fifteen shillings to the owners of the inn yard, that the inference of fact from the evidence was that the payment was made for leave to use the way, and that there had been no enjoyment of right within the Prescription Act, and that there was no ground for presuming a lost grant. Halsbury, L.C., says at p. 231: "One of the most common modes of preventing such a user growing into a right is to insist upon a small periodical payment, and if such evidence as

we have here were permitted to be evidence of a right, not only to the user upon terms of payment, but of a right to make the payment and continue the user in perpetuity, it would be a very formidable innovation indeed. Those who drafted the Prescription Act knew well what they were about when, in dealing with the consequences which have to follow from long-continued user, they used the words 'as of right.'"

Lord Macnaghten says at p. 234: "Can a person who uses a way across his neighbour's land, and pays for the use of it year by year, be said to use the way 'as of right?' Again, I think every layman and most lawyers would answer, 'Certainly not.' If the way in question has not been used 'as of right' there is nothing to attract the provisions of the Prescription Act. The case of the appellant, so far as it is founded on that Act, must fail. It was for the plaintiff to make out her case. If she cannot shew that the user of the way was 'as of right,' the essential condition of success is wanting." And at p. 235, he further says: "The suggestion of a lost grant burdening the respondents' property with a servitude which would so greatly diminish its value, and charging the appellant's property with a rent-charge in perpetuity, is, I think, out of the question. It seems to me a most unlikely hypothesis. But it is enough to say that, apparently, no trace of such an arrangement can be found in any of the deeds of either party, and that nothing is known of the circumstances which existed when the premises, which now belong to the appellant, and the premises which now belong to the respondents, if they ever formed one property, became separated. There is certainly no need to resort to the presumption of a lost grant when the facts of the case, so far as they are known, suggest a much simpler and a more natural explanation."

In the present case, it seems to me idle to argue in favour of a lost grant. In the case of *Angus* v. *Dalton*, 3 Q. B. D. 85, 4 Q. B. D. 162, and 6 App. Cas. 740, the origin and effect of the doctrine of a lost grant was much discussed. The case is referred to in Goddard's Law of Easements, 7th ed., pp. 176 to 182. The author points out the difficulty to extract from the judgments and various opinions of the Judges any certain rule or principle of law. The learned author says at p. 172: "That it is not in every case where there has been user or enjoyment for the requisite period that the doctrine of presumption of lost grant can be applied. The doctrine can

only be applied to easements which could, if the evidence were sufficient, be claimed by prescription at common law, and the expedient of presuming a lost grant is only applicable to cases where the evidence or some technicality prevents the application of the principle of prescription at common law, to which only it is ancillary."

He further points out: "If a right is claimed under the lost grant doctrine, the question arises whether evidence is admissible on behalf of the party interested in defeating the presumption, either to prove positively as a fact that no grant ever was made, or to shew circumstances from which its non-existence may reasonably be inferred." There appears to be no actual decision on this point. The result of the authorities according to the view of the learned author is that if the evidence of user is not satisfactory, though uncontradicted, or if evidence to rebut this presumption is given, it is open to the Court or jury to find the fact or not according to conviction. This point was fully discussed in *Angus* v. *Dalton.*

In our own Courts, in *Re Cockburn,* 27 O. R. 450, it was held that where 20 years of open and uninterrupted user is proved, the jury may and ought to presume a lost grant. The implication of a lost grant does not arise to do an act forbidden by the law, *Rochdale* v. *Radcliffe* (1852), 18 Q. B. 287; *Neaverson* v. *Peterborough* (1902), 1 Chy. 557, C. A. "In inferring a legal origin for such user, it cannot infer one which would involve illegality," per Collins, M.R., p. 573. It was laid down by Gale, Easements, 8th ed., 194, 195, 197, that evidence is admissible to rebut the presumption, but the views of Judges differ as to what evidence is sufficient for that purpose. Although the doctrine of lost grant received a severe shock in *Angus* v. *Dalton,* it has not been put an end to by the statute. *Leconfield* v. *Lonsdale* (1870), L. R. 5 Common Pleas, 657-726, Gale, 199. No grant can be implied unless such implication is rendered reasonable by the surrounding circumstances or the act of the parties, Goddard, 7th ed., 127. In *Rangeley* v. *Midland Railway Company,* L. R. 3 Ch. 310, Lord Cairns says, "Every easement has its origin in a grant express or implied. The person who can make that grant must be the owner of the land. A railway company cannot grant an easement over the land of another person. They may grant an easement as soon as they become proprietors of the land, but not until they become such proprietors. They must own the servient tenement in order to

give an easement over the servient tenement." See *London and North Western Rw. Co.* v. *Evans* (1892), 2 Chy. 442.

A grant cannot be presumed if an actual grant would have been void by reason of an Act of Parliament, *Mill* v. *The Commissioner of the New Forest*, 18 C. B. 60. It is sufficient to prevent the acquisition of a prescriptive right that the grant would have been at variance with the purpose of the Act. Goddard, p. 243, *Rochdale* v. *Radcliffe*, 18 Q. B. 287. In deciding the question of a lost grant all the surrounding circumstances must be taken into consideration, *Birmingham* v. *Ross*, 38 Chy. Div. 295. We have the grant itself and no such right as is claimed is given. It is true that the defendants' predecessor in title was permitted to purchase the land upon which his mill was afterwards erected, upon the understanding that he should build a saw-mill, but this does not, in my opinion, raise the presumption of an implied grant to foul the stream.

The case of *Attorney-General* v. *Harrison*, 12 Grant 466, was decided in the year 1866 and prior to any legislation so far as I can find, restricting the right of putting sawdust in streams in navigable waters. In that case the Crown in making sale of a lot of land situate upon a navigable stream stipulated that the purchaser should erect on the property a saw-mill as well as a grist mill, and it was there held that "this did not warrant the purchaser in creating a nuisance in the river by throwing into the water the sawdust and refuse of his saw-mill, the effect of which was to create obstructions in the river to such an extent as to injure or impede the free use of the river by vessels navigating the same." The case was tried before Spragge, V.-C., who gave a considered judgment. At p. 470, he says: "The rights of the public in navigable waters are correlative with those of a riparian proprietor, nor is it any answer or any justification in either case that the injury is not very great, or that it is compensated by some public benefits. It is said in this case that the defendants' mill is a public benefit, and in proof of its being so the defendants' counsel point to the fact that in making the sale of the mill-site by the Government it was made a condition that the purchaser should erect as well a saw-mill and a grist mill thereon. But in *Rex* v. *Ward*, 4 A. & E. 384, it was held, that if an erection in a navigable river be in fact a nuisance it is no answer to say that a resulting public benefit has counterbalanced the nuisance." And again at p. 473: "The defendants make a more serious point of this,

that by the conditions of sale (to which I have referred), they were bound to put up a saw-mill; that it is in the ordinary practice, in saw-mills worked by water, for the sawdust to be allowed to drop into the stream, and that this being done must have been contemplated by the Government when the sale was made. That, however, can amount to no more than this, that the obligation to erect a saw-mill imposed by the Crown, carried with it an implied license to drop sawdust into the river. This position is open to more than one answer. One is that the Crown cannot grant a license to commit a public nuisance. It would be licensing an individual to do that which interferes with a right which is the common inheritance of the people. Another is, that such a license is not to be implied; it would be derogating from the honour of the Crown to assume an intention to do that which would be injurious to the people; and it would be assuming ignorance on the part of the Crown of its own powers and of the rights of the subject." And again at p. 472: "The defendants say that they have been in the habit for a number of years, of allowing their sawdust to float down the river without any objection being made to it. There is clearly nothing in this; for no length of time will legitimize a public nuisance, the soil being in the Crown, and the user the common inheritance of the public at large."

We have in clear evidence the original grant and the subsequent user. By the first the land is alone granted; as to the second, in my opinion, there has been an interruption of the alleged user preventing any prescriptive right from arising. I think it may fairly be said upon the evidence that the user was at all times contentious, was objected to, and these objections were afterwards recognized as valid by the payments that were made and by making provision to burn the refuse. See *Burrows* v. *Lang* (1901), 2 Chy. 510; Goddard, 7th ed., 258.

Mr. Tilley strongly urged that the payment of the $100 and the $10 was for injury done over and above the prescriptive title. It is, I think, a sufficient answer to that position, to say that no such claim was made at the time of payment; no suggestion was made that a limited prescriptive right was claimed or that the payment was for the excess.

There is a further difficulty in the plaintiff's way. The learned trial Judge has found that prior to 1896 the injury to the plaintiff was comparatively trifling. It was owing to the increased capacity of the mill that the injury has been done.

There could, therefore, be no right prior to 1896, either by prescription or lost grant to justify the user of the mill as it has been used since that date. In *Crossley and Sons* v. *Lightowler*, L. R. 2 Chy. 478, Lord Chelmsford, L.C., decided that a prescriptive right having been acquired to pour foul water into a stream and the fouling having been increased by the erection of new factories in the place of those to which the right was attached, "the user which originated the right must also be its measure, and it cannot be enlarged to the prejudice of any other person." In *Goldsmith* v. *Tunbridge Wells Improvement Commissioners*, L. R. 1 Equity 161, the Master of the Rolls expresses his opinion that, "when the pollution is increasing, and gradually increasing from time to time, by the additional quantity of sewage poured into a stream, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription," but in *Attorney-General* v. *Acton Local Board*, 22 Chy. Div. 221, which is a similar case, Fry, J., treated the prescriptive right claimed not as a right belonging to the inhabitants of Acton as a class, but as an individual right belonging to the older occupants of houses; so that any occupant whose house had drained into the stream for twenty years would have a right to continue to drain into it. Goddard referring to these cases takes the view that if the pollution at its commencement, or twenty years before the action, was defined in amount, and originated from a cause certain, as a factory or any definite number of houses, a prescriptive right may be acquired, and the measure of the right will be the extent of pollution at the commencement of the user, or at the beginning of the twenty years, but otherwise it is doubtful if any right can be gained.

In considering a case of this kind, it should not be forgotten that it is a well-established rule of law that every land-owner has a natural right, that the water of a natural stream which passes over his land shall be suffered to continue in its natural state, that is, not only that it shall be uninterrupted in its course, but also that it shall be suffered to continue in its naturally pure condition. The leading case for this principle is *Wood* v. *Wood*, 2 Ex. 748. See G d dard, 105.

In *Wood* v. *Wood*, it was proved that many other manufacturers poured filthy matter into the stream, so that the damage caused by the defendants was imperceptible; but it was held that the plaintiffs had received damage in point of

law, for they had a right to the natural stream flowing through their land in its natural state as an incident to the property in the land through which the watercourse flowed, and that the right continued notwithstanding the pollution from other causes. See Goddard, 106.

Here is the necessity to enquire whether R. S. C. ch. 115, sec. 19, creates a prohibition of the defendants fouling the stream in the present case. That section provides that no owner or tenant of any saw-mill, or any workman therein or other person shall throw or cause to be thrown, or suffer or permit to be thrown any sawdust, edgings, slabs, bark or rubbish of any description whatsoever into any river, stream or other water, any part of which is navigable or which flows into a lake which is navigable. This section is, I think, applicable to the present case. This section would appear to have been originally introduced in modified form by 36 Vict. ch. 65, sec. 1, and carried into the subsequent statutes; 49 Vict. ch. 36, sec. 7; 1886 ch. 91, sec. 7. There was, I think, sufficient evidence to bring this case within the operation of the statute.

The principle that would apply is that to foul a stream prohibited by Act of Parliament is against public policy and no prescriptive right could be obtained against the policy of the law, and the same principle applies to prevent the presumption of a lost grant arising in such a case.

In Halsbury's Laws of England, vol. 11, sec. 533, it is said, "The Court will not presume a lost modern grant which, had it ever existed, would have been in contravention of the provisions of a public statute, or of a custom." *Neaverson* v. *Peterborough Rural Council*, [1902] 1 Ch. 557, C. A., per Collins, M.R., at p. 573; *Rochdale Canal Co.* v. *Radcliffe* (1852), 18 Q. B. 287. See also *Clayton* v. *Corby* (1843), 4 Q. B. 415; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, 648.

In my opinion the judgment of the trial Judge is right and ought to be affirmed and the appeal dismissed with costs.

HON. SIR WM. MULOCK, C.J.Ex.D.:—I agree.

HON. MR. JUSTICE RIDDELL:—In and through the township of Grattan runs Constant creek, which at the places in question in this action, furnishes two water powers—that up

the stream being the defendants' with a dam affording a head of from 11½ to 14¾ feet, that down the stream the stream flowing nearly due south, being the plaintiff's with a dam affording a head of 8 feet 7 inches to 11 feet 7 inches, the pond being 14¼ acres in extent. Below the plaintiff's dam is a beaver meadow through which the stream flows, making in the meadow an angle almost a right angle to the right down stream.

The plaintiff has a mill upon his premises badly out of repair and not now in use; the defendant is running a saw-mill.

The complaint is that the defendant during the years 1904 to 1909 inclusive has polluted the stream by placing therein "sawdust, bark, shingle edgings, roots, cull shingles and other mill refuse, thereby causing damage to the plaintiff's said mill-pond, water power, preventing him running his said mill and causing damage to his said land." A complaint is also made that the defendant penned back the water, etc., but this is not pressed having been found against at the trial.

The defendant claims (1) that he has the right to do as he has done by virtue of a grant from the Crown (2) prescriptive right by the common law and (3) by statute R. S. O. ch. 133. To determine the rights and position of the parties it is necessary to look at the Crown Lands records—and this is proper: *Brady* v. *Sadler* (1890), 17 A. R. 265.

From the records of the Crown Lands Department, Toronto, it appears that a petition was presented to the then Governor-General Lord Elgin in 1854, alleging that the inhabitants of Grattan, Bromley and Wilberforce suffered from want of sawn lumber, and that Duncan Ferguson, Esq., would erect a saw-mill if he was granted the right to buy 300 acres of land in Grattan—the petition asked that this be done. The township of Admaston sent in an identical petition during the same month, June, 1854. Representations were made in August against the proposition; but in July, 1854, the Governor-General in Council approved of a report of the Commissioner of Crown Lands that the three lots be offered for sale at $4 per acre, one-fourth down at the time of sale the remainder in three annual instalments on condition of the purchaser building a saw mill within 12 months and a grist mill within 18 months from the date of sale, of a description suitable to the capacity of the mill site. Accordingly on July 20th, 1854, a notice was given by the Crown Lands De-

partment that lots Nos. 7, 8 and 9 of the second concession of Grattan, 300 acres, would be offered for sale by the resident agent at Renfrew, August 29th: Conditions of sale—price as already mentioned. "The purchaser to build a saw-mill within 12 months and a grist mill within 18 months." Upset price $4 per acre. Cameron and Ferguson bought and gave security (Cr. S. 12739).

In June 1858, the Governor-General approved a report of a committee of the Executive Council approving a recommendation of the Commissioner of Crown Lands, which says: "the lots in question were sold as a mill site under an order of council of the 30th July, 1854, subject to the building of a saw-mill and a grist mill, and that it appears by the evidence filed that the necessary dams have been erected and a first-class saw-mill, while the materials are on the ground for a grist mill. Under these circumstances, he recommends the patent be allowed to issue in anticipation of the complete fulfilment of the conditions of sale, upon payment of the purchase-money in full."

In 1859, the balance of the purchase-money was paid: Cameron had in 1856 conveyed all his rights in the three lots to Ferguson; and on the 3rd June, 1859, a patent issued to Ferguson of the three lots.

By thus issuing the patent without enforcing the condition that a grist mill should be built as it is said was done, the condition was simply changed into a contract which the Crown might enforce at pleasure or abandon if that course was for any reason thought advisable.

Behn v. *Burness* (1863), 3 B. & S. 751 (Cam. Scacc.); *New Hamburg* v. *Webb* (1911), 23 O. L. R. 44. But the land was sold as for a water power and to run a saw-mill and a grist mill—of this there can be no shadow of doubt. There can be as little doubt that the grant of land under these circumstances carried with it the right to occupy and use the land and the stream in the manner contemplated as a saw-mill and grist mill—and further that there was an obligation enforceable by the Crown that the property should be so used.

And it is not at all necessary that the obligation or right should appear in the deed.

In *Robinson* v. *Grove* (1873), 27 L. T. N. S. 648, Wickens, V.-C., says in the case of a grant made for the purpose of the grantee building: "When the grant does not notice the intention of building but both grantor and grantee knew

that the purpose is building, an equitable right is obtained co-extensive with the legal right which would have been obtained if the grant had noticed the intention of building." In that case the building was put up between contract and conveyance just as in this the saw-mill was put up between contract and grant.

I do not cite other cases though they are not few—the question is not what does the grant contain, but what did the parties contemplate at the time of the contract and deed.

If the grantee has covenanted or contracted to do a certain act or carry on a certain trade, etc., the case is if anything even a fortiori.

Siddons v. *Short* (1877), L. R. 2 C. P. D. 572. And it can make no difference that the contract appears in the conveyance of the land or as here in conditions of sale accepted by the vendee. It is not contended that a grantee from the Crown stands in any other position from a grantee from a private individual.

"No strained or extravagant construction is to be made in favour of the King . . . royal grants are to receive a fair and liberal interpretation . . ." Chitty, Prerog. of the Crown (1820), p. 393: "If the King's grants are upon a valuable consideration, they shall be construed strictly for the patentee for the honour of the King," do. p. 394. When an owner of land sells a portion thereof for a particular purpose, he cannot derogate from his own grant—this is plain equity. "He is bound to abstain from doing anything on the remaining portion which would render the demised (or sold) premises unfit for carrying on such business in the way in which it is ordinarily carried on . . ."

Stirling, J., in *Aldin* v. *Latimer & Co.*, [1894] 2 Ch. 437, at p. 444.

In other words the purchaser who buys to carry on a particular business has an easement over all the remaining land of his vendor so far as to entitle him to carry on that business in the ordinary way—the vendor cannot derogate from his own grant. "The principle that a man cannot derogate from his own grant is one of considerable importance with regard to easements for it frequently happens that it would be an act in derogation of a grant to stop the user of an easement which has not in fact been granted to one who claims it" (Goddard on Easements, 7th ed., p. 139), "and as the law will not allow a land owner to prevent that enjoyment, an easement is thus practically acquired although no express

grant of the easement has been made." Consequently the Crown by what was done, gave the grantee the right to carry on saw-milling "in the ordinary way"—and that it is admitted was at that time throwing sawdust, etc., into the stream. The natural result being that this was carried down stream over and between other lands of the Crown, the grantee acquired the easement over such lands necessary to enable him to carry on in the ordinary way his business. That this "polluted" the water is immaterial—"a right to pollute water may be acquired by grant express or implied:" Goddard, 7th ed., 355—and not less than others on the doctrine that a vendor cannot derogate from his own grant. In *Hall* v. *Lund* (1863), 1 H. & C. 676, S. the owner of certain land demised part of it, a mill, to the defendant described as a "bleacher"; this had been used as bleaching works and it was mentioned (in effect) in the lease that it was for the purpose of carrying on the business of bleaching. The defendant entered and carried on his business as bleacher, which involved throwing into a stream passing through S.'s other land a considerable amount of foul and polluting matter, pulp, refuse, drugs, etc. The plaintiff bought the other land of S. and the reversion of the mill. Pollock, C.B., "cannot see any difference 'between' the lessee using the stream for the purpose of carrying off his refuse, and taking the water from a stream and returning it in a foul condition," and adds, "the plaintiff who purchased the reversion stands in the same position as the lessor and cannot derogate from his own grant," p. 68. Channell and Wilde, BB., also considered that the lessor, having demised the premises for the purposes of bleaching, neither he nor those claiming under him could derogate from their own grant. See Gale 8th ed., p. 124.

Ewart v. *Cochrane* (1861), 4 Macq, H. L. 117 is another case of right to foul a stream being acquired by implied grant —implied because this was necessary for the convenient and comfortable enjoyment of the property granted not essentially necessary so that the property granted would be valueless without it: p. 123. Lord Chelmsford says, p. 125: "it was essential to the enjoyment of the tanyard, and, therefore, one must imply a grant to D. when the tanyard was conveyed to him . . ."

There are other cases not of pollution decided on the same principle, e.g., *Siddons* v. *Short*, 2 Ch. D. 572. The plaintiffs desired to build an iron foundry and bought land

from the defendants for that purpose—nothing being said in the deed as to the purpose. The defendants were prevented from mining for coal upon the rest of their land, so near as to imperil the plaintiff's building, although the deed contained no grant of right to support and the natural right to support for the land unburdened would not have entitled them to support for their new buildings.

I think the crown was bound not to prevent the purchaser acting in the ordinary course of saw-milling at that time and could not object to his doing so in virtue of ownership of lands lower down.

The saw-mill began operations in 1855, as stated at the trial, not disputed and in effect found by the trial Judge; the witness Bower and others prove it satisfactorily—Ferguson the grantee and Cameron his partner operating it.

At some time—when, does not appear, the plaintiff acquired title to lot 10—his father apparently before him owned the land—the furthest back I can find any reference to this ownership being p. 23, where the plaintiff says that his father had been running a saw-mill at the point for 18 or 20 years and stopped as he supposes 20 years ago—this is just a guess apparently (p. 24), but if we accept it, and if, which does not appear, the father began sawing as soon as he got a patent (if he did get one) of the land, the date is carried back to 1872 or 1870. In any event the predecessor in title of the land of the plaintiff obtained his patent subsequent to that of the predecessor in title. If such be not the fact, it was for the plaintiff to make it clear; and he should be allowed to put in the patent of lot 10. The plaintiff's predecessor took no more by his grant than the Crown had to give him and consequently the plaintiff holds the land subject to the easement already mentioned unless something more appears in the case.

The Registry Act does not assist the plaintiff. From the first Registry Act in Upper Canada in 1795, 35 Geo. III. ch. 5, the operation of the statute is limited to a period after the grant from the Crown. It will, however, be proper to consider what took place after 1855. The evidence does not warrant any finding other than that until 1895 or 1896 the defendant's predecessors in title used the stream as a vehicle for carrying off the sawdust, etc., from the upper mill and that no substantial change took place.

I think we are bound by the decision of the Divisional Court in *Re Cockburn* (1896), 27 O. R. 450, to hold "that

where 20 years open and uninterrupted user is proved, a jury may and ought to presume the existence of a lost grant if . . . there be no evidence in denial, explanation or modification of the actual enjoyment, and that this presumption cannot be displaced by merely shewing that no grant was in fact made, though it is rebutted if there be an incapacity to grant the easement, extending over the whole period in the course of which the right (if granted at all) must have been granted," p. 467. I do not discuss the many cases before *Re Cockburn* and *Dalton* v. *Angus*, 6 A. C. 740, upon which it is founded.

That the doctrine of lost grant has not been affected or become effete by the operation of the statute is clear. More than 20 years quiet and uninterrupted user of the easement took place during the time of the plaintiff and his father before 1895 or 1896. The Statutes of Canada against throwing sawdust, etc., into navigable waters are appealed to. The first of these is (1873), 36 Vict. ch. 65, sec. 1, assented to 23rd May, 1873, which forbids owners, etc., of saw-mills throwing sawdust, etc., "into any navigable stream or river either above or below the point at which such stream or river becomes navigable." Even supposing that this statute should be held to apply to the Constant creek, and that it would void a grant after the statute there was a time during which the predecessor in title of the plaintiff could have legally granted the easement claimed and that according to the authorities quoted is sufficient to compel us to infer a lost grant at that time. The enactment of the statute would or might not affect the rights of the owners *inter se*.

In 1886 by 49 Vict. ch. 36, sec. 8, this act was repealed and sec. 7 introduces a provision somewhat different, "No owner . . . of any saw-mill . . . shall throw . . . any sawdust, edgings . . . into any river, stream or other water any part of which is navigable or which flows into any navigable water. . . ." This became R. S. C. (1886) ch. 91 and is now R. S. C. (1906) ch. 115, sec. 19.

There is no evidence that Constant creek itself is navigable—so that the original Act of 1873 would not apply nor is the evidence such as that it could be found that the later statutes have any application. The branch of the Constant upon which these mills are situated is above Ferguson lake —it flows into that lake which is about a mile long—but there is no evidence that this lake is navigable; then a

stream flows from Ferguson lake down to McNulty lake or "eddy you couldn't call it a lake," and then to Calabogie lake which is navigable. It is not apparently the case of a large stream or river having an expansion in its course, like the river St. Lawrence and Lake St. Louis, but rather like a chain of lakes—at least so far as Ferguson and Calabogie are concerned—with streams connecting the upper with the lower. It seems to me that the stream, 20 miles away, can no more be said to flow into Calabogie lake than the St. Clair can be said to flow into Lake Erie. Criminal statutes are to be interpreted strictly; and I am unable to convince myself that the acts of the defendant combined for so many years are criminal in the sense of violating the statutes of Canada. The Ontario legislation, now R. S. O. (1897), ch. 142, sec. 4, from the beginning excepted sawdust, see C. S. U. C. ch. 47, sec. 2.

And moreover in the body of the section itself, sec. 4, it is made applicable not to all streams but to all except those thereafter mentioned—those are set out in sec. 7 and amongst others include "rivulets wherein salmon, pickerel, black bass, or perch do not abound." The exception is contained in the section creating the offence and imposing the penalty—and in such cases the person alleging an offence against the statute must at least in civil proceedings prove that the case is one to which the general words apply.

See the cases cited by Lord Alverstone, C.J., in *Rex* v. *James*, [1902] 2 K. B. 540, at pp. 544, 545. At the worst one should not hold that the prohibition did exist in view of the long and uninterrupted course of action by the defendant and his predecessors in title without clear evidence of the application of the statute.

So far then as sawdust is concerned there is nothing to prevent the implication that the Crown gave the power to foul the stream and as I think the same should be held in respect of the other materials from the mill thrown into the stream. If indeed, it were contended, as I think it is not, that the stream is not one within sec. 7, the plaintiff should if it be material have the privilege of proving it if he can.

If this view be correct, none of the acts relied upon by the plaintiff of payment by the plaintiff have any bearing—a right acquired is not divested without something equivalent to a grant—the mere payment of money may be and often is cogent evidence of what the person paying conceives his rights to be but it does not determine what the rights

are or by itself derogate from rights actually existing. And the same remarks apply as I think to a lost grant.

But I agree that if the acts complained of were illegal, there could be no implication that the grant of land for the purpose of a saw-mill also gave the right to violate the statute.

And the law would not imply that the lost grant to be found contained a grant of the right even as against the grantor to do an act forbidden by the law.

Rochdale v. *Radcliffe* (1852), 17 Q. B. 287; *Neaverson* v. *Peterborough, etc. Col.*, [1902] 1 Ch. 557, reversing S. C., [1901] 1 Ch. 22. I do not discuss the statute or the effect of the more or less ambiguous payments upon any right to be acquired under the statute. It would appear that the learned trial Judge thought that the yearly payments were for a use of the waters in excess of the right acquired by the defendant under the statute—but that I do not go further into. It seems that no amount of sawdust, etc., has since the burner was erected in 1903 been placed in the stream than before the first payment. I cannot see that the plaintiff has made out a case—if the right came by implication from the Crown with the patent it does not appear that any excess has been committed—and if by implication through a lost grant, the same statement applies.

If the plaintiff desires to be permitted to shew that the stream is not within sec. 7 of the Ontario Act, he should be allowed to do so, in which case the costs of action, appeal and new evidence should be reserved to be disposed of upon the renewed application to this Court—but if not, the appeal should in my view be allowed with costs and the action dismissed with costs.

HON. MR. JUSTICE RIDDELL. JUNE 17TH, 1912.

DANBROOK v. PARMER.

3 O. W. N. 1430.

Vendor and Purchaser—Repudiation of Contract for Sale of Land.

Action by executors of one Whyte to rescind agreement entered into by their testator with defendant for the purchase by the latter of certain lands, on ground that defendant's conduct in refusing to carry out the agreement or conform to its terms, amounted to a repudiation.

RIDDELL, J., made order as asked. Costs of action to plaintiff.

Action tried at Woodstock non-jury sitting.

P. McDonald, for the plaintiff.

R. N. Ball, for the defendant.

HON. MR. JUSTICE RIDDELL:—This case was tried before me at Woodstock at the recent non-jury sittings. The defendant did not appear: but lest there should have been some misunderstanding or inadvertence I caused information to be conveyed to the solicitor for the defendant that the Court would sit again if he desired to call any evidence or to cross-examine witnesses already called for the plaintiff. The solicitor informed me that he did not so desire but that all he asked was leave to put in a written argument. This was granted and counsel for the plaintiff was given an opportunity of answering.

The arguments are now to hand and I proceed to dispose of the case.

The action is by the executors of the late John Whyte: Whyte and the defendant entered into an agreement November 15th, 1909, for the purchase by the defendant of 25 acres of land "for $650, fifty dollars to be paid down, interest five per cent. per annum. . . . Mr. E. D. Parmer of the second part agrees to leave the second growth maple standing, this timber contains a ridge through the swamp until $100 is paid. Mr. John Whyte of the first part agrees to give the deed of the land one year from the present date." The defendant did not pay the $50 cash agreed upon but gave a note at one year for $52.50 in lieu of the cash: he went into possession and tilled the land, removed timber contrary to the agreement and took away part of the fences, etc. Whyte died in August, 1911; and the executors find-

ing the note among the assets demanded payment. The defendant refused to pay either the note or the remainder of the purchase price and insisted that the agreement was that Whyte was to give him a deed upon the payment of the $50 and take a mortgage for the remainder of the purchase money at 5%—the defendant not to cut the timber on the ridge till he had paid $100 but to have the right so to do thereafter. The provision as to leaving this timber standing until $100 should be paid certainly indicates that something of the kind was or might have been in contemplation and the document cannot be interpreted in the sense contended for.

The conduct of the defendant amounts to a repudiation of the agreement as it stands: the plaintiffs accept this repudiation and expressly waive any right they may have to damages of any kind. They are, therefore, entitled to an order rescinding the agreement and for possession of the land.

The same conclusion is to be arrived at by another route. The defendant insists that his understanding of the agreement was as he says: the plaintiffs may admit that but insist that the document sets out their testator's understanding of the agreement. The parties were, then, not *ad idem* and the document should be cancelled and the defendant ordered to give up possession.

The plaintiffs will have their costs.

COURT OF APPEAL.

JUNE 18TH, 1912.

NELLES v. HESSELTINE.

3 O. W. N. 1381; O. L. R.

Appeal—To Supreme Court of Canada—From Court of Appeal for Ontario—Jurisdiction of Court of Appeal to Allow—Final or Interlocutory Judgment — Time for Appealing — Extension of Refused.

Application by defendant company to Court of Appeal under sections 38 and 71 of the Supreme Court Act, for an extension of the time for appealing to the Supreme Court from judgment of Court of Appeal, 11 O. W. R. 1062. That judgment directed a reference, and defendant company had acquiesced therein and decided it was inadvisable to appeal therefrom at that time. The reference was had and defendant company appealed from the Master's Report to MEREDITH, C.J.C.P., who reduced the damages awarded, 18 O. W. R. 196. Defendant company further appealed to Court of Appeal, which affirmed judgment appealed from, 20 O. W. R. 120. An appeal from the latter judgment was now being taken to Supreme Court, and defendant company wished to combine therewith an appeal from 11 O. W. R. 1062, the substantive judgment herein. The Supreme Court had refused a similar application, holding it had no jurisdiction under the statute, 21 O. W. R. 201; 1 D. L. R. 156, 309.

COURT OF APPEAL *held*, that in view of the long delay and the deliberate acquiescence in the 11 O. W. R. 1062 judgment, the application should be refused with costs. MEREDITH, J.A., dissented.

Judgment of MOSS, C.J.O., 21 O. W. R. 430; 3 O. W. N. 862, affirmed.

An appeal by the defendants the Windsor, Essex and Lake Shore Rapid Rw. Co. from a judgment rendered in Chambers by HON. SIR CHARLES MOSS, C.J.O., 21 O. W. R. 430, 3 O. W. N. 862, dismissing their motion for an extension of the time for appealing to the Supreme Court from a judgment rendered herein by this Court on the 21st of April, 1908, 11 O. W. R. 1062, and for allowance of their appeal to the Supreme Court from said judgment.

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

M. Wilson, K.C., and A. H. Lefroy, K.C., for the appellants.

C. J. Holman, K.C., for the plaintiffs, respondents.

HON. MR. JUSTICE MACLAREN:—The motion made before the Chief Justice was based exclusively upon section

71 of the Supreme Court Act and section 38 of the Act was not cited or referred to. On the motion before the full Court counsel for the appellant stated that he desired to present his claim not only by way of appeal, but also as a substantive motion under section 38 as well as section 71, and he read in support of his motion affidavits that were made subsequent to the decision of the Chief Justice refusing the motion presented to him, chiefly as to the intention of the defendants to appeal.

The action was instituted in 1906 for the specific performance of two agreements whereby certain stock and bonds of the company were to be handed over to the plaintiffs. The trial Judge ordered specific performance, and in default damages. On appeal to this Court the judgment was modified, but specific performance was decreed against the company on the 21st of April, 1908; 11 O. W. R. 1062. There was no appeal from this judgment and the company not delivering the stock or bonds there was a reference before the Master to assess the damages and he made his report on the 7th of April, 1909. The company appealed and the appeal came before Meredith, C.J., who on January 23rd, 1911, gave judgment reducing the damages; 18 O. W. R. 196. The company further appealed to this Court, and on the 28th of September, 1911, their appeal was dismissed: 20 O. W. R. 120.

From this last judgment an appeal was taken to the Supreme Court which is still pending. The company moved in the Supreme Court to have an appeal from the judgment of this Court of the 21st of April, 1908, included in their appeal to that Court. This motion came before the Registrar who held that the Supreme Court had no jurisdiction to grant this or to extend the time for appealing and an appeal from the Registrar was heard by the full Court and dismissed on the 23rd of February, 1912: 21 O. W. R. 201.

As above stated a motion was subsequently made before the Chief Justice of this Court and afterwards before the full Court to extend the time and to grant leave to appeal to the Supreme Court from the judgment of April 21st, 1908.

In my opinion the company might have appealed as of right from the last named judgment within the 60 days provided by section 69 of the Supreme Court Act, although it is not a final judgment, and there is nothing to the contrary in the cases of *Union Bank* v. *Dickie*, 41 S. C. R. 13;

Wenger v. *Lamont*, *ibid.* 603; *Clarke* v. *Goodall*, 44 *ibid.* 284; or *Crown Life* v. *Skinner*, *ibid.* 616, as these were all common law actions.

Section 38 (o) of the Supreme Court Act gives an appeal to that Court from any judgment whether final or not of the highest Court of final resort in any province other than Quebec, where the Court of original jurisdiction is a Superior Court, in any action, suit, cause, matter or judicial proceeding in the nature of a suit or proceeding in equity.

In my opinion no leave would have been necessary to take this appeal, but in case it were application might have been made either to the Supreme Court or this Court under section 48 (e) of the Act.

Assuming that we still have the power under section 71 of the Supreme Court Act to extend the time and allow the appeal I am strongly of the opinion that it should not be done. It seems to be eminently a fitting case for the application of the old maxim, *interest reipublicae ut sit finis litium*. Instead of taking an appeal within 60 days after the judgment of the 21st of April, 1908, as they had a right to do, the company chose to acquiesce in the judgment, and to take their chances of shewing on the reference what they had previously claimed, namely, that the stock and bonds in question were really of no value. Having failed to convince the Referee of this, or to convince the High Court or this Court on the respective appeals to them, they are now proceeding with their appeal to the Supreme Court from the judgment of this Court of the 28th of September 1911. This they have a perfect right to do, and if they succeed they will be entitled to the full benefit of such relief as they may obtain. But it is quite another question when they come, after four years of litigation, and after having put the plaintiffs to the expenditure of large sums of money and a large amount of labour, and now ask leave to do what they should have done four years ago if at all, and attempt to re-open the question that was then practically closed.

The officers of the company state in their affidavits that they were advised by their solicitor that they could not appeal from the judgment of April 21st, 1908, until the amount of damages was ascertained and fixed so as to make it final; while the solicitor in his affidavit does not go so far but says that on account of the reference being directed by the Court of Appeal in the said judgment of April 21st,

1908, it was not thought advisable to appeal at that time to the Supreme Court as the same was not a final judgment.

It was not suggested to us on behalf of the appellant that this was a case that might come under section 48 (c) of the Supreme Court Act; we were asked to grant the extension under section 71, which allows us to do it "under special circumstances."

It is true that in construing Consolidated Rule 353 as to an extension of the time for appealing to this Court we have never been so strict as the Court of Appeal in England under their corresponding Rule. For illustrations of their refusal to extend the time on account of a mistake by counsel or solicitors see *International Financial Society* v. *City of Moscow Gas Co.*, 7 Ch. D. 241; *In re Helsby* (1894), 1 Q. B. 742; *In re Coles and Ravenshear* (1907), 1 K. B. 1. It is to be observed that in those cases there was no such delay as in this case; the application in each case was made shortly after the time had expired; there was no decision as here that it was not "advisable" to appeal at the time. There was there no deliberate choice of a particular course and a determination to take chances as here, nor any postponement for years of what is required to be done by the statute within a limited number of days.

No precedent was cited to us where anything approaching the facts and circumstances of the present case had been held to be such "special circumstances" as would justify such an order as now asked for.

I am of opinion that the application of the appellant, both by way of appeal and as a substantive motion, should be dismissed, and that the company should be limited to the appeal which it now has pending in the Supreme Court and to such relief as it may be able to obtain from its appeal from the final judgment of this Court and such interlocutory judgments as may properly be brought up on such appeal.

HON. MR. JUSTICE GARROW:—I agree.

The other members of the Court also concurred.

HON. MR. JUSTICE LATCHFORD. JUNE 18TH, 1912.

PHILLIPS v. CONGER.

3 O. W. N. 1436.

Timber—Lease from Crown—Rights of Lessee—Action for Trespass —Damages — Conversion of Timber — R. S. O. (1897), c. 36, s. 40.

Action by plaintiff, owner of a mining lease, for trespass on and wrongful cutting of timber from his mining lands by defendant Watts, and conversion of same by defendant Conger Lumber Co., to whom it was sold after notice of plaintiff's claim.

LATCHFORD, J., gave judgment against defendant Watts for $624.20 and costs, and against defendant Conger Lumber Co., for $959 and costs. Any sum realized against one of defendants to be applied upon judgment against other.

The measure of damages against defendant company was the value of what was cut in trespass at date of conversion.

Greer v. *Faulkner*, 40 S. C. R. 399, followed.

H. H. Dewart, K.C., and J. P. Weeks, for the plaintiff.

F. R. Powell, K.C., for the defendant Watts.

D. Lally McCarthy, K.C., for the defendants the Conger Lumber Company.

HON. MR. JUSTICE LATCHFORD:—Under a demise from the Crown, dated October 14th, 1904, and duly registered under the Land Titles Act, the plaintiff is the holder of a mining lease, for a term of ten years, of the south halves of lots 32 and 33 in the seventh concession of the township of Foley. The defendant Watts had, it appeared, previously applied to the Crown Lands Department to be located for the lots, but before the lease to the plaintiff issued released to the plaintiff his claim for damages to the surface rights; and, some time in 1904—the document bears no date—transferred to the plaintiff all his right, title, and interest in the south halves of the lots mentioned. Watts sought upon the trial to impeach the latter document, but I declined to allow him to do so. He had not given any intimation that he intended the attack, and his manner in giving his testimony led me to place little reliance on any of his unsupported statements.

Some prospecting was done upon the property, and a shaft sunk on an adjoining lot to the south. It was contended that the work done was not a sufficient compliance with the requirements of the Mining Act. This, however, is a matter between the Crown and the lessee; and in any case

there was in this regard, according to credible evidence, a sufficient compliance with the statute.

But little mining was done during the years 1909 and 1910. The property was unoccupied; the owner lived at a distance—Watts near by; settlement in the neighbourhood was sparse; hemlock and other trees now of value stood near the invisible line between the mining claim and the lands of Watts to the south of it; all circumstances ideally favourable for the trespass which, I find, the defendant Watts was tempted to commit. He yielded to the temptation without, I think, much resistance, and with full knowledge that he was sinning against the absent owner, who as lessee of the mining rights, was entitled under the statute in force when the lease was made (R. S. O., 1897, ch. 36, sec. 40), to such trees other than pine as were necessary for building, fencing, or fuel, or any other purpose necessary for the working of the mine or the clearing of the land. The legislation subsequently enacted did not affect the lessee's rights to the timber. *Gordon* v. *Moose Mountain Mfg. Co.* (1910), 22 O. L. R. 373.

It is upon the evidence difficult to determine the exact amount of the damages resulting from the trespass. I do not think I can give full effect to the testimony of Labreche and Gardiner. I do not question their honesty or competency. They counted and measured the pieces left in the woods; and, as to such, I accept the quantities which are given. The logs, timber, and bark taken away they could estimate only from the stumps and tops which they found to have been cut in 1909-10 and 1910-1. That their estimate is a little high is apparent from the actual quantity of tan-bark. According to the estimate there should have been about 110 cords of bark. No bark was peeled except in the last season. Of this, seven cords remain in the woods. Watts sold and delivered 68 cords. His total cut was, therefore, 75 cords, not 110; or, allowing for some slight loss in handling, about thirty per cent. less than the quantity estimated by the plaintiff's witnesses.

If the remaining figures of their estimate of what was taken away are similarly reduced, their 112,446 feet of hemlock becomes approximately, 85,000 feet, and their 2,493 feet of oak, elm, and basswood, 1,650 feet.

The hemlock timber cut but not removed—probably because culled—they measured and found to be 9,377 feet.

On this basis, which seems to me as nearly an accurate estimate as can be made, the trespass of Watts in the two years, at the values stated by the culler Gardiner and the experienced lumberman Labreche—which I accept as proper values—works out as follows:—

75 cords tanbark, at $3	$225 00
94,800 feet hemlock, at $4	379 20
2,500 feet hardwood, at $8	20 00
	$624 20

Exact figures are afforded by the records of the Conger Lumber Company of the total quantity made for them by Watts—marked and delivered. However, only part of this was cut in trespass. Disregarding the pine (the right to which was in others), the total cut of Watts for his co-defendants, according to their books, was:—

	1909-10	1910-11	Total.
Hemlock, feet	33,523	120,500	154,023
Oak, etc., feet	1,921	917	2,838

Some portion of this was cut on Watts' land to the north; how much does not clearly appear. Hurd "thought" that about half the cut of 1910-11 was made south of the line. His estimate was, however, given without any pretence of accuracy.

Watts is responsible for the mixing of the timber cut north of the line with that cut to the south, and cannot reasonably object if the actual measurements and the estimates of Labreche and Gardiner, supported to no slight extent by the actual quantity delivered, are taken—subject to the deduction mentioned—as approximately stating the amount of the trespass.

As against Watts there will be judgment for $624.20 and costs.

His co-defendants had no knowledge of the trespass of 1909-10, when they purchased the timber which he had made in that season. But in April, 1911, before they had taken possession of the logs cut by Watts in 1910-11, they were notified of the trespass and that the plaintiff claimed the logs. They, nevertheless, took possession of the logs, and thus converted them to their own use. They are not liable for Watts trespass, of which up to that time they were ignorant. But they then became liable for the conversion. The measure of damages against them is the value of what was

cut in trespass as of the date of the conversion. See *Greer* v. *Faukner* (1908) 40 S. C. R. 399.

This may, in the absence of other evidence, be taken to be determinable by the prices paid to Watts: $6.50 for bark, $8.50 for hemlock, and $11.00 for oak, etc. At least half the logs converted by the Conger Company in 1911, were cut in trespass by Watts; or, 60,250 feet of hemlock and 458 feet of oak, etc. Taking the values and quantities stated, the liability of the Conger Company to the plaintiff is as follows:—

68 cords bark, at $6.50	$442 00
60,250 feet hemlock, at $8.50	512 00
458 feet oak, etc., at $11	5 00
	$959 00

There will be judgment against the Conger Company for this amount, with costs.

Any sum realized against one of the parties is to be applied upon the judgment against the other.

All amendments may be made in the pleadings considered requisite or necessary to change the frame of the action as against the Conger Lumber Company from trespass to conversion.

Stay of thirty days.

COURT OF APPEAL.

JUNE 18TH, 1912.

JONES v. CANADIAN PACIFIC Rw. CO.

3 O. W. N. 1404.

Negligence—Railway—Fireman Killed in Collision with Snow Plough —Misdirection—New Trial.

Plaintiff, widow and administratrix of Gilbert Jones, a locomotive fireman in employment of defendants, killed by collision with a snow plough on Feb. 14th, 1911. Defendants claimed negligence of the engineer of the deceased's train was the cause of the accident, and admitted liability under the Workmen's Compensation Act, paying into Court $2,000 in full of all claims. Plaintiff claimed negligence of defendants causing accident, and consisted in employment of incompetent signalman.

CLUTE, J., gave judgment in favour of plaintiff for $6,000 and costs upon the findings of a jury.

COURT OF APPEAL *held*, that jury's findings were inconclusive, and Judge's charge misdirected jury. New trial directed, costs of appeal to defendants in any event.

An appeal by the defendants from a judgment of HON. MR. JUSTICE CLUTE, upon the findings of a jury, in favour of the plaintiff, the administratrix of the estate of Gilbert Jones, who was an engine-fireman in the defendants' service, and, when acting as such upon a snow-plough train, was killed in a collision, to recover damages for his death. The plaintiff alleged negligence on the part of the defendants.

The questions submitted to the jury and the answers given were as follows:—

1. Were the defendants guilty of negligence that caused the death of Gilbert Jones? A. Yes.

2. If so, what was the negligence? A. By not having a competent employee in charge of snow-plough train.

3. Did the defendants permit Weymark, signalman, to engage in the operation of the train on which Jones was when he came to his death, without first requiring such employee to pass an examination in train rules and undergo a satisfactory eye and ear test by a competent examiner? A. Yes.

4. Did the plaintiff suffer the damage complained of thereby? A. Yes.

5. Did the deceased come to his death by reason of the defendants operating the railway by a negligent system? A. Yes.

6. If so, what was the negligent system? A. By allowing Weymark to operate snow-plough train without having passed the eye and ear test.

7. Might the deceased Gilbert Jones have avoided the accident by the exercise of reasonable care? A. No.

The jury assessed the plaintiff's damages at $6,000, for which sum judgment was given in favour of the plaintiff with costs.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

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

Sir George C. Gibbons, K.C., for the plaintiff.

HON. MR. JUSTICE MEREDITH:—There was, in my opinion, a mistrial of this case; it was not presented to the jury

as it should have been; and, consequently, the jury's findings are inconclusive. No objection was made, on either side, in this respect; and so it may fairly be said, as it was in the plaintiff's behalf, that the verdict ought to be sustained, and held to be sufficient to support a judgment in the plaintiff's favour, if, in any way, reasonably it can. But I am unable to find any such way; or to understand how anything more can be done for the plaintiff than to direct a new trial, if she remains unwilling to accept the judgment which the defendants are willing she should have.

Liability under the workmen's compensation for injuries enactments is admitted by the defendants; and was, I think, conclusively proved through the negligence of the engineer in charge of the locomotive engine which was propelling the train. Although signals had been regularly given by the signalman on the snow plough until the first highway level crossing after passing Schaw station was passed; no signal of any character came from the snow plough from that on until the accident; none for any other of the level highway crossings; none though the train ran through McRae station; and none for Guelph Junction station, though the train had passed both distant and near semaphores and was in the station yard when the accident occurred.

Failing to get from time to time the signals which should have come from the snow plough, what possible excuse can the engineer, or indeed the conductor, have for forging ahead over level crossings, past one stopping-place and into the yard of the next, without making the least effort to learn the cause of such obvious and dangerous failure to give the necessary warnings of the approach of the train, a train not running on "schedule time" and a snow plough train at that? The engineer must have known that something was wrong; and there should have been signals from time to time; even if he were blind, he must have known that. The difficulty which the findings occasion is primarily the result of insufficient questions; the jury were not asked whose negligence was the proximate cause of the disaster. No just judgment can be given, in the plaintiff's favour at all events, until the real cause of the accident has been found. If it were, as the defendants admit, the negligence of the engineer, the damages awarded by the jury must be reduced; if it were negligence on the part of the signalman, not arising from defective hearing or eyesight, a mere question would arise as to the measure of such damages—whether they are limited

under the enactments I have mentioned or not—if the plaintiff would be entitled to any.

It may be that the crucial question was avoided in the fear that it might involve a finding under which the plaintiff would be limited to damages under the enactments; but whether so or not, this case is another one illustrating the need for conformity with the usual questions aimed at eliciting all the material facts irrespective of what the legal result of the whole truth may be.

The jury were evidently under the impression that the employment of an unqualified signalman made the defendants answerable for all the mishaps of the train arising in any way from want of proper signals from him; a view which, instead of being dispelled, may, I fear, have had some sort of encouragement from the trial Judge, his charge upon the more vital part of it being in these words:—

"As I understood the argument of the defence upon that point, it was suggested that even although there might be (he did not admit that there was) a breach of that rule, yet it was not the breach of that rule which caused the injury which caused the death, that the death was not the natural result, was not the proximate cause. Well, that is for you to say. Should that train have been sent out at all, if you find it was not under competent management? Should they have directed or permitted Jones to go out with that train, if it was not properly manned? Did it devolve upon them, if they chose to disregard the order of the Board, to see that no accident should occur? A. Did they not in fact assume the risk of a safe conveyance of their servant if they chose to disregard the order of the Board which directed what was to be done for that safety?"

That, I have no doubt, contains a good deal of misdirection, and misdirection which has a bearing upon the question of a new trial, even though misdirection not objected to.

The jury ought to have been plainly told that a mere breach of the rule did not give a right of action under it, that there must not only be a breach of the rule, but also injury flowing from it to give a right of action such as this. They ought to have been plainly told, if they were told anything upon the subject, that unless the accident was caused by the incapacity or negligence of the signalman the plaintiff had no right of action under the rule.

The jury did not find that the accident was caused by any such incapacity or negligence; and so the verdict which

is based upon the rule alone cannot stand. I cannot think that they meant to find that either the hearing or sight of the signalman was defective; but if they did there was no evidence upon which reasonable men could so find. They make no distinction between sight and hearing; the ear test is as prominent in their findings as the eye test, and yet it is very plain that the signalman was not deaf; if he had been all who came in contact with him would have known it; and it is also obvious that defective hearing could not have had anything to do with the accident. But it was argued that the man may have been colour-blind; if he were some attempt at least should have been made to prove it; it is not very likely that it could have existed in a railway servant without someone knowing something about it in some way—his wife, his relatives, and his fellow-workmen; the examination which he did pass is opposed to any such notion; so, too, as to colour-blindness being the cause of the accident; colour-blindness would not have prevented his seeing the colourless highway, the semaphores, switches, and buildings, all calling for a signal which was not given. Colour-blind or not he could have seen the semaphores, and no matter what he might have deemed the colour of their lamps, it was equally his duty to signal the approach to Guelph Junction station. Whatever then may have been the cause of silence at these points, and at the highways, it was not colour-blindness. So that in these two respects there was not only no reasonable evidence, but, in my opinion, not a scintilla of evidence.

If there had been any reasonable evidence that colour-blindness was the cause of the accident, and if the jury had found that it did cause it the judgment in the plaintiff's favour—subject to any question as to excessive damage—ought to stand; whilst if there were reasonable evidence that the accident was caused by some negligence of the signalman, apart from any want of qualification required by the rule, and if the jury had found that it was so caused the question would arise whether the plaintiff's damages—if entitled to any—should be limited, under the enactment I have mentioned, or not; a question better not dealt with until it necessarily arises. But neither is the case.

Upon the whole evidence, it might reasonably be found that the accident was not caused by any want of qualification or negligence on the part of the signalman; and in that case the defendants' liability would be limited because, as the

defendants admit, the accident was caused, not by any breach of the rule which it is admitted has the effect of an enactment, but by the negligence of the engineer, a fellow-workman in common employment with the man in respect of whose death this action is brought.

It is quite within the range of possibility, if not extremely probable, that the failure to signal after the last of the series of signals duly given from Woodstock to the first highway after passing Schaw, was caused by some injury to, or displacement of, the signalling machinery which the signalman had not power to correct, or indeed may possibly not have known of on account of the noise of the snow plough in which he was cooped up; or it may be by reason of some accident or illness suddenly incapacitating the man; things which shew the gross want of care on the part of him who had control of the motive power of the train in the engine, as well as of the conductor of the train.

The plaintiff having failed to establish a claim at common law, as it is called, might in strictness have her action dismissed if she refuse to accept—as she does—the offer of judgment under the Workmen's Compensation for Injuries Act; but that would be a harsh method of procedure, for the Court, as well as the parties, is to blame for the failure to elicit at the trial all the facts needful for a consideration of the plaintiff's claim in all its aspects.

I would, therefore, allow the appeal; and direct a new trial. The plaintiff should pay the costs of this appeal in any event; the other costs wasted not unfairly be costs in the action.

COURT OF APPEAL.

JUNE 18TH, 1912.

FISHER & SON v. DOOLITTLE & WILCOX LTD. AND GRAND TRUNK RW. CO.

3 O. W. N. 1417.

Trespass to Lands—Action for Damages — Injunction—Possession Sufficient in Absence of Proof of Title — Fouling Stream — Nuisance.

Action by owners of a paper mill and mill pond against quarrymen who were dumping debris and other waste material on lands adjoining the east bank of the mill pond, for damages for a declaration that plaintiffs were owners of the land, and for an injunction restraining defendants from such dumping and compelling the removal of materials dumped over the brow of plaintiff's land as charged. Plaintiffs alleged that by acts of defendants water had been discoloured and unfit for paper making, and that material dumped was apt to slip into pond.

BRITTON, J., *held*, 17 O. W. R. 441; 2 O. W. N. 259, that plaintiffs' possession, in the absence of proof of title by defendants, was sufficient to entitle plaintiffs to maintain the action for the trespasses complained of; that plaintiffs were entitled to the injunction restraining defendants from like trespasses; that plaintiffs had suffered no injury, to any extent, from discolouration of the water of the stream, but that a continuance, for any considerable time, would result in a ground for action as to fouling the water; that the only damage so far was the amount required to either buttress the dumps by a wall, or to remove them. Damage for the expense of so doing awarded at $200. Plaintiffs to have a reference at their own risk, if desired, instead of accepting the award. Plaintiffs to elect within 30 days.

COURT OF APPEAL varied above judgment by awarding plaintiffs $100 damages to date of issue of writ in lieu of $200 for retaining wall, and affirmed the judgment as to injunction granted plaintiffs.

Plaintiffs to have costs of action, no costs of appeal.

Delete S. C. col. 4210, Dig. Can. Case Law, 1900-1911.

An appeal by the defendants from a judgment of HON. MR. JUSTICE BRITTON, 17 O. W. R. 441; 2 O. W. N. 259, at the trial, in favour of the plaintiffs.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

E. D. Armour, K.C., and T. C. Haslett, K.C., for the defendants.

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

HON. MR. JUSTICE GARROW:—The plaintiffs own a paper mill at the town of Dundas, which has been established and

in use for many years. The water used in the mill is derived from a stream flowing down through a ravine southerly across the tracks of the defendant the Grand Trunk Rw. Company, the pond being to the north and the mill to the south of such tracks.

The defendants, Doolittle & Wilcox, Limited, own land upon the table-land above the ravine upon which it carried on quarrying operations. And desiring a dumping ground for the surface and other debris accruing from such operations, obtained a lease from the defendants the Grand Trunk Rw. Co., of land which extends from the east bank of the pond upwards towards the table-land belonging to the other defendant, with the right to dump such debris upon it. And this debris which consists largely of clay and sand, it is said by the plaintiffs, is falling or being carried down the declivity into the pond, affecting and fouling the water, and threatening the integrity of the pond itself which it is said is being slowly filled up thereby.

The plaintiffs claim to be the owners of the east bank either by paper title, or by length of possession. And that in any event that they are entitled to restrain the defendants from injuriously fouling and otherwise affecting the pond or its waters by means of such dumpings.

The defendants deny the plaintiffs' title to the lands upon the east bank, where the dumpings were made, and assert title therein in themselves, but do not deny the plaintiffs' title to the mill or to the pond.

Britton, J., was of the opinion that the plaintiffs had failed to prove a paper title to what he in his judgment calls the "gorge," which would, I suppose, include the east bank, but upon the evidence that the plaintiff was in possession when the lease before-mentioned was executed, and that such possession was sufficient to entitle the plaintiffs to maintain the action for the trespasses complained of; and was evidently of the opinion that the defendants had also failed to establish a paper title, otherwise it would have been necessary to determine the larger question which the plaintiffs raise, that their possession had ripened into a title under the Statute of Limitations.

The learned Judge also held that, so far, the plaintiffs had not suffered appreciable damage from the acts of the defendants, but that there was a well-founded apprehension of danger resulting from the dumps falling towards or into the stream, against which he awarded the plaintiffs the sum of

$200 towards the erection of a wall to intercept such dumpings, or in the alternative a reference as to damages, and an injunction restraining the defendants from trespassing on the lands of which the plaintiffs are in possession and from dumping or depositing any earth, rubbish, stones or other material upon such lands.

There was thus no adjudication upon the question of title to the lands on the east of the pond, either on the part of the plaintiffs or of the defendants, further than the declaration that the plaintiffs are in possession.

The defendants appeal and claim to have proved title to such lands in themselves, and also claim that, no damages having been established, they were entitled to have the action dismissed.

The plaintiffs cross-appeal and claim that the evidence establishes a good paper title in them, and failing a paper title, that they have proved a good title by possession; and they also claim a reference as to actual damages already sustained.

The title of the plaintiffs to the mill or to the land covered by the water in the dam, or to the use hitherto made of such water, is not in dispute.

While the action from one point of view is an action of trespass involving the question of title to the east bank, that is not its main feature, which is a complaint of what in law would be wrongful, whether the defendants did or did not own the east bank, namely the dumping there on a steep and rocky declivity of large quantities of material which it was probable would slide down or be washed down and thus reach and injure the plaintiffs' pond, and his mill. If the land upon which this dumping was taking place was the plaintiffs', then it was trespass, but if it was not, it was at least in the nature of a nuisance, so that in either view the plaintiffs were entitled to some if not all of the relief granted by the learned trial Judge.

These being the circumstances as they appear to me in the evidence, the case does not in my opinion call for an adjudication upon the question of title upon either side, a question I may say which has given us all much labour and anxiety in attempting to unravel the tangled mess created by years of careless and inaccurate conveyancing. The plaintiffs' relief may well, I think, stand upon that which is undisputed, namely their right to the mill and to the pond, leaving all other questions of title to be hereafter adjusted between the

parties, peaceably I hope, or by further litigation if they are foolish.

The evidence fully, in my opinion, justifies the injunction which was granted. I also think the plaintiffs were entitled to something more than mere nominal damages, which sum to avoid the expense of a reference, I would allow at the sum of $100. And this should take the place of the $200 allowed by Britton, J., towards a protecting wall. And the present recovery should be without prejudice to subsequent suits for damages subsequently arising by reason of the acts now complained of.

The plaintiffs should have their costs of the action, but the parties may well be left to bear their own costs of the appeal to this Court under the circumstances.

HON. MR. JUSTICE MEREDITH:—The question of title to the strip of land on the east side of the mill pond was left in a very confused and unsatisfactory state at the trial; perhaps one of the clearest things in connection with it is that neither side has yet proved title to that land.

On the defendants' side, the deed from Somerville to Hamilton, and one of the deeds from Hamilton to the railway company, cover it; but title in Somerville is not proved.

On the plaintiffs' side, it is comprised in the metes and bounds of the deeds under which they claim title from Leeming, but seems to me to be plainly enough comprised in the exceptions contained in several of the deeds in their chain of title.

Nor can I think that title by length of possession has been proved on either side; or that any possession which would be evidence of ownership was proved.

But really the question of title to the land on that side of the pond is of no paramount, if indeed of any very substantial importance in the real matter in controversy in this action.

The real and substantial question is whether the plaintiffs' pond, stream and mill have been injuriously affected by any wrongful act of the defendants; and no question has been raised as to their title to pond, stream and mill; ownership of the land on the east side of the pond would not give any right to do any of the injury complained of to pond, stream or mill; nor would ownership by the plaintiff add to such a cause of complaint. The injury to the land on that side of the pond is another cause af action which can well

be left to be dealt with when the parties bring something more than a muddled title before the Court.

That at the time when this action was begun the plaintiffs had a good cause of action against the defendants I can have no doubt; the case is not to be dealt with as it is now, or was at any time after the defendants were enjoined; it must be looked at as it was at that beginning when the defendants were still dumping earth, stone, and other refuse material from their quarries on the side of the high and steep hill running up from the pond to the top of it—a hill commonly called the mountain. That work so continued must have been a serious menace to the plaintiffs' rights in the pond, which is of paramount importance to their mill.

But apart from the danger of the dumps sliding in a body into the pond, there was the ever present injury from the earth and other substances carried down by surface water, if not by spring water, from the dumps into the pond; this could not be injurious to the plaintiffs' property rights; it could not but foul the stream and fill in more or less the pond; while much might be carried down the stream in solution to the mill, much must in time be precipitated on the bottom of the pond. Indeed streams of mud had already, at the time of the trial, run down the hill and been projected into the pond, in more than one place, in the way the plans indicate. It is not a good answer to say that in the freshets and high waters the stream would be muddied anyway; the fact that nature cannot be enjoined from doing such injury, does not give to man the right to add to it, it may rather be a greater reason why he should be enjoined; the burden which natural causes impose is enough. And, indeed, if there had been no appreciable damage the fact that the wrong might in time grow into a right would be an abundant reason for stopping the wrong.

The plaintiffs were, therefore, rightly enjoined from dumping as they were when the action began; and that injunction should, I think, be made perpetual; they should also pay damages, which, up to the present time, may, I think, be put very reasonably at $100. In regard to present and future danger from the old dumps, as nothing in the shape of a catastrophe has yet happened, I would make no order; but let them remain as they are at the risk of the defendants; so too as to any injury from earth or other substances brought down by surface or spring water from the dumps; if the defendants do not stop it, they will be liable in a future action

for damages, and subject to an injunction if needed. The judgment should express the fact that it is without prejudice to the claims of either party to the land on the east side of the pond, as well as to any future claims by the plaintiffs for damages and an injunction.

Success being divided I would make no order as to costs of this appeal; but the defendants should pay to the plaintiffs the general costs of the action.

HON. MR. JUSTICE MAGEE:—The defendant company Doolittle & Wilcox Limited, who own a quarry, have been dumping their strippings of earth over a high cliff, upon the sloping rocky bank of a stream flowing through a gorge of which the cliff forms the easterly side—this sloping bank varies in width from three hundred to five hundred or more feet—and in places is covered with earth and vegetation, and throughout with cedar and other trees and undergrowth. The company hold a lease of this land from the defendants, the Grand Trunk Rw. Co., whose tracks running easterly and westerly cross upon an embankment, the mouth of the gorge, and run along the southerly face of a lofty escarpment which rises high above the north side of their tracks, and on the top of which at the easterly side of the gorge the quarry company own the land—the lease was made for the purpose of using the bank as a dumping ground. The stream flowing through the gorge from the north is dammed up by the north side of the embankment, beneath which it is carried in a culvert past the plaintiff company's paper mill, which is immediately south of the embankment and for which it supplies water as well for power as for use in the manufacture.

The earth has in large quantities been dumped in these places, about two hundred feet apart; the southerly one being about that distance north of the embankment—the plaintiffs complain that it has from its weight aided by springs beneath and surface water descended the slope carrying with it soil, rocks, and trees, and some of it has found its way into the stream and made it muddy and unfit for paper making, and there there is danger that the whole will descend and probably block the culvert and carry away the embankment, and in any case form a deposit above the dam and reduce the storage capacity of the pond which they need to provide water in dry seasons. They claim to own the whole of the sloping bank. It is part of lot 13, on the 1st concession of West Flamboro township.

Both sides claim title through Ralph Leeming, who owned in 1841, on both sides of the stream—by deed of 18th December, 1841, he conveyed 24 acres to Hugh Bennett and Robert Somerville, reserving a road. The description is given by metes and bounds and the surveyors upon each side agree upon the starting point. The north easterly boundary extends from the point where practically the south face of the escarpment and the easterly cliff of the gorge meet—and runs along "the face of the mountain," that is the edge of the cliff, 20 chains 69 links, and the north-west boundary runs 12 chains and 65 links, which would carry it across the stream—and thus include the whole of the eastern slope, the bed of the stream, and land on the west side of it. On 27th June, 1842, Hugh Bennett conveyed the same land and other land on the face of the escarpment east of it to Robert Somerville. On 25th June, 1842, Somerville mortgaged both parcels to Ralph Leeming and Susannah Leeming his wife. On the 18th October, 1843, Robert Somerville conveyed to Joseph Spencer a parcel containing over eleven acres. There is no evidence of this deed except the recital of it in the subsequent deed Leeming to Eliza E. Spencer, where it is stated to have conveyed the land therein mentioned and conveyed. Assuming that to be so, it was evidently the west part of the twenty-four acres for four westerly boundaries correspond in bearings and distances in both descriptions, and the north-west boundary, six chains and eighteen links is evidently the west end of the twelve chains and sixty-five links which formed the boundary of the twenty-four acres. The eastern boundaries seem to follow by seven different bearings the general course of the stream. Surveyors on both sides have agreed within a few feet as to the location of these easterly boundaries, which are found to run along the easterly bank at varying distances about a chain apparently from the present edge of the water.

By deed dated 2nd July, 1851, Joseph Spencer conveyed to the Great Western Railroad Company (which was subsequently united with the defendant Grand Trunk Railway Company) 3.81 acres as delineated on a plan attached. This land formed approximately the site of the embankment and the boundaries were subsequently changed by an agreement of 31st December, 1899, being extended a short distance northerly on the east side of the stream. It does not otherwise affect the present action. But the plan shews an existing dam about 25 feet north of the land granted, and

by agreement of the same date 2nd July, 1851, the railroad company agreed with Spencer to construct their embankment so as to form the dam for his mill and so that he might raise the water seven feet higher and to give him another right of way, he having given up the right to the road intended to pass through the gorge and reserved by Leeming.

Thus the railway company's track and embankment come through the same deed as the plaintiffs' title to the bed of the stream and the strip of land along its easterly edge.

On the 10th June, 1851, Robert Somerville conveyed to James Hamilton 11 acres, 1 rood and 18 perches, the description of which is set out and covers the whole eastern bank from the edge of the cliff to the margin of the creek, the length along the cliff being 20 ch. 69 lks., as in the deed from Leeming. This deed would thus include the land along the eastern bank which had already been conveyed by Somerville to Joseph Spencer. It is noticeable that the north-west boundary 7 chains more or less added to Spencer's north-west boundary would exceed the 12 ch. 65 lks. mentioned in the deed from Leeming.

Both parcels, so far as appears, would be subject to the mortgage to Leeming but it may be that Spencer the first grantee would be entitled to throw the burden of the mortgage upon the other land. On 30th June, 1851, Somerville conveyed to the Great Western Railroad Company the parcel along the south face of the escarpment which lies east of Hamilton's land and was also in the mortgage. By deed of 31st July, 1863, reciting a sale under a decree in chancery in a redemption suit Ralph and Susannah Leeming conveyed to the purchaser Eliza Elinora Spencer, who seems to have been an executrix of Joseph Spencer's will, the land already referred to as conveyed by Somerville to Joseph Spencer, excepting the portions conveyed by Joseph Spencer to the Great Western Railroad Company and three roads conveyed to Robert Somerville with a privilege of ingress and egress and a privilege of pumping water. A description of the three roads is given which shews that it was about a chain wide but of varying width extending along the east margin of the creek for a distance of about nine chains south from the allowance for road reserved by Leeming. The defendants called as a witness a nephew of Robert Somerville, who says the road ran only to the old

mill which was about the site of the present dam. It would seem therefore that the three roods excepted do not cover any of the land in question here

The effect of this conveyance from the mortgagee Leeming would be to give Eliza E. Spencer the legal title to the land therein described although it covered part of that conveyed by the mortgagor Somerville to Hamilton. It does not appear that Leeming had ever released Hamilton's parcel from the mortgage. Also it does not appear that Hamilton or the railroad company were parties to the redemption suit. At the trial by oversight—which they now ask and as I think should be allowed to remedy— the defendants omitted to put in a registered statutory discharge by Leeming of the mortgage of 1842. But that discharge is dated 27th November, 1871, and evidently could not affect the previous conveyance by him in 1863 if indeed it could take effect at all. I may note that it only refers to registration in Halton township and not West Flamboro.

Eliza E. Spencer thus obtained the conveyance of the land covered by the stream and the strip of about one chain wide along the eastern shore—and the railroad company owned the land between that strip and the edge of the cliff.

Eliza E. Spencer in 1863 conveyed to John Fisher who gave a mortgage back which was subsequently discharged. He conveyed in 1867 as part of his capital stock in their co-partnership to the use of himself and John Abram Fisher as joint tenants. In 1869 the sheriff under execution against John Fisher purported to convey his interest to John Abram Fisher but no proof of execution is offered. Whether that deed was valid or not John Abram Fisher would still have his joint interest in the property and John Fisher the joint tenant subsequently died. John Abram Fisher conveyed to Christopher Eli Fisher in 1871 an undivided two-thirds and in 1888 all his interest.

On 31st December, 1899, a rearrangement of boundaries as already mentioned was made by agreement between Christopher Eli Fisher and the Grand Trunk Rw. Co. whereby the railway company released to him "all the lands lying outside of the boundaries comprised within the description aforesaid and so delineated on said plan."

But it is evident this release was only intended to cover such of the lands in the old deed from Spencer to the Great

Western Railroad Company as were not within the new railway boundaries. It could not be as contended for the plaintiffs reasonably construed to cover the lands here in question. His right to the enjoyment of the water was, however thereby recognised.

On 26th August, 1903, he conveyed to the plaintiff company, the deed covering inter alia the mill and the bed of the stream and the strip along the eastern bank, the eastern boundaries being the same as in the deed Leeming to Spencer.

He had by agreement of 31st July, 1903, agreed to sell to the plaintiff company the same land and all the rights under the agreement of 31st December, 1899, and all right to any property under the agreement for dissolution of partnership between him and John Abram Fisher dated 1st June, 1885. On 28th April, 1909, after commencement of this action the plaintiff company obtained a conveyance from the National Trust Company as executors of Christopher Eli Fisher covering all the land between the brow of the cliff and the stream and also the bed of the stream and land west of it. There is nothing to shew that under the agreement of 31st July, 1903, or that of 1st June, 1885, the plaintiffs at the commencement of the action had any equitable or other right to any land outside of the boundary in the deed Spencer to John Fisher. But they have, I think, shewn legal title to at least one-half interest in the land described in that deed and they probably have title to the other half.

That being so the acts of ownership and possession shewn to have been exercised by them and the Fishers are quite enough to establish legal possession by them. For more than twenty years back they have had east of the creek a notice forbidding trespassers and at least one has been prosecuted; they have planted trees on the west side and some on the east side and have sown some seed of trees and have protected some of the trees by barriers around them; their cattle have pastured on the east side, crossing the stream from the west side to which they were admitted by a gate of which they had the key—no other cattle are shewn to have been there—as there is no access to the east bank from the south except by climbing the north railway fence—which runs as far as practicable up to the peak—

the only other way of getting there would be across the stream which is their property. It must, I think, be taken that they have shewn possession of all the land described in their deed from Spencer.

But that does not give them possession or title thereby to the land outside their boundary between that and the cliff.

There is that long unfenced boundary between them and the railway company. The bank is wild, rough, rocky and largely covered with trees and undergrowth. It is not shewn that any of the trees or seed put in or protected by them was outside their boundary, or that the cattle have gone beyond that boundary though doubtless wandering at will. There is nothing I think in the evidence to justify an extension of the presumption of full possession in the Fishers to land over which they had no claim and merely because the railway company have not had occasion to use it. The plaintiff company and the railway company stand, I think, just where Eliza E. Spencer and the Great Western Railroad Company stood with regard to each parcel. And the railway company appear to be the owners of the strip between the plaintiffs and the cliff.

But the evidence shews that the earth dumped by the plaintiffs has encroached upon the plaintiffs' side of the boundary and some of it has reached the stream over the plaintiffs' land. The evidence as to the danger of its advancing further was very contradictory. Reading the evidence, I would be inclined to agree with the learned trial Judge that there is danger, but he had in addition the advantage of seeing the witnesses and also viewing the premises, and I can see no reason to question the conclusion at which he arrives on that question.

As the earth so far as appears was dumped upon the defendants' own land does not appear to me to be any ground for preventing them from doing that so long as they do not injure the plaintiffs' land. That injury might be from allowing the earth to be carried thereon by its own gravity or by water or putting such weight of earth as to cause the soil of plaintiffs' land to give way—or the trees or vegetation to be injured or by allowing such washing or descent into the stream as to render it appreciably less fit for the use of their mill—or cause injury or danger thereto. The

plaintiffs claimed all the land up to the cliff and the judgment declared them to be in possession of it.

The judgment should, I think, be varied so as to declare the defendants entitled to the land outside the boundary in the deed Leeming to Spencer and only restrain them as to the land within that boundary from allowing any of the earth, stones or material already deposited or hereafter deposited on their land to go or be carried in solution or otherwise upon the plaintiffs' land or to foul the water in the stream so as to injuriously affect the plaintiffs.

As the quantity which has already crossed the plaintiffs' boundary is not sufficient to cause grave danger the plaintiffs will not be at the expense of a wall and I think they will be fully or more than compensated by $100 damages.

The defendants should pay the plaintiffs' costs—except of the appeal.

COURT OF APPEAL.

JUNE 18TH, 1912.

REX v. COHEN.

3 O. W. N. 1409.

Criminal Law—Practice and Procedure—Amendment of Indictment—Changing Offence Charged—Code, ss. 405, 405a, 889, 890.

Stated case by Denton, Co.C.J., who on the trial of an indictment under sec. 405 of the Criminal Code, charging defendant with knowingly and fraudulently by false pretences obtaining $500 from the Northern Crown Bank, after the evidence had partially been taken, allowed an amendment of the indictment to charge that defendant did in incurring a debt or liability to the Northern Crown Bank obtain credit under false pretences contrary to sec. 405 (a) of the Code. Upon such amendment the jury found the defendant guilty, and the question stated was, "Had I the power to amend the indictment at the time and in the manner stated?"

COURT OF APPEAL held that sec. 889 of the Criminal Code allowing amendments to indictments when there is a variance between the evidence given and the charge did not permit of amendments charging an offence different in character from that originally charged.

Rex v. *Benson*, [1908] 2 K. B. 270, and *Rex* v. *Corrigan*, 20 O. L. R. 99, referred to.

Question stated answered in negative.

Case stated by HIS HONOUR JUDGE DENTON of York County Court.

The case in the Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LENNOX.

T. C. Robinette, K.C., for the defendant.

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

HON. MR. JUSTICE MACLAREN:—The defendant was indicted at the General Sessions, Toronto, for having knowingly and fraudulently by false pretences obtained from the Northern Crown Bank $5,000 with intent to defraud the said bank, and the grand jury returned a true bill against him.

During the trial at the close of the case for the Crown the defendant's counsel took the objection that the offence charged in the indictment had not been made out, that sec. 405 of the Criminal Code under which the charge was laid required that the accused must have obtained something capable of being stolen; whereas according to the evidence for the Crown, the most that had been obtained from the bank in this case, was a line of credit for a joint stock company of which the defendant was a director, and credit was something that could not be stolen. Counsel relied upon a decision of the Quebec Court of Appeal, *Reg.* v. *Boyd,* Que. Rep. 5 Q. B. 1.

The county Judge held that the objection was well taken; but that the indictment might be amended by striking out the words charging the defendant with obtaining the $5,000 and substituting a charge under sec. 405A of the Code that "in incurring a debt or liability to the Northern Crown Bank he obtained credit from the said Bank under false pretences," and the indictment was so amended. This sec. 405A was added to the Code in 1907, by 7-8 Edw. VII., ch. 18, sec. 6, to supply the defect in the law pointed out in the *Boyd Case.*

The trial proceeded on the amended indictment and the jury found the defendant guilty. At the request of counsel for the defence the Judge reserved for this Court the following question: "Had I the power to amend the indictment at the time and in the manner stated?"

The law as to the amendment of an indictment in a case like the present is found in sec. 889 of the Code, which provides that "If on the trial of any indictment there appears to be a variance between the evidence given and the charge in any Court in the indictment . . . the Court before which the case is tried may, if of opinion that the accused has not been misled or prejudiced in his defence by such variance, amend the indictment or any count in it or any . . . particular so as to make it conformable with

the proof." Section 890 (3) provides that "The propriety of making or refusing to make any such amendment shall be deemed a question for the Court, and the decision of the Court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal like any other question of law."

Section 889 above quoted, was first enacted as in the Criminal Code of 1892, as sec. 723. Although it has been in force for nearly 20 years and has been largely used, we were not referred at the argument to a single reported case in which it has been construed by any Court. The corresponding provision in the English criminal law is very different, so that we do not find any direct authority there. It is sec. 1 of 14 & 15 Vict., ch. 100, and enumerates a list of amendments that may be made, such as variances in the names of places, persons, owners of property, etc., or in the name or description of any matter or thing named or described in the indictment. Our own law before 1892, was not unlike the English, and is to be found in R. S. C., ch. 174, sec. 238, where any variance in "names, dates, places or other circumstances, not material to the merits of the case, and by the misstatement whereof the person on trial cannot be prejudiced in his defence on such merits," may be amended by the Court. This was taken from the Criminal Procedure Act of 1869, which was practically an adaptation of the English Statute of 1851.

There are two reported cases in which amendments under sec. 889 of the Code (then sec. 723), were discussed and upheld. The first in *Reg.* v. *Patterson,* 26 O. R. 650 (1895), where an indictment was laid for obtaining two cheques by false pretences, the false pretence being "that there was a large quantity of beans, to wit, 2,680 bushels of beans" in a certain warehouse. The words "a large quantity of beans to wit," were struck out of the indictment and the prisoner was convicted. A Divisional Court upheld the conviction, and held that the indictment as amended was substantially the same as the one on which the grand jury found a true bill. It was pointed out that the Code did not require the indictment to state in what the false pretence consisted.

The other is a Montreal case, *Reg.* v. *Weir* (No. 3) 3 Can. Cr. Cas. 262 (1899), where an indictment for making false returns under the Bank Act was amended by inserting the word "containing," before the words "a wilful, false, and de-

ceptive statement," etc. Wurtele, J., said at p. 268: "The correction in no way changes the character or nature of the offence, and as the defendant knew to the same extent before and after the amendment what he was accused of, he was neither misled nor prejudiced by it . . . In fine, if the transaction is not altered by the amendment, but remains precisely the same, the amendment ought to be allowed; but if the amendment would substitute a different transaction from that alleged, or would render a different plea necessary it ought not to be made."

Although secs. 405 and 405A both relate to false pretences yet they differ. The former relates exclusively to obtaining money, chattels, etc., something "capable of being stolen," the later exclusively to the obtaining of credit; the punishment in the former case may be three years' imprisonment, in the latter the maximum is one year; the former is an adaptation of sec. 86 of the English Larceny Act; the latter is derived from sec. 13 of the English Debtors' Act, 1869 (32 and 33 V. C. 62).

If the amendment had been simply the substitution of another article capable of being stolen, as for instance the substitution of promissory notes, or other valuable securities for the "five thousand dollars," the transaction being the same as that disclosed in the preliminary examination, to use the language of Wurtele, J., it would seem to me that the amendment might have been upheld.

Another question of importance is whether the defendant was not deprived of his right to have the grand jury pass upon his case. It may be argued that the grand jury have not found a true bill against him for the offence for which he was tried. The formula by which the grand jury give their assent to the bill reported by their foreman is that they are content that the Court shall amend any matter of form in the indictment, altering no matter of substance without their privity. May it not be said to be a matter of substance and not of form, to substitute what may be said to be a different offence expressed in different terms, under a different section; and with a different punishment?

It was also argued that evidence was put in by the Crown that was admissible under the indictment before the amendment, but which would have been inadmissible under the amended indictment, and that the defendant was prejudiced thereby. Particulars of these were not given. If correct it would no doubt be a serious matter. However, I do not wish to base my decision on this.

On the whole I am of the opinion for the foregoing reasons that the trial Judge had not the power to amend the indictment at the time and in the manner stated, and that the question reserved by him should be answered in the negative.

HON. MR. JUSTICE GARROW:—I concur.

HON. MR. JUSTICE MEREDITH:—It is not necessary to consider whether the defendant could have been convicted of the offence of obtaining money by false pretences, because he was not tried upon that charge, but was tried upon the charge, recently made by statute a criminal offence, of obtaining credit by false pretences; but I may add that where one procures another to do that which is tantamount to paying over a sum of money by false pretences it is at least getting very near the offence, even though the transaction is completed by that which is tantamount to an immediate deposit of the money by the person obtaining it with the person from whom it is obtained, subject to the order of the person obtaining it.

The question here is one very different from that, however; it is whether the change of an indictment from one of obtaining money, to one of obtaining credit, by false pretences, is an amendment which the law permits; and that question is solved, in my opinion, when the question whether the two charges are substantially for an offence of the same kind, is truly answered. If the charge were of obtaining one thing capable of being stolen, within the meaning of sec. 405 of the Criminal Code, and the change went to something else of the same nature, the amendment might well be made; whether it ought to be would, of course, be another question. But wide as the power of amendment is, it cannot comprehend a change from an offence of one nature to one of another; and, in my opinion, having regard to the case *Rex* v. *Boyd*, 5 Q. O. R. 1, and the subsequent enactment of sec. 405A as an addition to the Criminal Code this case should be looked at as if before that enactment the thing with which the defendant was charged was not one coming within the provisions of sec. 405; or of the same nature, so as to justify the amendment of the indictment which was made in this case; see *R.* v. *Benson*, [1908] 2 K. B. 270, and *R.* v. *Corrigan*, 20 O. L. R. 99.

If it were not, then there was no jurisdiction to try the defendant upon the new indictment; it was his right to

have that charge first dealt with by a grand jury; and not to be put in jeopardy without their consent; and so some substantial wrong or miscarriage occurred at the trial, excluding the resort of the Crown to sec. 1019 of the Criminal Code, to sustain the conviction: see the *King* v. *Bates* (1911), 1 K. B. 964.

I would answer the question reserved in the negative, and direct that the conviction be quashed and that the accused be discharged in respect of this conviction.

HON. MR. JUSTICE MAGEE:—The original charge of obtaining money by false pretences was framed under sec. 404 of the Criminal Code, 1906, which makes it an indictable offence to obtain with intent to defraud by false pretences anything capable of being stolen. The punishment therefor is three years imprisonment. The amended charge is framed under sec. 405A, which was added to the Code in 1907 by 7-8 Edw. VII. ch. 18, sec. 6, and which makes guilty of an indictable offence and liable to one year's imprisonment every one who in incurring any debt or liability obtains credit under false pretences or by means of any fraud. This section was no doubt added in consequence of the decision *Reg.* v. *Boyd,* 1896, 4 C. C. C. 219 (Q. B. Que.), that obtaining credit merely did not come within sec. 405 as credit, was not a thing capable of being stolen. It is taken from the Imperial "Debtors Act" 1869, ch. 62, sec. 13, where, however, the words are "under false pretences or by means of any other fraud." The English statutes relating to amendments in criminal proceedings are referred to in Lord Halsbury's Laws of England, 334 s. v. Amendment. Their effect was considered in *Rex* v. *Benson,* 1908, 2 K. B. 270, which somewhat resembles this case. The indictment contained two counts framed under the sections corresponding to our secs. 405 and 405A. Both counts alleged specific false pretences. The chairman of Quarter Sessions considered that the accused had not obtained the goods (board) or credit by the false pretences alleged (of being engaged to work), but on the faith of a promise to pay on a specified day and he struck out the first count and amended the second so as to charge that by means of fraud the accused incurred a debt in the purchase of goods. It is obvious that this amendment still left the charge in the second count one under the same section—that is our sec. 405A. The prisoner was convicted, but on a case being stated the five Judges agreed that

although the Criminal Procedure Act, 1851 (14, 15 Vict. ch. 100), sec. 1 allows amendment "in the name or description of any matter or thing," there was "no power to make an amendment substituting one offence for another." Lord Alverstone, C.J., in delivering the judgment of the Court said: "If the Legislature had intended that one offence might be substituted for another it would not have used language similar to that under which it allows an amendment to be made with regard to some variance in the ownership of property named or described in the indictment. The procedure in a criminal trial assumes that the bill of indictment has gone before the grand jury, and that they have returned a true bill. To allow an amendment to be made substituting a fresh offence might have the effect of placing a prisoner upon his trial for an offence that had never been before the grand jury. The fact that the evidence may be the same to establish both cases is immaterial." He referred to the decision in *Reg.* v. *Jones,* 1898, 1 Q. B. 119, as shewing that a person may be convicted of obtaining credit by means of fraud within the meaning of the Debtors Act, 1869, sec. 13, although he has made no false pretence.

The provisions of our Criminal Code, 1906, as to amendment are wider than the English Acts. Under sec. 889 (1) "if there appears to be a variance between the evidence given and the charge in any count," the Court may amend if of opinion that the accused has not been misled or prejudiced in his defence, and (2) if the indictment has been preferred under some other Act instead of under the Code or the converse or if it appears that there is an omission to state or a defective statement of anything requisite to constitute the offence or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the Court may likewise amend. This was inserted in the Criminal Code of 1892, as sec. 723. Previously the provisions for amendment R. S. C. 1886, ch. 174, secs. 237, 238, allowed amendments "in names, dates, places, or other matters or circumstances therein mentioned, not material to the merits of the case."

The present sec. 889 applies to a variance "between the evidence given and the charge in the count." This cannot fairly be interpreted to authorize the change to an entirely different charge from that in the count, but only to authorize the retention in substance of the same charge though amending it in details so as to conform to the evi-

dence. So long as an accused person is entitled to trial by jury, and every criminal accusation so to be tried is to be first passed upon by a grand jury, the basis upon which amendments should be made appears to me to be that stated by Lord Alverstone as already quoted, and is expressed in effect by the formula of the grand jury, which gives its consent "that the Court may amend matters of form altering no matter of substance in this bill." Here it is a matter of such substance which is altered that the offence sought to be charged by the amendment had been held in *Rex* v. *Boyd*, not to be one punishable under an indictment such as this was when assented to by the grand jury. Such a charge has, therefore, not been authorized by them. It is an offence under another and later provision of the law, and not subject to the same punishment. It is true that even before the acts allowing amendments in England, a man might be charged with an offence for which he would be liable to one punishment and be convicted only of a less offence for which the punishment might not be the same, but that was because the minor charge was included in the greater, and thus was in fact stated in the indictment and approved by the grand jury. Here there was no such inclusion.

It is evident from the second sub-section of sec. 889, that there no charge from one offence to another is intended, but that the substance of the charge which the accused has to meet must remain the same. Such also is in my opinion the effect of the first sub-section.

The power of amendment under sec. 898, when objection is taken to any indictment for "any defect apparent on the face thereof," allows the Court to cause it to be "amended in such particular," and yet it has been held that "matters of substance cannot be so amended, and essential allegations which have been entirely omitted cannot be added by the Court." *Reg.* v. *Weir*, 1900, 3 Can. Cr. Cas. 499; *Rex* v. *Cameron*, 1898, 2 C. C. C. 173. Until Parliament expressly authorises such interference with the work of the grand jury, it would be very unsafe to allow such change as this under the guise of amendment, and I do not think it was authorized—I would, therefore, answer the question in the negative.

I express no opinion as to whether the accused should have been convicted under the original indictment. Section 405 draws a distinction between obtaining property and procuring it to be delivered to another. As to the amended

charge it is noticeable that the written representation was on 8th February; the guarantee upon which the accused became liable is dated the 18th February, and the additional credit to the joint stock company by the discount of the $2,000 note had been given on 8th February, and the manager of the bank appears to think it was only to take up a note on which credit therefor had previously been given.

COURT OF APPEAL.

JUNE 18TH, 1912.

STOCKS v. BOULTER.

3 O. W. N. 1397.

Cancellation of Instruments — Sale of Farm, Chattels and Canning Factory—Agreement Entered into by Reading Advertisement in Newspaper—Negotiation Conducted on Basis of the Advertisement—Action to Set Aside Agreement, Deed and Mortgage—Ground Purchaser did not get what Advertisement Called for—Part of Farm having been Previously Deeded to Wife of Grantor as a Gift.

Action for rescission of an agreement to purchase certain lands from defendants, for cancellation of a mortgage given in part payment therefor, for the return of $11,000 paid by plaintiff to defendants with interest and for damages on ground of alleged false and fraudulent representations upon which plaintiff relied.

CLUTE, J., 20 O. W. R. 421; 3 O. W. N. 277, *held*, that plaintiff had no suspicion that his acreage was being curtailed, that he accepted the statements of the number of apple trees, the condition of the farm, the quantity of fall wheat, without question, having full confidence in defendant and the agreement, and the deed and mortgage registered in pursuance thereof should be set aside and cancelled. That plaintiff was entitled to a return of the purchase money, both for the farm and chattels, with interest. Reference to take accounts. Damages assessed at $7,630 in case of appeal.

COURT OF APPEAL affirmed above judgment.

Per GARROW, J.A.—It is not every dealing with a property which will take away a plaintiff's right to rescission on the ground of fraud.

Adam v. *Newbiggin*, 13 A. C. 308; and *Erlanger* v. *New Sombrero*, 3 A. C. 1218, referred to.

An appeal by the defendants from a judgment of HON. MR. JUSTICE CLUTE, 20 O. W. R. 421; 3 O. W. N. 277, at the trial in favour of the plaintiff.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LENNOX.

A. W. Anglin, K.C., and C. A. Moss, for the defendants, appellants.

R. McKay, K.C., for the plaintiff, respondent.

HON. MR. JUSTICE GARROW:—The plaintiff's case as disclosed in the statement of claim is that the defendant Well-

ington Boulter had by certain false and fraudulent representations induced the plaintiff to purchase that defendant's farm in the township of Sophiasburg in the county of Prince Edward, and the farm, stock and implements thereon. The transaction had been completed and the purchase-money paid, a part in cash and the balance by a mortgage on the land to the defendant Nancy Helen Boulter, the wife of the defendant Wellington Boulter, and the plaintiff had been let into possession.

The defendant pleaded that all representations which had been made in the course of the transaction were true in substance and in fact, that if they or any of them were false, the same were not false to the knowledge of the defendant Wellington Boulter, and that in any event, the plaintiff did not rely upon the representations, but upon the inspection and examination of the property made by himself and by others for him.

The facts developed at the trial are very fully set out in the judgment and need not be here repeated at any length. the issues were largely upon questions of fact and after hearing some forty witnesses the learned Judge determined them all in favour of the plaintiff, properly in my opinion.

In his judgment the learned Judge uses this language: "I think the plaintiff was a truthful witness. I entertain no doubt that his evidence is substantially true and accurate. I was also favourably impressed with Alexander McLaren and Peter Forin (witnesses called by the plaintiff). Where the defendant and his witnesses differ from the plaintiff and his witnesses, I think, the latter are entitled to credit."

To interfere with a trial Judge's conclusion upon the facts under such circumstances would be as unsafe as it is fortunately unusual. Nor do I suggest that if I had the power, I have any inclination to do so. On the contrary, I am of opinion, after a careful perusal of the evidence, and especially of that of the defendant Wellington Boulter himself, that the learned Judge's conclusions are entirely justified thereby. The plaintiff was not a neighbour, but a Scotchman unaccustomed to Canadian farming, who was residing in British Columbia, when what may be called the negotiations began. He came east after seeing the advertisement, and the letter of October 6th, to see the 300 acre farm which had been offered for sale by the defendant Wellington Boulter, represented as having upon it certain stated quantities of seeded down and fall wheat land, and an orchard of 2,000 trees, also a canning factory in A1. order, and the farm land

in the highest state of cultivation, for which the total price asked was $22,000. The plaintiff paid for the farm which he got, the $22,000, but he did not get 300 acres, but only about 255 acres. And the orchard had something less than one-half the number of trees stated, while the fall wheat land and the seeded down land each fell short of the quantities represented to about one-third. The farm was also infested with quantities of noxious weeds utterly inconsistent with the representation as to the state of cultivation and to its freedom from weeds, which had been made. And the caning factory was in anything but A1. order. Under these circumstances to absolutely deny the representations or that they were material was impossible. So the course of confession and avoidance adopted was the only one open under the circumstances.

The keynote, if I may call it so, to the whole transaction is, I think, the method by which the quantity of land, originally offered as 300 acres, was reduced. It appears that the plaintiff did not come forward at the time first arranged, but at a somewhat later date. The defendant anxious for his own purposes to break the apparent continuity of the negotiations speaks of the personal negotiations which took place after the plaintiff came east, as "a new deal" in the course of which, as he says, he withdrew from his original offer the parcel containing from 30 to 40 acres, which was divided from the rest by a road. But he made no corresponding reduction in his price, nor, it is I think perfectly clear upon the whole evidence, did he make or attempt to make it clear to the plaintiff that the original offer had been so modified.

That this circumstance must have greatly impressed the learned Judge is, I think, apparent, if from nothing else from the circumstance that the appeal book contains about four printed pages of an examination of the defendant Wellington Boulter by the learned Judge entirely devoted to an endeavour to ascertain if possible exactly at what stage in the negotiations the plaintiff was informed that he was getting the reduced acreage while paying the full price. And the result of a perusal of it is to leave me, as it apparently left the Judge, under the strong impression that what was done was a carefully planned piece of deception, devised after the defendant saw the purchaser.

It is not necessary to discuss at any length the details of the other representations. Some of them from their nature or rather the nature of the subject-matter could have been con-

veniently tested by an ordinary examination. Others of them such as the number of trees in the orchard might have been. The plaintiff might even have enquired among the neighbours as to the character of the farm weeds. But he did none of these. He and his friend Mr. Maclaren did, it is true, go over the land, but it is evident not for the purpose of making a critical examination, or to test the representations which the defendant had made. So that the learned Judge's findings that the plaintiff relied upon the representations is amply borne out. And it is no answer in itself to say as a defence that he had the opportunity to do so, unless it also appears that he was relying upon his own judgment and not upon the representations. Nor is there, in my opinion, anything in the defendant's contention that the plaintiff had elected to abide by the purchase, or that he had so dealt with the property that rescission should not be awarded. When the deception appeared early in the following season, he at once became active in asserting his rights. He could not have been reasonably expected to do so earlier, because he was still in ignorance of the facts. In the meantime he had made the lease of the orchard upon which the defendant relies, but the lease has been cancelled, and the plaintiff is now in a position to restore the land practically in the state and condition in which he received it. It is not every dealing with the property which will take away a plaintiff's right to rescission upon the ground of fraud: see *Adam* v. *Newbiggin*, 13 A. C. 308; *Erlanger* v. *New Sombrero Co.*, 3 A. C. 1218. The remedy is, of course, an equitable one in its origin, and involves the corresponding duty to do equity to the other side. This, however, only means such equity as the Court may regard as necessary to substantially restore the parties to their original positions.

Counsel for the defendant also contended that actual fraud is not specifically found by the learned trial Judge. This argument, however, seems to me to be not based upon a reasonable interpretation of the language of the judgment. In the course of his remarks the learned Judge said: "I reluctantly reach the conclusion that the plaintiff was overreached in the deal. The defendant had resided upon the premises all his life. He planted the orchard. He was living on the farm when the advertisement was put out, and the letter written. The letter of 6th October, was written in answer to a request for particulars to be used in an endeavour to effect a sale. He must or should have known that the representations were false." This language, whose

mildness perhaps gives occasion for the argument, was doubtless employed from a humane impulse, to not unnecessarily hurt the feelings of a man of the age and apparent respectability of the defendant Wellington Boulter, but read in the light of the pleadings where the issue presented was plainly one of actual fraud. could only mean that the representations were not merely false, but false to the knowledge of the defendant, and were made for the purpose of deceiving.

"Overreach" in the Century Dictionary is given as one of its meanings "to deceive by cunning, artifice or sagacity, cheat, outwit." That the learned Judge had quite in mind the distinction between the nature of the misrepresentations which are sufficient to justify rescission before, and those which must be established after completion, is further made clear by the authorities to which he refers.

Finally the defendant contends that the sale of the lands and chattels were separate transactions, but I agree with the learned Judge, in thinking that they were not. Even the defendant Wellington Boulter admits in answer to his own counsel as to the time when the purchase of the stock and implements was first spoken of, that he thought it was on the day they went to Picton to have the agreement of sale prepared, saying "he said I want to buy all as a going concern, in fact I am going to buy lock, stock and barrel . . ."

In my opinion the appeal should be dismissed with costs.

HON. MR. JUSTICE MACLAREN:—I agree.

HON. MR. JUSTICE MEREDITH:—It seems to me to have been well proved at the trial that the plaintiff was induced to purchase the property in question by false statements as to very material facts made to him by the defendant, for the purpose of inducing him to purchase, and made with full knowledge of their falseness; and that, I have no doubt, was the finding of the trial Judge, unhesitatingly reached, however it may have been expressed.

The abstraction of the 30 acres, or whatever the actual quantity may be, from the land offered; and the great difference between truth and assertion as to the orchard and as to the quality of the land, are things unexplainable and inexcusable, especially in dealing with one who was an entire stranger, not only in the locality, but indeed in this part of the Empire, and one who was brought into the transaction through the innocent interposition of a judicial officer of

the locality, which might very well put him off his guard. They were not in any sense mere matters of opinion or of mere commendation; they were material and essential.

Nor can I find in the evidence anything sufficient to prevent a rescission of the contract on the ground of fraud; there could be no affirmance binding upon the plaintiff in the absence of knowledge of such things as gave a right to rescind. The sale of the future produce of the orchard, made as it was, was not intended to be more than a personal contract, and it has been wholly annulled by the parties to it. There was no intention to make any election or to waive any right. But all this is immaterial, because damages have been assessed by the trial Judge at a reasonable amount and the defendant prefers a rescission, which the plaintiff also prefers.

I would dismiss the appeal.

COURT OF APPEAL.

JUNE 18TH, 1912.

HYATT v. ALLEN.

3 O. W. N. 1401.

Company—Sale of Plant and Assets—Secret Profit by Directors—Action for Accounting—Fraud—Directors Held Trustees—Reference to Take Accounts—Costs.

An action for a declaration that defendants were trustees of the moneys and other considerations received by them from the Dominion Canners Ltd., for the use and benefit of the shareholders of the Lakeside Canning Co., and that the interests of all parties interested might be ascertained, for a full discovery and account of the profits received by defendants, etc. Defendants received from Dominion Canners $33,750 in cash and $15,250 in preferred stock in one certificate issued in the name of defendant company, and $15,000 of stock issued in another certificate also in the name of defendant company. They subsequently apparently received further consideration in cash, which Dominion Canners, Ltd., paid for portions of the property of defendant company purchased by it, but not included in option.

SUTHERLAND, J., *held*, 18 O. W. R. 850; 2 O. W. N. 927, that there should be judgment for plaintiffs, declaring that the individual defendants were trustees for plaintiffs of the shares in defendant company respectively transferred by plaintiffs to individual defendants, and that plaintiffs were entitled to be paid all profits realised by individual defendants, in respect of such shares, and directing a reference to Master at Picton to enquire and state what profits said individual defendants had respectively realised as to such shares.

DIVISIONAL COURT, 20 O. W. R. 594; 3 O. W. N. 370, varied above judgment by declaring that the *cestuis que trustent* should not include one Bately nor anyone not a party to the record. The scope of the reference before the Master was extended so he could enquire and report the amount which each of the plaintiffs should receive, and that in such enquiry the defendants should be entitled to shew any ground by way of estoppel or otherwise, why any particular plaintiff should not receive money. Otherwise the appeal was dismissed with costs.

COURT OF APPEAL dismissed defendants' appeal from above judgment with costs.

An appeal by the defendants from a judgment of Divisional Court, 20 O. W. R. 594, 3 O. W. N. 370, affirming, with two variations, a judgment of HON. MR. JUSTICE SUTHERLAND, 18 O. W. R. 850; 2 O. W. N. 927, at the trial.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LENNOX.

J. W. Bain, K.C., and M. Lockhart Gordon, for the defendants, appellants.

E. Gus Porter, K.C., and J. A. Wright, for the plaintiffs, respondents.

HON. MR. JUSTICE GARROW:—The action was brought by 22 shareholders in the Lakeside Canning Co., Limited, on behalf of themselves and all the other shareholders, except the defendants, against the defendants other than the company, to obtain certain declarations, and accounts in respect of certain transactions, whereby it was alleged that the defendants, the directors, obtained from the other shareholders transfers of their shares.

The facts are set out very fully by Sutherland, J., in his judgment, and need not be here repeated at any length.

The questions with which he had to deal were chiefly questions of fact depending upon contradictory evidence and involving the credibility of the witnesses, and that being so I am unable to see any satisfactory ground upon which we in this Court could reverse his main conclusions, especially as they have since received unanimous endorsement in the Divisional Court.

The action is essentially one to compel the defendants (other than the company, which upon the argument of the appeal was by consent dismissed from the record), to account for the proceeds received by them as the alleged agents for the plaintiffs upon the sale or other disposal made by them of the plaintiffs' shares.

The case in no way, in my opinion, turns upon a nice question of the relation ordinarily existing between a director and an individual shareholder, such as was considered in *Percival* v. *Wright*, 1902, 2 Ch. 421, upon which counsel for the appellants relied. It may well be that under ordinary circumstances there is no fiduciary relation existing between a director and a shareholder, although the range of the judgment in that case seems to be somewhat wider

than the very simple facts required. But there is certainly nothing to prevent a director from becoming the agent of the shareholders under special circumstances and thus establishing such a relationship. And that apparently is exactly what occurred in this case.

The recital in the option which the shareholders signed reads as follows: "Whereas the directors of Lakeside Canning Company, Limited, parties of the first part, have interviewed Garnet P. Grant of Montreal, representing certain merger interest in connection with the combining of the principal canning plants of Ontario, for the purpose of purchasing the plant of the Lakeside Canning Company, Limited, and whereas it becomes necessary for the said directors to secure the consent of the majority of the shareholders of the said company in order that they may transact any business relating to the sale of the plant and property of the said company." At what time the scheme on the part of the defendants to acquire the shares for themselves originated is not clear, but that there was such a scheme is, as was found by the learned trial Judge, beyond question. And there are circumstances which suggest that it may even have at least been in their minds before the date of the options. The recital before quoted, however, in the light of the circumstances, quite justified the shareholders in assuming the contrary, and in believing that the obligation and duty which the defendants were thereby undertaking was simply that of agents, "in order," to quote from the recital, "that they may transact any business relating to the sale of the plant and property of the said company." The options might well under the circumstances have been regarded by the plaintiffs as a power and instruction to the defendants to sell the assets of the company at a price to realize for the shareholders, at least, the sum per share mentioned in the options. And if that is a proper assumption, and more was realized, the surplus would, of course, in that case also belong to the shareholders.

Between the giving of the options, and the so-called exercise of them by the defendants in the following month of February, no bargain of any kind had been made between the plaintiffs and the defendants. The transfers then put before the plaintiffs for execution were prepared by the defendants, and were executed in blank as to the purchasers' names. There was nothing, therefore, upon the surface to indicate to a careful, or even to a suspicious shareholder, that

the options were being exercised otherwise than in pursuance of the original intention.

The defendants' position would have been stronger if they had been less reticent, for from a perusal of the evidence it is clear that as little information as possible of the position of affairs was conveyed to the shareholders, who in no sufficient way had it brought home to them, that instead of a sale to the merger, they were selling out to the directors. Did the directors at that time know that in all probability the deal with the merger was going through? There is much reason to believe that they did. Negotiations had been steadily in progress from the previous month of November and had apparently so advanced that in a letter dated January 25th, 1910, from G. P. Grant, who represented the merger, to the defendant A. Allen, a leading director, he says "Mr. Drury has been asked to attend to the necessary searches . . . in connection with your agreement with me to enter the cannery merger."

Details may not have been arranged perhaps, and there were titles to be searched and appraisements to be made before the transaction was closed. The option to Mr. Grant on behalf of the merger did not expire until early in March, and in the meantime these preliminaries were progressing in apparently regular course. So much so that by the 25th of February all the documents necessary to carry out the sale to the merger had been executed ready for delivery over on payment of the price. Then there is a total absence of any cause whatever, other than the suggested one of obtaining a profit at the expense of the other shareholders, why the defendants should at that particular time have taken up the shares belonging to the plaintiffs. They, it is true, did so with money of their own, obtained from the Standard Bank, but the notes which were discounted to raise it were, as was probably anticipated, retired out of the proceeds subsequently received from the merger when the deal went through. So after all the transaction was not so bold a financial venture as it might seem to an outsider.

The learned trial Judge found a case of actual fraud against the defendants, a conclusion with which I do not quarrel. But, as was pointed out on the argument, it is not necessary to go quite so far, for the moment it appeared, as in my opinion it clearly did, that under the original option given by the plaintiffs to the defendants they became agents for the plaintiffs in the transaction, a fiduciary re-

lationship was established, which on well-known legal principles prevented the agents from obtaining a profit at the expense of their principals. See *Ex parte Larkey*, 4 Ch. D. 566 at 580; *Parker* v. *McKenna*, L. R. 10, Ch. 96 at 118, and the cases collected in Kerr on Frauds, 4th ed. (1910), at p. 155 *et seq.*

It was argued by counsel for the appellants that the action is not a class action, and perhaps strictly speaking it is not, but the record may be so amended as to eliminate that feature, as in effect was done by the judgment of the Divisional Court. It was further objected that there is misjoinder, because the causes of action are said to be several and not joint. This objection, however, even if well-founded, which I am inclined to doubt, is not one which in the interests of justice I feel any call to give effect to, or even to seriously consider at this stage of the litigation.

The appeal should, in my opinion, be dismissed with costs.

Hon. Mr. Justice Meredith:—For all substantial purposes it is immaterial whether this action was regularly brought and carried on, in name, as a class action; or whether, if regularly brought there should have been individual separate actions. It is quite too late to trouble anyone with any such questions at this stage of the case; all that need be said is that if irregular the irregularity has had its uses—needless multiplication of costs has been avoided and the true end, justice to all parties, quite as well reached. The addition of the company as a party was irregularly made and irregularly maintained throughout; no claim was ever made against the company; no defence ever made; the whole thing amounts to nothing more than the interjection of the name of the company into the style of cause; and in truth the company has never been represented in the action. Its name should be struck out; and that counsel on both sides agreed to before the commencement of the argument of this appeal. If the actions had been brought separately an order would no doubt have been made staying all but one, or some such steps as would have brought about final results in the least costly way possible, would have been taken.

The whole, and the simple question, upon the merits, is whether the transactions in question were out and out sales or were really merely transfers of the stock in question in trust or agency for transferors in regard to any future benefit

arising from the stock over and above that which they received at the time of the transfer.

The findng in the Courts below was that this was a case of trust or agency and not a sale; and that finding, however expressed, is well supported by the evidence, not only the testimony of the witnesses, but also the writings. Indeed there can be no reasonable doubt, in my opinion, that the shareholders generally were brought into the transaction and concluded it as one of trust or agency not of sale, and relief should be granted accordingly.

The appeal should be dismissed; the name of the company should, as agreed upon, be struck out of the action; the reference to the proper officer should be to ascertain and state what, if any, sum is due from the defendants to each of the plaintiffs in respect of the transactions in question respectively on the footing of a trust or agency except in such cases, if any, as shall appear to have been out and out sales.

The appellants should pay the costs of the appeal.

COURT OF APPEAL.

JUNE 18TH, 1912.

STOKES v. CURLED HAIR CO.

3 O. W. N. 1414.

Negligence—Servants—Dangerous Machine—Infant Injured—Absence of Warning—Questions not Raised at Trial.

Action by plaintiff, an employee of defendants for damages for an injury to his hand while in such employment in the operation of a dangerous machine called a picker in use in defendants' factory. The alleged negligence consisted in putting plaintiff to work temporarily upon this machine without instructing or warning him of the danger involved in its use, which was not apparent.

SUTHERLAND, J., at trial, entered judgment for plaintiff for $1,200 and costs upon the findings of the jury.

COURT OF APPEAL affirmed above judgment with costs.

An appeal by the defendant from a judgment of HON. MR. JUSTICE SUTHERLAND at the trial in favour of the plaintiff, an infant, in an action for negligence.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

D. C. Ross, for the defendants, appellants.

J. E. Jones, for the plaintiff, respondent.

Hon. Mr. Justice Garrow:—The action was brought by the plaintiff, an employee of the defendant, to recover damages caused to him by an injury to his hand while in such employment in the operation of a machine, called a picker, in use in the defendant's factory at the city of Toronto.

The case came on for trial before Sutherland, J., and a jury, when upon the findings of the jury there was judgment in favour of the plaintiff for $1,200.

The jury in answer to questions said among other findings of no present importance, the plaintiff was injured by reason of the negligence of the defendant, which consisted in not having been properly instructed and warned of the danger, and that there was no contributory negligence.

There was, in my opinion, reasonable evidence to warrant these conclusions. By consent a view of the machine in action was had by the jury during the trial. They were thereby placed in a position, in which we are not, to consider the evidence and to see whether or not the machine was a dangerous one and liable to clog, as the plaintiff alleged.

The plaintiff had not been hired to operate the machine in question. From the beginning of his employment on July 17th until the accident on the 5th of September, he had only actually operated it occasionally for very short periods at a time, apparently as a sort of stop-gap. On the day of the accident his evidence is that Mr. Collins the foreman came to him where he was engaged on other work and said: "You had better go on this machine while Harvey goes down and cleans the office." He had never seen the inside of the machine and did not know that at the back where the injury occurred there were rapidly revolving spikes. And he says he was never instructed in the use of the machine or warned of the danger of doing what he did. These spikes it appears could only be separately distinguished when the machine was at a standstill. When rapidly revolving as it did when in use their individuality was lost, and the whole resembled a solid revolving metal cylinder. It is under the circumstances a reasonable assumption that the machine was a dangerous machine to an operator ignorant of its construction, and that proper instructions as to its use and management were necessary for the reasonable safety of the plaintiff. The duty to instruct is really not denied. No objec-

tions to the charge of the learned Judge dealing with that portion of the subject were made. But the defendant among other things contended that the plaintiff had been properly instructed, relying apparently upon the evidence of the manager Mr. Griffin. But even Mr. Griffin does not pretend that he gave any particular instructions about the use of the machine to the plaintiff. What he says is more by way of general instructions, that no man or boy would be allowed to feed the machine who did not have some acquaintance with it, and, speaking of the plaintiff particularly, "he had his instructions for to not have anything to do with machinery until he became properly acquainted with it." The plaintiff had been ordered by the foreman to take charge of the machine while another boy who had been in charge was sent to clean the office. There is no pretence that Mr. Collins gave any instructions or had been directed by the defendant to do so. So that the only issue presented at the trial as to instruction was that between the plaintiff's evidence on the one hand and the evidence of Mr. Griffin on the other. And the jury quite properly, I think, accepted the plaintiff's version.

Before us a new issue was presented by counsel, namely, that as the defendants' operations are carried on by and through its manager and foreman, it cannot be liable for a failure to instruct if these gentlemen were competent. And reference was made to the recent case of *Young* v. *Hoffman*, 1907, 2 K. B. 646, where most of the modern cases are discussed. At the trial in that case it was proposed by counsel for the defendant to raise the issue now for the first time raised in this Court, but the trial Judge refused. His refusal was reversed by the Court of Appeal and a new trial directed. And it was declared to be the law that the duty of the master to instruct may be delegated to a proper and competent person occupying the position of superintendent or foreman, as has been held in the earlier case in the same volume of *Cribb* v. *Kynoch Limited*, at p. 548. What would have been the result in this case if the point now presented had been raised at the trial we do not know, but that it was not intended to be raised is very clear, I think.

Upon the whole I do not think that we should now interfere, which we could only do by granting the doubtful indulgence of a new trial. The plaintiff received a very severe injury, practically destroying his hand. And he has been awarded a very moderate sum indeed for such a serious in-

jury. The case bears no resemblance in my opinion to the case of *Smith* v. *The Royal Canadian Yacht Club*, so much relied upon by the learned counsel for the defendant. The plaintiff there had been guilty of inexcusable negligence not through ignorance, for he knew what he was about. Here the plaintiff, ignorant of the danger, was trying to unclog the machine in order to proceed with his employers' work. Of the danger of doing so while the machine was in motion he had never been warned and was wholly ignorant, as all the circumstances shew.

I would dismiss the appeal with costs.

HON. MR. JUSTICE MEREDITH:—The machine in which the plaintiff's hand was injured would, according to the testimony for the plaintiff, occasionally become clogged, and it was, according to such testimony, in an attempt to remove the hair which caused such a clogging on the occasion in question that he was hurt. As the plaintiff's injury shews, it was a dangerous procedure, attempting in that way to clear the machine; though it might reasonably be thought a method which might be attempted by anyone ignorant of a better method and ignorant of the danger.

The jury have found that the defendants were guilty of a breach of duty towards the plaintiff in putting him at the work he was engaged in when, and in which, the accident happened, without instructing him in the work, and warning him of the danger; and that such negligence was the cause of the plaintiff's injury. If the findings be true the plaintiff has a good cause of action; and this appeal must be dismissed; and there was, undoubtedly, I think, some evidence upon which reasonable men could so find.

The testimony of the foreman, who directed the plaintiff to do the work, makes it plain that he gave no such instructions or warning. The testimony of the manager is ambiguous and I have no doubt deals with what ought to have been done rather than what was done. But, in any case, the question would have been one for the jury on a conflict of testimony.

It was argued that the plaintiff was told that he should not go behind the machine, and that, as he had to go behind to get his hand in the machine, his injury was a result of a disobedience of his orders; but the evidence does not support the contention, and the jury have found against it.

Whether the plaintiff would, or would not, fail in this action, if the testimony of the manager adduced for the purpose of shewing that the plaintiff voluntarily incurred the risk were true, need not be considered, because it was contradicted by the plaintiff, and the jury have found expressly in his favour upon that very question.

I would dismiss the appeal.

COURT OF APPEAL.

JUNE 18TH, 1912.

JOHNSTON v. OCCIDENTAL SYNDICATE LTD.

McDOUGALL v. OCCIDENTAL SYNDICATE LTD.

3 O. W. N. 1384.

Judgment — Foreign — Action to Recover on — Defence — Fraud — Obtained in Yukon Territory.

Action on a judgment obtained against defendant in Yukon Territorial Court, where defendant had appeared in the action. The action was for services rendered by plaintiff which defendant claimed had been rendered for another company.

FALCONBRIDGE, C.J.K.B., *held*, 20 O. W. R. 67; 3 O. W. N. 60, that the fraud relied on must be something collateral or extraneous and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counter-statements by the other side and the whole adjudicated upon by the Court and so passed on into the limbo of estoppel by the judgment. Judgment for plaintiff for $4,918, with interest and costs.

COURT OF APPEAL affirmed above judgment, holding that even if defendant's contention were admitted this was not such fraud as would void the judgment.

Jacobs v. *Beaver*, 17 O. L. R. 496, 12 O. W. R. 803, referred to.

Appeal by the defendant from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., 20 O. W. R. 67; 3 O. W. N. 60, without a jury, who found for the plaintiff.

The appeal to the Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE, HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE LENNOX.

H. W. Mickle, for the defendants, appellants.

R. C. H. Cassels, for the plaintiff, respondent.

HON. MR. JUSTICE GARROW:—The action was brought upon a judgment recovered by one Frederick Charles Johnston against the defendant, an English joint stock company, in the Territorial Court of the Yukon Territory, which was assigned to the present plaintiff after the action commenced,

and by an order of revivor, dated the 12th of December, 1911, the action was directed to be continued in the name of the present plaintiff.

The judgment in the Yukon Court was recovered in the month of February, 1907. The defendant appeared to the writ of summons and was represented by counsel before the Court on the motion for judgment. Mr. Archibald Baird Craig its managing director, then in Canada, made an affidavit of the facts from the defendant's standpoint which was read and used upon the motion. The defence suggested in that affidavit is not that the then plaintiff's claim was entirely unfounded, but that if he had a claim at all it was not against this defendant, but against another company called the Klondike Eldorado Company Limited. And upon this affidavit, as well as upon the other materials before him, the learned Judge of that Court found in favour of the plaintiff.

Fraud is not explicitly pleaded upon this record. An application to amend so as to set up a defence of that nature was made at the trial and was reserved by the learned Chief Justice. The application is now renewed and as it must depend for its success upon the evidence already given, I see no objections to formally granting it.

The state of the pleadings, however, is not the defendant's main difficulty, which goes much deeper. And his difficulty is this; he is not by the evidence seeking to set up such a fraud as would avoid the judgment under the principles discussed and approved in *Jacobs* v. *Beaver,* 17 O. L. R. 496, 12 O. W. R. 803, recently before this Court, to which the learned Chief Justice refers in his judgment, but practically to have the question which was before the Yukon Court, and upon which that Court necessarily passed in awarding judgment in favour of the plaintiff, tried over again. What is presented is really not, properly speaking, a case of fraud at all.

The Klondike Eldorado Company by which Johnston was apparently originally employed, was connected with and largely owned by the defendant, and those interested in the defendant as shareholders, in addition to which the defendant was a large creditor for money advanced to the former company. The Klondike Eldorado Company became, on the evidence, practically moribund some years before the action in the Yukon Court was commenced. But it had owned certain mining claims considered of value, which were in charge of Johnston, who apparently continued in such charge for the benefit of those interested, in other words

for the defendant's benefit as well as of any other in like case, who were interested as creditors of, or shareholders in, the Klondike Eldorado Company. And out of such charge, for the services rendered and advances made, the claim actually sued upon arose. The story is somewhat meagrely told, but it is quite apparent that there were communications from John Craig, a director of the defendant in Canada, to Johnston, by virtue of which he might well believe that he was if not in the defendant's actual employment, to look to it for payment. The defendant now attempts to repudiate these communications, and also to repudiate Johnston's services, not by saying they were not rendered, but that they were rendered to the moribund Klondike Eldorado Company.

The letters subsequently discovered in a barrel, upon which stress is laid, merely support what cannot be denied, that Johnston was originally employed by the Klondike Eldorado Company. They in no way shew, or tend to shew, that the claim subsequently made upon the defendant was not made in good faith, or even that had the letters been before the Yukon Court the result would probably have been different. What that Court had to pass upon after reading as it must be assumed was done, the affidavit of A. B. Craig, was whether regarding the subsequent correspondence with John Craig and Mr. McKee, the then plaintiff had made out a case upon which to charge the defendant.

The conclusion reached may have been erroneous, or even unjust; with that we have nothing to do. The point is that it was not, so far as appears, obtained by any fraud practiced upon the Court by the plaintiff, for which reason I agree with the judgment of the learned Chief Justice.

The appeal should be dismissed with costs.

HON. MR. JUSTICE MEREDITH:—If the judgment sued upon were obtained by fraud the Courts of this province will not give effect to it; that is now quite settled law of the province, as well as generally, whatever formerly may have been the view of this Court upon the subject.

So the single question for consideration in this case should have been and is one of fact, whether the judgment in the Yukon Court was obtained by fraud.

From the whole evidence adduced in this case, it appears that the plaintiff had a good cause of action, but that he was in doubt as to his real debtor; one McKee had employed him, but apparently McKee was acting for the company whom

the defendants say are the real debtors, or else for the defendants; and these two companies seem to have been in some way related to one another; the one is said to have been the outcome of the other. The plaintiff first threatened McKee with an action, asserting that in any case he was answerable for the debt; subsequently he sued the defendants for it in the Yukon Court and there recovered judgment for the amount of it against them in summary proceedings.

It is quite clear that there was no fraud in the sense of a pretence of a debt, which had no existence in fact; nor can I think it proved that there was in the assertion of a debt on the part of the defendants knowing that they were not the real debtors, or in asserting that they really were, when in truth, he did not know whether they were or not; and, however much the plaintiff may have been mistaken in any respect, if at all as it does not appear to me to be proved that he was dishonest in any of the respects, fraud in obtaining the judgment has not been established; and so the action was rightly dismissed.

Whether the judgment in the Yukon Court ought to have been made upon a summary application; and, if so, whether it ought to be opened up now and sent down to a trial in the usual way in view of all the circumstances of the case, especially the subsequently discovered evidence, are questions for the Yukon Courts, where justice between the parties will be done if they are applied to.

COURT OF APPEAL.

JUNE 18TH, 1912.

CUNNINGHAM v. MICHIGAN CENTRAL Rw. CO.

3 O. W. N. 1395.

Negligence—Railway—Trespasser on Tracks Injured—Warning of Approach of Engine.

Plaintiff, a brakesman in employ of Toronto, Hamilton & Buffalo Rw. Co., on arrival at railway yard at Waterford of a freight train of defendants, went through the yard to sort out and check up certain cars to be transferred to a train of his company, and while thus engaged, was struck by an engine in charge of defendants' servants and badly injured. He brought action for damages, alleging negligence on part of defendants' servants in driving engine at excessive speed and neglecting to give proper warnings of its approach. The evidence shewed that the work in which plaintiff was engaged was unnecessary and unauthorized, being done solely for his personal convenience, and that all warnings required by statute had been given by the crew of the engine.

TEETZEL, J., entered judgment for plaintiff for $1,500 and costs, upon the findings of the jury that proper warnings had not been given.

COURT OF APPEAL allowed appeal of defendants therefrom and dismissed action, both with costs.

An appeal by the defendants from a judgment of HON. MR. JUSTICE TEETZEL, upon the findings of a jury in favour of the plaintiff, a brakesman employed by the Toronto, Hamilton and Buffalo Rw. Co., who, while engaged in checking cars for his employers, was struck by an engine in charge of the defendants' servants, and injured, in an action for damages for his injuries. The jury found negligence, and assessed the plaintiff's damages at $1,500, for which sum he was awarded judgment with costs.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

D. W. Saunders, K.C., and A. A. Ingram, for the defendants.

D. L. McCarthy, K.C., and J. G. Gauld, K.C., for the plaintiff.

HON. MR. JUSTICE MEREDITH:—It seems to me to be impossible to support the judgment in this case, directed to be entered in the plaintiff's favour at the trial.

In the first place there is no evidence of any duty to the plaintiff, on the part of the defendants, the breach of which had anything to do with his injury. He was in the place where the accident happened without the leave or knowledge of the defendants, as far as the evidence shews. The work he was engaged in was premature; he had no right to interfere with the cars in any way until they were delivered by the defendants to his masters, the other railway company. That which he was doing was being done for his own convenience, and was at best, but only a cursory glance at cars which might, and probably would, be so delivered in due course, a glance which might, and no doubt would generally, aid in the convenient disposition of some of the cars after such delivery in due course. There is no evidence of any duty, or right, on the part of the other railway company to interfere, in any manner, with any cars, such as those in question, until they were duly delivered; the delivery being made by the transfer of way-bills, through the station-master, or the night operator performing his duty, and shunting the cars from the defendants' lines into the line of the other railway company. So that there seems to

me to be no lawful justification for the plaintiff, or any other of the servants of the other railway company, going among the tracks of the defendants for any purpose in connection with these cars. But it was said that it had been habitually done by them, and that from such conduct it ought to be conclusively presumed that it was done with the leave of the defendants. There is, however, no such evidence sufficient, in my opinion, to support even a *prima facie* case of such leave. The whole evidence is that of the plaintiff who said that he had done the same sort of thing, in the night-time, for several months; and that of a brakeman of the defendants' that he had "seen them come out different times there." Surely there is in this no reasonable evidence of any knowledge on the part of the defendants of the plaintiff's actions in this respect, not to speak of acquiescence in it amounting to even leave, much less a right. The plaintiff then being really a trespasser upon the defendants' property, it cannot be reasonably contended that there was a breach of any duty towards him.

Assuming, however, that the plaintiff had a right to be where he was, on what ground can it be said that the defendants were guilty of negligence towards him? The jury have said, in not slowing speed, and giving such warning as ringing the bell or blowing the whistle of the engine of the train by which he was injured on approach to station or yard limits. It is not proved, nor is it now contended that any "warnings" which legislation provides for were not given; the evidence is that they were given; so that that which the jury must have meant was additional warning, because the warnings required by statute and given were given on approaching the station or yard limits; it may be that they meant within the yard limits, though there is no evidence that the bell was not continuously rung. Having given all the warnings required by statute-law, and the railway being fenced, no jury has a right to be a law-maker in each particular case, and in effect overrule legislation without any peculiar circumstances requiring a reduction of speed. It ought not to be the law that each jury may in each particular case determine what ought to have been the speed of a railway train though there are no kind of peculiar circumstances in the particular case requiring a lessening of the statute-permitted speed.

Again, the plaintiff testified that if the bell were ringing he could not hear it; he said: "You could not hear a bell

very far coming that distance;" and two witnesses, both trainmen, and one, the engineer of the train on which the plaintiff was employed, testified that immediately after the accident the plaintiff said that he saw the train coming, but mistook the place where he was standing, thinking there was a track between him and the west-bound line on which the oncoming train was; that is that his own mistake, not any want of warning, caused his injury. The most that he would testify to, opposed to this, was that he had no recollection of saying it, and that if he did it was untrue; so that I cannot think there was any reasonable evidence that the accident was caused by the speed of, or any want of warning from, the train by which he was struck. His statement at the time is the only reasonable one of the cause of the accident, having regard to the fact that he was an experienced brakeman, with a knowledge of the yard, and of the movement of trains at the time, especially of the incoming, about that time, of the fast train by which he was struck; in the noise of its oncoming, after signaling its approach, and in the glare of the head-light of the engine.

I would allow the appeal and dismiss the action.