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HON. MR. JUSTICE MIDDLETON. APRIL 8TH, 1913.

LUCIANI v. TORONTO CONSTRUCTION CO., LTD.

4 O. W. N. 1073.

Negligence — Fatal Accidents Act — Right of those Entitled to Sue under to Appoint Attorney to Sue for them — Action by Infant by Next Friend—Action Brought in Own Right — Letters of Administration—Refusal of Stay to Obtain — Statutory Limitation—Dismissal of Action.

MIDDLETON, J., *held*, that an infant has no right to bring an action by a next friend as attorney or assignee of another.

That those entitled under the Fatal Accidents Act to bring an action must bring it themselves; they cannot clothe others with the right to bring action.

That where an infant brings suit in his own name and after the expiration of the statutory limitation applies to have the action stayed in order that he may obtain letters of administration, the Court should not grant such leave as it would have the effect of depriving defendants of the benefits of such limitation.

Dini v. *Farquhar*, 8 O. L. R., considered.

Motion by the defendants for an order under Consolidated Rule 261, dismissing the action upon the ground that on the statement of claim the action appears to be unfounded and vexatious.

The plaintiff, an infant suing by his next friend, alleged that he sues on behalf of his father and mother for damages by reason of the death of his brother, a labourer said to have been killed by an explosion of dynamite—which he was thawing—owing to negligence and an improper and defective system in use by the company.

J. Grayson Smith, for the defendant.

D. C. Ross, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The accident was alleged to have taken place on the 3rd of December, 1911. The writ was not issued until shortly before the expiry of

the year; that is, on the 22nd of November, 1912. It is endorsed laconically that the plaintiff's claim is for damages for negligence. The statement of claim, not delivered until the 10th of December—after the expiry of the year—is the first intimation that the claim is for anything other than personal injury to the plaintiff himself.

On the 2nd November, 1912, the father and mother, in consideration of one dollar, assigned to the plaintiff all damages they were entitled to receive by reason of the death of the brother; as his absolute property. It is conceded that this assignment is inoperative; and it is not referred to in the statement of claim. On the same day the father and mother constituted the plaintiff their attorney to sue to recover the damages in question. It is said that the existence of this document makes this suit by the father and mother. In the alternative it is said that the plaintiff will, if the action is delayed until he is of age, apply for letters of administration to the estate of his deceased brother and that his title as administrator will relate back to the death.

I do not think that either of these contentions is entitled to prevail. The person in whom the cause of action is vested, and not his attorney or agent, must be the plaintiff.

Dini v. *Farquhar*, 8 O. L. R. 712, undoubtedly determines that where the plaintiff brings his action as administrator it is sufficient to support the acton if he can produce letters of administration issued at any time before the trial; the administration relating back to the death; but it is clear from all the cases cited that it is essential that the action should have been brought as administrator; the production of the letters of administration being merely proof that at the hearing the plaintiff fills the representative character alleged. There is no case which goes to shew that a plaintiff suing in his own right can succeed upon a cause of action vested in the administrator of another, merely because he produces at the hearing letters of administration constituting him the administrator of that other.

The plaintiff is an infant suing by next friend; and, as I understand the practice, such form of suit is only authorised with respect to an action where the right is vested in the infant personally. This plaintiff has no right, as he is not within the provisions of the statute.

The plaintiff urges that the action should be allowed to proceed, being stayed if necessary until he attains his majority, when he will take out letters of administration. I would have no hesitation in allowing any necessary delay if I thought it would help the plaintiff. The difficulty is that the defendants are only liable to an action by an administrator. They have been sued by one who is not and who does not claim to be an administrator, and who is not the person *prima facie* entitled to the grant.

In *Chard* v. *Rae*, 18 O. R. 371, the Chancellor apparently takes the view that this benevolent fiction by which the administration is related back has no application as against a statutory limitation, even when the plaintiff purports to sue as administrator. *A fortiori*, I cannot here allow the plaintiff to clothe himself with a title he does not now possess, and then permit an amendment in assertion of a title which he does not now assert, so as to deprive the defendants of the protection which the statutory limitation has afforded them.

The same reasoning answers the suggestion made by the plaintiff that he should now be at liberty to remodel his action by substituting his parents for himself as plaintiff. This could only be done on terms that the action should be deemed to be brought as of the date of the amendment; so that the plaintiff would not be helped.

Costs will probably not be asked.

HON. MR. JUSTICE LENNOX. APRIL 8TH, 1913.

YORK PUBLISHING CO. v. L. COULTER & WAYSIDE PUBLISHERS LTD.

4 O. W. N. 1091.

Injunction — Interim Order — Balance of Convenience — Use of Plaintiff's Mailing Lists — Trade Name—Former Employe — Terms—Expedition of Trial.

Motion by plaintiffs for an interim injunction restraining defendants from in any way using the mailing list of subscribers to the plaintiffs' publication, from canvassing for subscribers or customers of the plaintiffs for any journal published by the defendants, from using any information which the defendant obtained as an officer or servant of the plaintiff in regard to advertisers, and from printing any journal under the name of "The Journal of Health Administration and Sociology," or under any name similar to that of plaintiffs' journal.

LENNOX, J., granted, on the terms that the trial would be expedited, an interim injunction restraining defendant, a former employe of plaintiff, from using advertising lists or information obtained from plaintiff or a name as a trade name closely resembling that of plaintiff, holding that the balance of convenience justified such an order.

Sexton v. *Brockenshire*, 18 O. R. 640, and *Dwyre* v. *Ottawa*, 25 O. R. 121, referred to.

E. E. A. DuVernet, K.C., for the plaintiffs.

J. Grayson Smith, for the defendants.

HON. MR. JUSTICE LENNOX:—That where there is serious doubt as to the rights of the plaintiff and the inconvenience appears to be equally divided between the parties the Court should not grant an injunction pending the trial was in substance the decision in *Sexton* v. *Brockenshire*, 18 O. R. 640. And in *Dwyre* v. *Ottawa* (1898), 25 A. R. 121, Chief Justice Moss said: "The rules governing applications of this kind are well settled. Where the legal right is not sufficiently clear to enable the Court to form an opinion it will be generally governed in deciding an application for an interim injunction by consideration of the relative convenience and inconvenience which may result to the parties from granting or withholding the order. And where it appears that greater danger is likely to result from granting than withholding the relief, or where the inconvenience seems to be equally divided between the parties the injunction will not be granted."

I am satisfied that greater inconvenience will result from withholding an injunction than from granting it; and

although of course the rights of the parties can only be determined at the trial enough has been shewn to enable me to form an opinion of the plaintiff's title and rights within the meaning of the cases above referred to. It is a case too in which damages would probably not prove to be an adequate remedy. *Edge* v. *Nicolls* (1911), A. C. 693, is the most interesting case I have found as to how astute the Courts are to prevent methods which are calculated to deceive or mislead customers or the public. As to what is covered by "good will" it is sufficient to refer to *Massop* v. *Nixon*, 18 Grant 453; *Curl* v. *Webster* (1904), 1 Ch. 685 and *Trego* v. *Hunt*, (1896), A. C. 7.

The plaintiffs will be at liberty to amend so as to include the Wayside Publishers Limited, and the order to be issued will restrain these defendants as well. There will be an order and injunction restraining the defendants to the extent and in the manner set out in the notice of motion herein, but the plaintiff must proceed to trial promptly, must deliver the statement of claim within two days after notice of this order, join issue promptly, and proceed to trial without delay.

The costs of and incidental to this application will be costs in the cause unless the trial Judge shall otherwise order.

HON. R. M. MEREDITH, C.J.C.P. APRIL 8TH, 1913.

RE NATIONAL HUSKER CO.

(WORTHINGTON'S CASE.)

4 O. W. N. 1077.

Company — Winding-up — Contributory — Subscription — Absence of Fraud—Loss of Patent—Evidence.

MEREDITH, C.J.C.P., dismissed an appeal by one Worthington from the order of the Master-in-Ordinary in the winding-up of a company under the Dominion Winding-Up Act, placing him upon the list of contributories, holding that there had been no fraud or misrepresentation in connection with the obtaining of the certificate.

Appeal by one Worthington from the order of the Master-in-Ordinary in a winding-up under the Dominion Winding-up Act making him a contributory in respect of $3,760 balance due upon a subscription for $5,000 stock of the company.

W. E. Raney, K.C., for the appellant.

J. M. Ferguson, contra.

HON. R. M. MEREDITH, C.J.C.P.:—The outstanding features of the litigation involved in this appeal seem to me to be inconsistent and unsatisfactory. I find it difficult to account satisfactorily for the shareholder in the former litigation being taken out of liability and the shareholder in this litigation left to bear the brunt. I am also unable to understand why the roundabout, costly and needless process of winding up the company should have been resorted to and authorised if the truth be, as it was asserted in the argument of this appeal, that there are no ordinary creditors of the company unpaid, and that these proceedings are being carried on for the one purpose of enabling the shareholder who got relief from his subscription to recover, from the shareholder who did not, the amount of the former's payment upon his stock for which he has judgment against the company; why he was not left to the more usual and direct method of doing so.

But there is no power to deal with the latter question upon this appeal; the winding-up order must be treated as a valid subsisting one, which it is: if it should not have been made, objection should have been raised before it was granted. So too as to the relieved shareholder who is prosecuting the winding-up proceedings; the judgment upon which his rights are based is a valid and binding judgment now, and must be given full effect to as such, however much one might think that if his case were to be decided now, upon the whole evidence available upon this appeal, he might very well fail.

Nor can the appellant succeed merely to make the conclusion of each case alike: nor even because one may think he has a better right to succeed than, or at least as good a right to succeed as, the other shareholder seems now to have had. The single question is whether the learned referee was right or wrong in his conclusion that the appellant is not entitled to be relieved from liability for his shares.

I am quite sure there never was any intention on the part of any one connected with the company to cheat, at any time; sincere belief in the future of the patented process was the mainspring of all that was said and done by

the patentee. The high-sounding descriptions of the process and machine set forth in the paper called—perhaps erroneously—the prospectus of the company, emanated from the professor of modern languages who was the secretary, as well as a shareholder, of the company; and were to some extent but visions, sincere ones, of the future stated as facts of the present; but visions which have not yet come to pass.

That the process and machine were things of great promise is obvious. A pea sheller had been invented and had proved to be a very successful, useful and profitable contrivance and labour saver. A corn husker was and is much needed; the patentee's invention did its work admirably, but only with small quantities, becoming soon clogged, and so being of no value for practical purposes. But having accomplished the difficult task of producing a machine that would husk well, it was but natural that it would be expected by all that the trouble of clogging could soon be overcome. The professor of modern languages with mistaken foresight described that which was to be as that which was; and to that mistake added the very prevalent mistake of the misuse of superlative adjectives and exaggerated language generally; but there was always on the part of the patentee, and for a good while on the part of the secretary, a firm belief that all that was said would surely come to pass; and the hyperbolic prospectus—if prospectus it can truly be called—admittedly had no part in inducing the appellant to subscribe, as his letters to McGaffanay plainly state.

The appellant came into the company with a knowledge that these things had not come to pass, and that a machine doing continuous good work had not then been made, but imbued with the faith that the patentee still had, but which the professor of modern languages had lost or was fast losing: a faith which I think he as well as the patentee still has, and one which it may well be is not wholly unwarranted. He came in with the very object of enabling the development of the process to the looked for successful and profitable end. There was no deceit practised on the appellant by the patentee, or by any one acting for the company; though to some extent, and of a passive character, there was I think, by the professor of modern language and his friend McGaffanay; they abstained from repudiation of their subscriptions in the hope of new shareholders coming in, who, and whose money, would either make the thing a success, with

much profit to them all, or else would be contributing losses with them, lightening their burdens.

The McGaffanay successful litigation made a final and to further efforts to make a success of the process with all the gain that that meant to those who had speculated in it: and then there was the usual rush for cover as was to be expected.

I cannot find that the appellants' subscription was procured by fraud; and, if I could, I could not but find also that his conduct proves an election, after discovery of it, not to avoid the contract. Approbation not reprobation.

Much reliance was placed, for the appellant in argument, upon the character of the patent which the patentee had, but which the company by inaction lost, but I cannot believe that the character of the patent was in any way a substantial factor in the transaction by which the appellant acquired his shares, or indeed weighed at all as an inducement to any subscriber. This is merely a defensive plank picked up out of the wreckage caused by the McGaffanay litigation. If the machine would only do continuously that which it does so well for a short time, the rush of all these subscribers would be not to get out of, but to get more, into the company.

And so I am unable to say that the learned referee was wrong on either point; on the contrary I agree with him.

The appeal must be dismissed; but, exercising my discretion in that respect, I make no order as to the costs of it.

HON. MR. JUSTICE MIDDLETON. APRIL 8TH, 1913.

CITY OF TORONTO v. WILLIAM J. HILL.

4 O. W. N. 1076.

Statute — Construction of — City and Suburbs Plans Act — 2 Geo. V., c. 43—Rule against Retroactivity.

MIDDLETON, J., *held*, that the City and Suburbs Plans Act, 2 Geo. V., c. 43, did not apply to plans in existence at the date of its coming into force.

Action for an injunction to restrain defendant, the Registrar of the county of York, from registering certain plans. By consent of counsel the motion was turned into a motion for judgment.

Irving S. Fairty, for the plaintiff.

W. E. Raney, K.C., for the defendant.

H. E. Rose, K.C., for the British & Colonial Land & Securities Co., Limited.

HON. MR. JUSTICE MIDDLETON:—The land company, though not parties to the action, appeared by counsel and desired to be heard. I allowed this, as they are the parties really concerned, and Rule 1086 relating to mandamus, appeared to me to afford a proper analogy for my guidance, as directed by Consolidated Rule 3.

The question arises under the City and Suburbs Plans Act, 2 George V. ch. 43. By that Act, assented to on the 16th of April, 1912, and coming into operation by proclamation on the 14th of May, 1912, it is provided:

"Where any person is desirous of surveying and subdividing into lots, with a view to a registration of a plan of the survey and subdivision, any tract of land lying within five miles of a city . . . he shall submit a plan of the proposed survey and sub-division to the Ontario Railway and Municipal Board for its approval," and by sec. 5 that "no plan of any such land shall be registered unless it has been approved by the Board . . . and no lot laid down on a plan not so approved shall be sold or conveyed by description containing any reference to the lot as so laid down on such plan."

The company, holding a large tract of land intended to be subdivided and sold in small lots, long prior to the passage of the Act in question had the same surveyed and subdivided, and a plan submitted to the council of the township of York for its approval. One general survey and plan was prepared, covering the entire parcel. This was the plan submitted and approved by the council. Part of the land being registered under the Land Titles Act and part under the Registry Act, it was found necessary to prepare separate plans of different sections for registration. These plans were merely copies of separate portions of the original survey. The survey and the subdivision were complete before the Act came into force; but the plans were not actually tendered for registration until after that time.

The Act does not profess to have any retrospective effect; and, apart from the general principle to be found in such cases as *Gardener* v. *Lucas*, 3 A. C. 601, "unless there

is some declared intention of Legislature, clear and unequivocal, or unless there are some circumstances rendering it inevitable that we are to take the other view, we are to presume that an Act is prospective and not retrospective." apart from that principle, it is clear from the Act itself that it is prospective. It does not purport to affect any subdivision already made or to invalidate any plans or transactions made before it came into force.

The extreme inconvenience of any other finding is evidenced by the provisions of sec. 5 which invalidates a sale according to the plan.

The action therefore fails; and I think the city should pay the costs not only of the defendant but of the company.

MASTER IN CHAMBERS. APRIL 11TH, 1913.

McNAIR v. McNAIR.

4 O. W. N. 1093.

Husband and Wife—Alimony—Interim Order—Penniless Defendant—Order Refused.

MASTER-IN-CHAMBERS refused to make an order for interim alimony against a penniless defendant resident out of the jurisdiction.

Motion for interim alimony and disbursements.

A. J. Russell Snow, for the motion.

R. McKay, K.C., contra.

CARTWRIGHT, K.C., MASTER:—The plaintiff makes affidavit that defendant once said he was worth $90,000, but no particulars are given nor any specific asset mentioned. Defendant is now at Reno in Nevada where he is engaged in procuring a divorce. His affidavit says he is wholly without means and without employment and is living on loans from his friends. Though daily seeking employment he is unable to obtain any.

Under these circumstances I do not think the case differs from *Pherrill* v. *Pherrill*, 6 O. L. R. 642. I still think as I said there: "It would be useless to make an order against a man who has no property on which it could operate and where there is no evidence as to his earning power."

When as here the defendant is out of the jurisdiction this principle seems even more applicable.

The motion is therefore dismissed, leaving the plaintiff to take the matter higher or proceed to trial as may be thought best.

HON. MR. JUSTICE MIDDLETON. APRIL 12TH, 1913.

RE JANNISON.

4 O. W. N. 1084.

Insurance—Life Insurance — Death of Beneficiary — "Surviving Children" — R. S. O. 1897, c. 203, ss. 151, 159 — 1 Ed. VII., c. 21, s. 2, s.s. 7 — 4 Ed. VII., c. 15, s. 7 — Phrase refers to Death of Testator and not Death of Beneficiary — Subsequent Gift in General Language in Will Ineffective.

MIDDLETON, J., *held*, that the phrases "survivor" and "surviving children," in the clauses as to distribution upon the death of a beneficiary in the Insurance Acts prior to the Act of 1912, had reference to the death of the testator and not that of the beneficiary.

Motion by widow of William Jannison, deceased, for payment out of Court of $1,000, being the amount of a beneficiary certificate paid into Court by the insurance company.

F. D. Davis, for the widow.

J. R. Meredith, for the infants.

HON. MR. JUSTICE MIDDLETON:—William Jannison was married three times. During the life of his second wife, Chattie, he had the insurance in question made payable to her. She died in 1902, childless. On the 3rd of October, 1904, the deceased married the present wife; and on the 1st April, 1905, he made his will, by which he gave all his property, "including all my insurance policies at present in force and that I may hereafter have," to the applicant.

On the 16th January, 1907, the infant was born. The testator died on the 29th February, 1912, leaving him surviving the applicant and the infant, his only child.

The insured having died before the Insurance Act of 1912, came into force, the rights of the parties must be determined on the earlier legislation. Under the Insurance Act, R. S. O. 1897, ch. 203, sec. 151, as amended by 1 Edw. VII., ch. 21, sec. 2, sub-sec. 7, if all beneficiaries named

in an insurance contract die during the life of the assured "the insurance shall be for the benefit in equal shares of the surviving infant children of the assured, and if no surviving infant children then the benefit of the contract and the insurance money shall form part of the estate of the assured." This section is general, and applies to all beneficiaries, whether within the preferred class or not.

Some confusion existed by reason of the failure to make a corresponding amendment in sec. 159, dealing with preferred beneficiaries; but the two sections would have to be read together, and this amendment would serve to supplement the provision of sec. 159, sub-sec. 8, which did not cover the case of the death of all beneficiaries, but only the case of the death of some of the beneficiaries.

This was the position of the law when the second wife died; and as there were then no children, the policy would form part of the estate of the assured, unless this expression "surviving infant children" refer to the death of the assured.

In 1904, before the marriage took place, the law was again amended, and sub-sec. 8 of sec. 159 was remodelled by 4 Edw. VII., ch. 15, sec. 7; a provision being added recognizing the amendment of 1901, as applicable to preferred beneficiaries and providing that in default of any new apportionment upon the death of the preferred beneficiary the benefit shall be for the survivors and if "there is no such survivor the insurance shall be for the benefit in equal shares of the children of the assured, and if no surviving children of the assured then the assurance shall form part of the estate of the insured."

I have come to the conclusion that the whole context indicates that the words "survivor" and "surviving children" relate to the death of the insured and not to the death of the beneficiary. The destination of the insurance money upon the death of the insured is what is being dealt with by the Legislature. If the beneficiaries have then predeceased the testator, the insurance money, which has become a trust fund, is to be given to those named by the statute; the survivor of any beneficiaries named, or, if there is no survivor, then to the children.

All this is subject to the power conferred by the statute upon the insured. He may, by an instrument in writing attached to, endorsed on, or referring to and identifying

the policy by number or otherwise, deal with the policy as he sees fit, so long as he does not transfer the benefit outside of the class of the preferred beneficiaries.

Re Cochrane, 16 O. L. R. 328, determines that the use of the general language in a will, such as that here found, does not affect policies theretofore designed to beneficiaries.

Although the testator in this case may reasonably have thought that this policy would form part of his estate, its destination could not be ascertained until his death. It then appeared to belong to the infant child. Two courses were open to the testator if he desired it to go to his wife. He could have placed the matter beyond question by identifying the policy in the first instance, or he could have re-considered the matter after the child was born.

I, therefore, think that the moneys in Court belong to the infant. In the outcome it will probably make little difference, as an order will no doubt be made for payment to the mother for the maintenance of the child.

HON. MR. JUSTICE LENNOX, APRIL 12TH, 1913.

CROFT v. MITCHELL.

4 O. W. N. 1086

Broker—Purchase on Margin—Refusal to Deliver on Tender of Sum Due—Liability of Broker—Measure of Damages — Value of Shares at time of Demand—Rate of Commission.

LENNOX, J., *held*, that in a purchase of stock upon margin, the broker is under obligation to deliver the stock purchased at any time, upon being tendered the amount due thereon, and in case of neglect or refusal to deliver upon demand the purchaser is entitled to the market value of the stock at the date of demand, less any proper charges to be made against the same.

Clarke v. *Baillie*, 45 S. C. R. 50, referred to.

Action to compel defendants to deliver to plaintiff 40 shares of stock in the Rock Island Railroad Company or for repayment of a sum alleged to have been paid on account of the purchase of the shares and for damages for non-delivery.

Geo. H. Watson, K.C., for the plaintiff.

R. S. Cassels, K.C., for the defendants.

HON. MR. JUSTICE LENNOX:—There is no ground for the contention that the plaintiff is entitled to recover back the money he paid to the defendants, with interest. That might be his right, if he so elected, if the defendants had failed to execute their contract to purchase Rock Island Railway stock for him. The default here was failure to deliver to the plaintiff 40 shares of this stock upon demand made therefor and upon the offer of the plaintiff to pay the balance owing to the defendants.

On the other hand there is no ground for the pretence set up in the statement of defence that the defendants submitted to the plaintiff the names of three firms of brokers doing business on the New York Stock Exchange, employed by the defendants as correspondents, and the plaintiff thereupon "selected the said R. B. Lyman & Company, as the firm through whom the purchase was to be made for him and by whom the shares were to be carried on his account." Not only would this statement have been grossly misleading as to the commercial status of Lyman & Co., if it were made—for they were not members of the New York Stock Exchange—but, more than this, the attempt to substitute a contract with Lyman & Co. for a contract with the defendants cannot in any way be reconciled with Mr. Lamont's examination for discovery or his examination or cross-examination in Court.

I leave out of account a half-hearted attempt to set up this contention on re-examination. It is inconsistent too with the terms upon which Lyman & Co. and the defendants dealt with each other; the bought note in each case notifying the defendants: "We have this day on your order and for *your account* and for your risk bought," etc. The meaning of the phrase "for your account" is put beyond controversy by *Gadd* v. *Houghton*, 1 Ex. D. 357.

I accept the plaintiff's evidence as furnishing a substantially accurate account of what took place between him and Mr. Lamont, representing the defendants, when this first order was placed; and the two subsequent orders were upon the same terms. It was the ordinary every-day arrangement with a broker to buy stock upon margin.

The law is clear enough in such a case. It is not necessary that the terms be discussed in detail. Certain incidents follow as to the rights and liabilities of the parties from simply placing the order. The purchaser must re-margin

from time to time as called upon, if the value of the shares decline; and he must pay interest and commission. The broker agrees, whether specifically stated or not, to furnish the additional money required to purchase the shares outright, and is obliged to have on hand sufficient stock to enable him to hand over to his customer the stipulated number of shares immediately upon a demand being made for them, accompanied by an offer to pay the balance owing in respect of them. *Conmee* v. *The Securities Holdings Company,* 38 S. C. R. 601.

The obligation of the broker is to be ready to deliver the shares. The shares may have enormously enhanced in value. Manifestly to return the customer his money with interest would not in such a case, be a discharge of the broker's obligation; and, conversely, the stock having declined in value in this case, and the defendants—as I find—having carried out their agreement to purchase, in a recognized way though not in a prudent way, it is equally manifest that what the plaintiff is entitled to have is not the money back, but the forty shares bargained for or their value at the time they were demanded, less any balance owing upon them and less the stipulated, or a reasonable, charge for commission and interest.

I am satisfied that the plaintiff was not told that the defendants would employ an agent or correspondent, and that he did not know it as a matter of fact, but he is bound by what is usual and necessary in such a case. The brokers may determine their own method of executing the contract, but they are bound to execute it, and, above all, they are bound to be ready at all times to deliver the scrip or certificates upon payment. Here, as in the *Conmee Case,* they never had it.

I am not satisfied that there was any agreement as to the commission. Mr. Mitchell says that "the consolidated rate is 1/16 of one per cent. "each way;" that is for buying and selling. He probably means the same is also paid the correspondent or agent. Mr. Morrow of the firm of Æmelius Jarvis says, they buy through a regular accredited agent in New York, who is responsible to them, and their total commission charge to their client is ¼ per cent. for buying and the same for selling. There was no need of two firms of brokers, if the defendants had told the plaintiff that Lyman

& Co. were in the next block, and if the plaintiff, knowing this, was willing to engage them.

The defendants claim a commission on sale, but are not entitled to it. They had no authority to sell. The plaintiff was entitled to the shares.

I am not sure that it should exceed ⅛, but I will allow the defendants a total commission of ¼ of 1 per cent. This includes anything they have paid or may pay their agents. The plaintiff is liable to pay the defendants ½ per cent. interest over and above the interest, the defendants have to pay, but they get this for procuring the money, and if they left it to their agents to procure the money, and they added a half per cent. in claims made upon the defendants and liquidated by the plaintiff, it must not be charged again.

I am of opinion that the plaintiff has paid the defendants the several sums of money he claims to have paid, amounting to $1,518.45, but if the parties are still in dispute as to this I will hear counsel upon this question—

At the time the defendants repudiated their liability and refused to deliver forty shares of the capital stock of the Rock Island Company to the plaintiff the shares were worth $28 each, or a total sum of $1,120.

There will be judgment for the plaintiff for this sum, less such balance as may be owing to the defendants on the purchase price of the three lots of shares in question, and for interest and commission on the basis aforesaid after crediting all sums paid by the plaintiff; and there will be interest on the balance of said $1,120 from the 14th day of October, 1912. The plaintiff will have costs.

In case differences arise as to the adjustment of the account, I can be spoken to and will adjust the items in dispute or give directions as to how it is to be done.

Reference may be made to *Clarke* v. *Baillie*, 45 S. C. R. 50; *Douglas* v. *Carpenter*, 17 App. Div. N. Y. 329, at pp. 333-4; *Rothchild* v. *Allen*, 90 App. Div. N. Y. 233; Dos. Passos on Stock Brokers, 2nd ed., pp. 206-7; *Cox* v. *Sutherland*, 24 Can. L. J. 55; *Carnegie* v. *The Federal Bank*, 5 O. R. 418; *Gruman* v. *Smith*, 81 N. Y. 25; *Geen* v. *Johnson*, 90 Pa. St. 38.

SUDBURY DISTRICT, 5TH DIVISION COURT.

MARCH 31ST, 1913.

REX v. HOLOWASKAWE.

Criminal Law — Appeal from Conviction—Inciting to Strike — 6-7 Ed. VII., c. 20, s. 60 — Industrial Disputes Act, 1907 — No Dispute prior to Strike — Conviction Quashed — Incitement after Strike Commenced — Conviction Affirmed—Costs.

KEHOE, Co.C.J., Sudbury, quashed a conviction under section 60 of the Industrial Disputes Act 1907, 6-7 Ed. VII., c. 20 (Can.), for inciting to strike "on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act" upon the ground that there had been no dispute prior to the strike itself, but confirmed another conviction where the inciting had taken place after the commencement of the strike.

Rex v. *McGuire*, 16 O. L. R. 522, referred to.

An appeal from a conviction made by Thomas Tovrance, Police Magistrate, on the 21st January, 1913, under which the defendant was convicted under sec. 60, of the Industrial Disputes Investigation Act, 1907, and being ch. 20 of 6-7 Edw. VII., for inciting to strike contrary to the provisions of the Act. By this is meant according to sec. 56, a strike which is unlawful by reason of any employee going on strike "on account of any dispute prior to or during a reference of such dispute to a board of conciliation and investigation under the provisions of this Act."

A. G. Slaght, for the appellant.

T. C. Robinette, K.C., and John M. Godfrey, for the respondent.

HIS HONOUR JUDGE KEHOE:—There is a lengthy clause, sec. 2, sub-sec. (e), which defines the meaning of the word "dispute," the effect of which is that it means "any dispute or difference between an employer and one or more of his employees," as to certain things therein generally stated or as to any other things therein specifically mentioned, such as wages, hours of employment, materials supplied and alleged to be bad, unfit or unsuitable, established custom or usage, interpretation of agreement, and other matter.

It was not proved before me, nor was it necessary to prove that there was any reference to a board of conciliation

or that there was any request for the same. *Rex* v. *McGuire*, 16 O. L. R. 522.

The evidence shewed that the first sign of dispute was the strike itself, or rather the inciting by the defendant of the strikers. The strike followed this inciting. As the prosecutor stated the strike came to him with so much surprise that it was like a thunderclap. It appears that there was no demand for increased wages, shorter hours of labour or anything of any kind until the defendant called upon the men to strike. This call was the very beginning of the dispute. There cannot be a dispute or difference unless there are two parties who dispute or differ with one another. It may be and without doubt must have been the case here that the strike was preconcerted among the men, though there is no evidence that this was so. But stating it as strongly for the prosecution as possible and allowing that the strike was the result of a previous understanding between the men, still matters did not reach a stage where there was a demand by the men for better terms and a refusal by the employer, the Hollinger Mines Co., of what the men asked. When such a demand and a refusal were not made can it be said that there was any "dispute" until the strike itself created the dispute? If the answer be that there was no dispute until the strike itself then will come the necessity of answering another question. Did the men go on strike "on account of any dispute," to quote the words of sec. 56?

In my opinion the defendant is not brought within the Act as an offender under secs. 56 and 61, for the reason that the strike was not on account of a dispute. To hold otherwise would be to eliminate the words "on account of any dispute," from sec. 56. If these five words were not in the section, then it would be clear that the defendant by his inciting was guilty of an offence.

The Act when framed might have been so framed with or without these words. One cannot assume that they were placed in the section without it being intended that they were to have a meaning and perhaps were intended for a purpose. Possibly it was considered that when a strike comes like a bolt out of the blue instead of like a storm of which there is premonition, there is not the danger to the peace of the community that would be engendered by the antecedent mutterings.

Another consideration is that penal statutes must receive a strict construction.

The conviction is quashed with costs to be paid by the prosecutor to the defendant, which costs I fix at $50.

REX v. CROFT.

The reasons in the *Holowaskawe Case* apply to this case with costs to be paid by the prosecutor to the defendant which costs I fix at $50.

REX v. CLEARY.

There is a difference in the circumstances of this case from those in the *Holowaslawe Case*. The inciting was done after the strike had started. I confirm the conviction. The costs of the appeal, which I fix at $50 are to be paid by the defendant to the prosecutor.

HON. MR. JUSTICE MIDDLETON. APRIL 9TH, 1913.

CLARK v. ROBINET.

4 O. W. N. 1092.

Discovery—Refusal to Answer Questions—Motion to Dismiss Action —Irrelevance.

MIDDLETON, J., refused to dismiss an action for refusal to answer certain questions on discovery, holding that they were irrelevant.

Motion by the defendant to dismiss action by reason of the refusal of the plaintiff to answer certain questions on examination for discovery.

F. D. Davis, for the defendant.

Frank McCarthy, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—Since the argument I have read the pleadings and examination; and I cannot see that the questions which the plaintiff refused to answer are relevant to any of the issues raised on the pleadings. The motion, therefore, fails, and must be dismissed, with costs to the plaintiff in any event.

I would call attention to the extremely inconvenient practice followed in this case, of omitting to specify the questions complained of, in the notice of motion.

HON. MR. JUSTICE MIDDLETON. APRIL 9TH, 1913.

RE SOULLIERE AND McCRACKEN.

4 O. W. N. 1092.

Will—Construction—Precatory Trust.

MIDDLETON, J., *held*, that the following clause in a will following an absolute gift:—"It is my desire that she takes good care of all my children as much as it is possible to do and I also desire that at her death she will divide the estate that I now give her among our children in the most just manner possible" did not constitute a precatory trust.

Johnson v. *Farney*, 24 O. W. R. 244, referred to.

An application under the Vendors and Purchasers Act, turned by consent into an application for the construction of the will, of David Soullière, under Con. Rule 938.

F. D. Davis, for the vendor.

J. Grayson Smith, for the purchaser.

J. R. Meredith, for the infants.

HON. MR. JUSTICE MIDDLETON:—The sole question turned upon the construction of the will of David Soullière. He gives all his real and personal property to his wife, the vendor: adding this clause, "It is my desire that she take good care of all my children as much as it is possible to do, and I also desire that at her death she will divide the estate that I now give to her among our children in the most just manner possible."

It is said that this constitutes a precatory trust and that it operates to cut down the gift to a life state with the power of appointment among the children.

At one time this would probably have been so; but the tendency of the more recent legislation is all the other way. I think that in this will the gift to the wife is absolute, and that the clause quoted recognizes this and falls far short of what is now regarded as necessary to cut down the absolute estate given.

In addition to the cases referred to by the Chancellor in *Johnson v. Farney*, 24 O. W. R. 244, I refer to *Re Williams* (1897), 2 Ch. 12, and *Re Oldfield* (1904), 1 Ch. 549.

There will be no costs between the vendor and purchaser. Costs of the Official Guardian to be paid by the vendor.

HON. MR. JUSTICE MIDDLETON. APRIL 9TH, 1913.

WYERS v. WINLOW.

4 O. W. N. 1080.

Negligence—Teamster Using Saw to Procure Firewood — Loss of Fingers — Improper Use of Saw—Orders of Bookkeeper—Plaintiff not Bound to Conform to — Perverse Findings of Jury — Non-suit.

Action by a labourer and teamster for the loss of his fingers through contact with a saw while in defendant's employ. While on a casual visit to the office of defendants before quitting work for the day, plaintiff was asked by the bookkeeper to go and get some firewood. He attempted to saw some as he swore he had done on previous occasions, by using a rip-saw as a cross-cut saw. The saw jammed and in attempting to fix it, plaintiff met with his accident. There was no evidence that the saw was not adequately guarded, but the jury found defendant negligent in that certain bolts were loose and in that a notice should have been posted, warning against the use of the saw by inexperienced persons. They also found that the bookkeeper was a person to whose orders plaintiff was bound to conform.

MIDDLETON, J., *held*, that the jury's findings were perverse and granted a non-suit.

Action for damages for personal injuries sustained by plaintiff in defendants' employ, a saw which he was operating taking off his fingers, tried at Hamilton, March 31st, 1913, with a jury.

C. W. Bell, for the plaintiff.

A. M. Lewis, for the defendant.

HON. MR. JUSTICE MIDDLETON:—The plaintiff was employed by the Winlow & Irving Company, since the 1st of April, 1912, as a teamster and general labourer. He occasionally worked at the saw hereinafter mentioned.

On the 9th April, 1912, the day was wet and cold. Well on in the afternoon, the plaintiff put his horses in the stable and went to the company's office before quitting work for the day. Mr. Turner,, a young man employed as bookkeeper,

then said to the plaintiff, "It is very cold; please get some firewood."

The plaintiff thereupon went to the lumber yard, and, not seeing any small pieces of waste wood convenient, procured some ends of boards and took them to the saw in question for the purpose of cutting them up into pieces that could be used in the office stove.

The saw was not intended for use as a cross-cut saw, but was designed and equipped for ripping boards. It had an efficient guard, placed so that lumber to be sawn would be guided and held both before reaching the saw and after passing it.

Instead of standing in front of the saw and passing the boards through in the ordinary way, the plaintiff went to the side of the machine, and, after setting it in motion by turning the electric switch controlling the motor, cut short lengths off the ends of the pieces of board, using the saw as a cross-cut saw. These pieces of board accumulated behind the saw, something caught, and the guard was thrown up at an angle of 45 degrees. Instead of then stopping the saw, the plaintiff used a short piece of board, some sixteen inches in length, remaining in his hands, and endeavoured to poke away from behind the saw the accumulated pieces of wood that held up the guard. While he was doing so, the guard fell, and brought his hand down upon the unprotected saw, severing the fingers.

The guard used on this machine had in front of the saw a toothed wheel, driven by power, to feed to the saw the board being ripped; and two rollers were behind the saw to take care of the severed strips passing from it. Between these was a cover, supposed to come down and protect the revolving saw blade. This cover was adjustable, so that it might be made to afford protection when either a large or a small saw was used, and when the saw projected a considerable distance or only a short distance from the table.

There was some evidence that the nuts for adjusting this were not tight. This would permit the guard to fall down by its own weight, over the saw blade. I cannot conceive that this, if a defect at all, had anything to do with the accident. In the picture of the machine, exhibit 1, this cover is shewn lifted higher than it would be when the machine was in actual operation, and the picture is to that extent misleading.

On the matter being submitted to the jury, in addition to finding that the machine was out of repair by reason of these nuts being loose, the jury found that the defendants were negligent in "not having a notice posted warning unskilled employees in the proper use of the saw," and that the plaintiff was bound to conform to the order of Turner "because of his position as bookkeeper," and that the plaintiff was justified in using the saw because "it had been customary."

There was no evidence, I think, to justify these findings; and it appears to me that I ought to grant the motion for a nonsuit.

The answer to the question whether the plaintiff had himself been negligent is "No, for being unskilled in the use of saw." The plaintiff himself said that he knew how to use the saw, and did not need any instruction. The only evidence that the saw had been used for the same purpose before was the plaintiff's own evidence. He said that he had cut wood in this way three or four times before; but it was not shewn that any one knew that he had done so.

When he found that the guard had been lifted as the result of his experiment, there was nothing to prevent his turning the switch and stopping the saw, so that the guard could be replaced without danger.

With every sympathy for the unfortunate plaintiff, I think that notwithstanding the finding of the jury I must dismiss the action.

Costs will probably not be asked.

SIMMERSON v. GRAND TRUNK Rw. CO.

4 O. W. N. 1082.

Negligence — Injury to Brakeman — Shunting of Car—Negligence of Fellow-servant in Charge of Operations — "Person in Charge or Control of Engine"—Findings of Jury.

MIDDLETON, J., entered judgment for $1,500 damages for personal injuries to plaintiff, a brakeman, upon the findings of a jury, who found that the plaintiff was injured through the negligence of a fellow brakeman in charge of shunting operations in giving a signal before plaintiff was clear of danger.

Allen v. *Grand Trunk Rw. Co.*, 23 O. W. R. 453, referred to.

Action for damages for injuries sustained by the plaintiff while in defendants' service as brakeman owing to the alleged negligence of a fellow brakeman who was at the time in charge of the engine.

Tried with a jury at Hamilton on the 2nd of April, 1913.

W. S. McBrayne, K.C., for plaintiff.

D. L. McCarthy, K.C., for defendants.

HON. MR. JUSTICE MIDDLETON:—The plaintiff was employed as a brakeman upon the Grand Trunk Railway. A car situated upon a transfer siding had to be removed for the purpose of placing it upon an industrial siding. This car was the second car upon the transfer siding; and in order that it might be removed it was necessary that the two cars should be drawn from the transfer on to the main line, and that they should then be backed so that the second car would be free of the switch leading to the transfer The first car would then be pulled forward and backed into the transfer, and the engine could pick up the car desired and take it to its destination.

The train crew consisted of an engineer and fireman, and two brakemen—the plaintiff and one Bryant. When the cars were drawn from the transfer on to the main line the brakes were not entirely free, and the plaintiff, who was upon the cars, went to the forward end for the purpose of releasing the brakes. When the car was backed upon the main line it was necessary for the brake to be applied, so that the car would not be carried too far after it was freed from the train.

As soon as the engine started to back, the coupling was released. The plaintiff, having released the brakes on the forward car, was passing to the rear; and, just as the signal to the engineer to reverse and go forward was given by Bryant, the brakesman standing upon the ground—whose duty it was to signal—the plaintiff was about to step from the forward car to the rear car. At this instant Bryant spoke to him, saying "Jump on the end car." Not clearly distinguishing what was said, the plaintiff, instead of immediately stepping across the space between the cars, hesitated for a moment, and then stepped. It was too late, as the momentary delay was sufficient to cause the end car to separate from the engine and the front car; and the plaintiff fell to the ground; fortunately being able to throw himself clear of the rails. Both feet were seriously injured; and this action is brought.

In giving his evidenec, the plaintiff did not state his case clearly, although he told the facts accurately. He

stated that there was no fault in anything done by the engineer or fireman; there was no jolt which threw him off the car. The accident would not have happened had it not been for his momentary hesitation by reason of his failure to grasp what was said by Bryant.

The jury found that there was "negligence on the part of the defendants through the defendants' employee not seeing plaintiff was on the other car before the cars parted;" which means, that in the view of the jury it was incumbent upon Bryant, the brakeman upon the ground—whose duty it was to give the signals for the motion of the engine—to have seen that the plaintiff reached the rear car before the signal was given which caused the engine to stop and permitted the cars to part.

Allan v. *Grand Trunk Rw. Co.*, 23 O. W. R. 453, and *Martin* v. *Grand Trunk Rw. Co.*, 4 O. W. N. 51, justify the finding that Bryant was in charge or control of the engine within the meaning of sub-sec. 3 of the Workmen's Compensation Act; and I think that the jury might well come to the conclusion at which they have arrived, that Bryant, who knew that it was the plaintiff's duty to go upon the rear car, ought to have seen that the plaintiff was safely there before giving the signal in question.

At the trial, counsel for the defendants did not desire the question of contributory negligence to be submitted to the jury; so that in this view the plaintiff is entitled to recover $1,500, the amount awarded by the jury.

MASTER IN CHAMBERS. APRIL 14TH, 1913.

RICHARDSON v. ALLEN.

4 O. W. N. 1136.

Process—Writ of Summons — Service Outside Jurisdiction—Order for Motion to Set Aside—Entry of Conditional Appearance—Enlargement of Time for Delivery of Defence—Waiver—Costs.

MASTER-IN-CHAMBERS *held*, that the entry of a conditional appearance and the procurement of an enlargement of time for delivery of the statement of defence precluded defendant from moving to set aside an order for service of a writ of summons outside the jurisdiction.

Motion by defendant to set aside an order for service of a writ of summons outside the jurisdiction and all proceedings thereunder.

J. Grayson Smith, for the defendant.

W. H. McFadden, K.C., for the plaintiff.

CARTWRIGHT, K.C., MASTER:—On 21st February last plaintiff obtained an order for service of writ of summons on defendant in Alberta. This was granted on his affidavit alleging that the case came within C. R. 162 (h). Time for appearance was 15 days.

The writ as issued did not conform to the order but included the plaintiff's statement of claim and directed not only appearance but delivery of statement of defence, within the 15 days.

This of course was irregular. See *Kemerer* v. *Watterson*, 20 O. L. R. 451. Service was apparently effected, as on 17th March defendant's solicitor obtained an *ex parte* order from the local Judge allowing the entry of a conditional appearance and extending the time for delivery of statement of defence for a week from date of order.

On 18th March an appearance was entered for defendant "without prejudice to his right to dispute the jurisdiction of the Court herein."

In consequence of illness of defendant's solicitor the time for defence was enlarged further by plaintiff's solicitor but apparently the defendant's solicitor changed his mind and on 7th inst. served notice to set aside the order of 21st February and all proceedings thereunder as irregular.

The motion is supported by an affidavit which apparently relies on the irregularity already noticed and also on the fact of a writ for service within the province having been issued on 12th December and being still in force, and also that the order for service under C. R. 162 should "specify a claim in the said writ." It was also contended that under clause (h) proof should be given of assets of defendant within the jurisdiction.

As to this last ground that was dealt with in *Kemerer* v. *Watterson, supra.*

The practice has always been to grant the order under that clause (h) if the plaintiff alleges the possession of assets. Then if that is denied the question might be considered, but usually it is disposed of as was done in the *Kemerer Case.* The possession of assets in the province is not denied. But whatever might have been the result if defendant had filed a denial of assets, and moved before

appearance, I think the obtaining of an order for conditional appearance and enlarging time for delivery of statement of defence effectually preclude him from making the present motion. No doubt there would have been no difficulty in having the time for appearance enlarged pending a motion to set aside the proceedings.

What has been done now gives the defendant all that could be obtained even if the present motion was successful. The conditional appearance will enable him to defeat the action (as to any part at least that does not come under clause (e) of C. R. 162, if such there be) on plaintiff failing to shew assets as alleged. Any irregularity was waived by the appearance and the motion will be dismissed with costs to plaintiff in the cause. Defendant to have 4 days further time to plead.

HON. MR. JUSTICE BRITTON. APRIL 14TH, 1913.

LESLIE v. CANADIAN BIRKBECK CO.

4 O. W. N. 1102.

Company—Loan Company—Action by Shareholder for Account — Prepaid Shares—Special By-laws of Company—Right of Prepaid Shares to Share in Gross Earnings—Discretion of Directors as to Dividends—Transfer of Assets to New Company—Reconstitution of Shares—Acquiescence by Plaintiff in—Estoppel.

Action by a stockholder for an accounting of the profits of a company. Plaintiff was the holder of a certain class of stock called prepaid stock, upon which $50 a share had been prepaid. This stock was to receive 6 per cent. per annum upon the amount paid in and any surplus profits were to be added to the prepayment until the same reached $100 a share, when the stock was to rank as fully paid up stock and to receive dividends accordingly. Plaintiff claimed that under the by-laws this prepaid stock was to receive a certain amount of the gross profits of the company for division among the holders of such stock and asks for an accounting upon this basis.

BRITTON, J., *held*, that the prepaid stock could only share in net earnings and that the directors of the company could determine how much they should distribute each year in earnings, and that, therefore, the action must be dismissed.

Tried at Toronto without a jury.

Hon. Wallace Nesbitt, K.C., for the plaintiff.

Britton Osler and E. D. Wallace, for the defendants.

By consent of the parties, the services of a Court stenographer were dispensed with. Admissions signed by counsel will be found with the exhibits put in in book form, and

styled the "brief." These admissions are quite sufficient for the determination of this case.

The Birkbeck Investment Security and Savings Company of Toronto was incorporated on the 10th of May, 1893, under the Act respecting Building Societies, being ch. 169 R. S. O. 1887. That company on the 15th day of February, 1894, before the plaintiff became a member of it, adopted certain rules and passed by-laws for its government and management. It was not argued that these rules or by-laws were in excess of the power of the company. These provided that the capital stock of the company should be five millions of dollars, divided into 50,000 shares of the maturity value of $100 each, and that the stock was to be issued in three classes, namely, (1) Instalment stock; (2) Pre-paid stock—the prepayment being $50 for some shares, and $40 for other shares, and (3) fully paid or permanent stock.

Only the prepaid stock and of that, only the shares on which the prepayment was $50, each share, is in question in this action.

Section 6 of art. 2 of the by-laws of the old company is as follows:—

"Prepaid stock of the company shall be issued at fifty dollars, and forty dollars per share payable in advance. Holders of the power shall receive a semi-annual dividend at the rate of six per cent. per anum on each sum of fifty dollars, which dividend shall be deducted from the profits earned, the balance of the earnings being credited to the stock. Holders of the latter shall be credited with the earnings accumulated thereon until maturity in like manner as instalment stock."

Sec. 7. "When the amount standing to the credit of any such share of fifty dollars prepaid stock, consisting of the semi-annual dividends paid and the profits apportioned thereto, together, equal one hundred dollars, the said share shall be deemed to have matured, and shall rank thereafter as fixed and permanent capital of the company."

Part of sec. 8. "Prepaid stock shall contribute a *pro rata* sum to the expense fund in the same manner as instalment stock."

Sec. 9. "The board of directors shall have power in their discretion to retire the unpledged instalment and prepaid stock of the company at any time after the fourth year

from the date of issue, and to determine by lot or other impartial manner whose stock shall be retired, when any matured stock remains on the books of the company."

On the 20th day of May, 1895, the plaintiff applied for and obtained 10 shares of the prepaid six per cent. stock of the company. The application was on a form sent by the company to Kingston and signed there by the plaintiff.

In the application the plaintiff agreed to abide by all the provisions and conditions and by-laws of the company. The plaintiff has regularly received the dividends of six per cent. per annum upon the prepaid $50 shares. She did not find to the credit of these shares any profits over and above the dividends, which she received.

Until very shortly before the commencement of this action she did not complain about this, and it does not appear that she made any enquiry.

In a booklet—issued by the company and which the plaintiff received, the following appears—see ex. page 3 of brief:—

"Partially prepaid stock of the par value of $100 is issued at $50 a share, on which a portion of the profits earned, not to exceed six per cent. per annum upon the original sum invested is paid to holders in cash semi-annually."

"This stock is entitled to receive in addition, its proportionate share of the entire profits of the company. Profits earned in excess of the six per cent. so paid are retained, and loaned by the company to hasten the maturity of the shares."

On the 11th August, 1899, the present defendants were incorporated by 62-63 Vict. ch. 103 D. By sec. 5 of that "Shareholders of the old company holding shares of fixed and permanent capital stock therein are hereby declared to be holders respectively of shares in the fixed and permanent capital stock of the new company to the same extent and with the same amounts paid up thereon as they are holders respectively of such shares in the old company."

Sec. 10. "The new company shall be liable for, and subject to, and shall pay, discharge, carry out and perform all the debts, liabilities, obligations, contracts and duties of the old company, and any person having any claim, demand, right, cause of action or complaint against the old company or to whom the old company is under any liability, obliga-

tion, contract or duty shall have the same rights and powers with respect thereto and to the collection and enforcement thereof, from and against the new company, its directors and shareholders as such person has against the old company its directors and shareholders."

It is clear that if the plaintiff had or has any cause of action against the old company not barred by the Statute of Limitations or not barred by reason of her dealings with the new company or not otherwise barred the same can be enforced against the present defendants.

The plaintiff in this action in paragraph 15, of the statement of claim "submits that under the contract between the (old) company, and the plaintiff, she was not, and cannot be made liable to the company for any amount in respect of unpaid stock, and also that she is entitled to have an account taken of the profits earned by the said company and to have the proportion earned by the money paid in by the plaintiff applied upon the stock held by her, so that her stock shall be made or created fully paid-up stock of the value of $100 per share—as soon as her share of the said profits would equal an amount of $500 and that from such date she would be entitled to rank as a stock-holder of the company to the extent of $1,000 fully paid-up—and thus receive dividends thereon at the rate allotted to fully paid-up stock of the company."

This statement is not embodied specifically in the prayer for relief. What the plaintiff asks is:—

"That an account be taken of the profits earned by the company in respect of, or on the moneys paid in by her to the said company and that the amount of such earnings applicable to the stock of the company, held by the plaintiff, be applied until payment is made in full of that stock, so that these shares shall rank as fully paid-up stock to the amount of $1,000.

As this case was presented to me, it is not necessary for the determination of it, that I should say anything about the liability of the plaintiff to the defendants for any further payment on the $50 prepaid stock, but my opinion is, and I need not refrain from expressing it, that there is no such liability. The plan on the part of the old company, in issuing that stock was, not that the holders of it could be compelled to pay any further sum on account of it, but that they would be permitted to allow the six per cent. per an-

num dividends to remain to the credit of it, and when, by reason of that and by reason of any further profits beyond the six per cent. fifty dollars would be added to the credit of each share, then each share would be $100, and would be what the company called "matured prepaid stock," on which six per cent. per annum would be paid. Neither the old company nor the defendants have ever made any call for payment of the second fifty dollars on each share or any part of it. There is nothing to shew that the defendants intend to treat that stock as liable for any unpaid balance against the holders. If there are profits out of which the defendants appropriate as dividends over and above the six per cent. per annum, on the stock—they are not obliged to pay excess in cash to the holders of the stock in question—but may put that excess to the credit of those shares until the shares amount to $100 each as mentioned.

Neither the six per cent. dividends, if left to the credit of the shares nor the profits, if any, put to the credit of these—carry any interest to the holders of these shares until $50 are added to each share. It so happens that according to the admission the sum of $36.43 over and above $500 prepaid, was placed to the credit of these shares.

So far, I am dealing with the matter as it stood with the old company—but I may mention here that this amount of $36.43 was by these defendants transferred to the reserve fund. Up to the present time that can make no difference to the plaintiff, as she cannot get interest on the $36.43—no interest or dividend being payable on any amount in excess of $50 until that excess reaches the sum of $50 on each share.

At the trial a good deal of time was taken by counsel for plaintiff, in his argument to shew that a company incorporated under the Act respecting Building Societies, could contract with a person about to become a member or shareholder as to shares, payments for them, and liabilities in regard to them. Such power for the purpose of this action was admitted. It was expressly admitted that the plaintiff subscribed for the shares in question here, upon the faith of the circular and booklet—Ex. 3.

The plaintiff did understand all about the $50 prepayment and that she was to get semi-annual dividends upon that, at the rate of six per cent. per annum, but she did not understand as the company understood what was meant

by the sentence: "This stock is entitled to receive in addition its proportionate share of the entire profits of the company." The plaintiff did not expect to pay any more in cash.

She could have allowed her dividends to remain, instead of taking the money—but she did not. She expected that profits would flow in so that she would soon have a dividend on $100 a share instead of on $50. Her expectations were not realised and the question is simply has she now upon the evidence any right to the account asked for. The words used in describing this stock are somewhat misleading—perhaps not intentionally so. Sections 6 and 7 of article 2 do not clearly explain what a stock-holder's rights and liabilities are.

This stock may not be preference stock as properly defined but it is in reality preference stock as to dividend. If there are profits sufficient the three per cent. semi-annual dividend upon it is assured and must be paid in preference to the other stock. To use the words of the company—"this dividend is to be deducted from profits earned," the balance of the earnings being credited to the stock. When the profits, (net profits) are sufficient to permit of a dividend in excess of six per cent. per annum she would get the increased dividend, not in money, but by a credit to these shares until the amount so credited would amount in all to $50 for each share. The plaintiff's interpretation of the contract with the old company is that when the gross earnings of the company were in excess of six per cent. per annum, she was entitled to have the *pro rata* part of these gross earnings put to the credit of her shares. For the purpose of having this done, the plaintiff asks for an account, and if it be found that the gross earnings—or gross profits as sometimes called, are sufficient that her shares be credited with such amount as will bring them up to $100 each share. The defendants admit that the business carried on by the old company down to 27th June, 1900, and then transferred to, and subsequently carried on by the defendants has produced gross earnings in excess of the dividend at the rate of six per cent. per annum from time to time declared and paid on the capital stock of the companies from time to time outstanding. I am not able to agree with the plaintiff's interpretation of the contract.

It is difficult to understand readily all the representations made by the old company in selling their stock. It was euphemistically stated that the holders of the $50 prepaid shares could leave their dividends to the credit of these shares and "thus hasten maturity." The dividends alone would of course in time, if left, pay the additional $50 a share—but the plaintiff very naturally preferred to take her dividends in money. The plaintiff must have understood that whether she would get any more or not—would depend upon what the net profits would be—and that would depend upon expenses of management, losses in the business, etc.

I am not able to find any promise express or implied on the part of the company, that the money paid in on these shares would be kept separate and profits made on that money appropriated, and credited to these shares; no company would undertake such a task.

Even if the old company had not been merged in the new—if it had continued to do business in its own name, and under the old act—the plaintiff, upon the facts disclosed would not be entitled to have an account for the purpose mentioned. There being nothing in the contract to compel the company to set aside a part of the gross earnings—and put same to credit of plaintiff's shares—the case is governed by *Bain* v. *Aetna*, 21 O. R. 233.

The old company carried on business down to the 27th June, 1900. On that day, all its assets were, with the consent of all its shareholders including the plaintiff, conveyed and transferred to the defendants. By the act incorporating defendants, all the shareholders of the old company became shareholders in the defendant company. On the 3rd March, 1902, the directors of defendant company passed a new by-law in regard to the stock of the company. This by-law was approved and confirmed by the shareholders at their meeting on the 5th March, 1902. A by-law was also passed and confirmed authorising the creation of a reserve fund. The by-law in regard to stock dealt with stock already issued and that to be issued—dividing it into 2 classes—permanent and terminating. Permanent was subdivided into (1) fully paid shares of $100 each (2) fully paid ordinary shares of $100 each, and (3) part paid ordinary shares of the par value of $100, issuable at $50 per share payable in advance the holders of which shall be entitled to

receive in cash out of the net earnings of the company dividends as declared by the directors, not exceeding such rate per cent. per annum as may be named at the time of issue." "Holders of ordinary shares shall participate in such surplus profits of the company beyond the rate per cent. so named as may be deemed available for distribution by the directors." When the amount standing to the credit of any part paid ordinary shares consisting of the amount paid thereon, exclusive of premiums, and the surplus profits apportioned thereto together equal $100, such share shall rank thereafter as a fully paid ordinary share of the company."

In my opinion this by-law places the plaintiff's stock in defendant company exactly as it was and as it was intended to be in the old company. It makes clear what was obscure —and it was within the power of the defendants to pass it.

There was not, in my opinion, any such contract as plaintiff alleges—either with the old company or the defendants. If any such with the old it was broken by the new in passing the by-law of 3rd March, 1902.

The matter of surplus profits available for distribution, must be determined by the directors in the honest administration of the affairs of defendant company. They must determine it having regard to expenses, to contingencies, to actual and possible losses, and to the necessity of keeping a reserve fund. It is not in dispute that defendants have on hand real estate taken as security for loans, upon which there may be losses or realisation. No fraud nor improvidence is charged. The plaintiff for all the years since 1895 has received the directors' reports and statements—and notices of meetings of shareholders—and has made no complaint until this action.

From any point of view this does not appear to me to be a case in which an account should be ordered. This case was spoken of as a test case. It is one which interests all shareholders of the same class of stock as that held by the plaintiff, and having regard to the want of clearness in the representations made to plaintiff when she purchased, the dismissal of the action should be without costs.

The action will be dismissed. Thirty days stay.

HON. MR. JUSTICE MIDDLETON. APRIL 14TH, 1913.

SAUERMANN v. E. M. F. COMPANY.

4 O. W. N. 1137.

Action—Minutes of Settlement of — Construction of—Alleged Defective Motor Car — Submission to Referee within One Month—Time Essence of Contract—Tender Refusal to Accept — Reference.

MIDDLETON, J., *held*, in an action to enforce minutes of settlement of another action between the parties for the return of the purchase-price of a motor car alleged to be defective, that a provision that defendants were to have the car ready for inspection within one month by a referee agreed upon, meant that the car at that time was to be pronounced satisfactory or unsatisfactory by the referee and defendants were not to be given an additional six months to make alterations from time to time suggested by the referee to make it satisfactory to him.

Action to enforce minutes of settlement of an action for return of the purchase price of a motor car purchased by plaintiff and claimed to be defective, tried at Hamilton on the 4th April, 1913.

G. Lynch Staunton, K.C., and J. L. Counsell, for the plaintiff.

M. K. Cowan, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—Mrs. Sauermann purchased an automobile from the defendant company. The automobile not giving her satisfaction, on the 11th October, 1911, she issued a writ claiming $1,580 damages by reason of the inferiority of the machine, which she alleged was worthless.

On the 13th June, 1912, when the action came on for trial, after evidence had been given, the parties relieved the Court from the task of determining the issue thus raised, by entering into a settlement. The settlement was embodied in a written memorandum signed by the eminent counsel. The present action was brought on the 27th of January, 1913, for the purpose of enforcing the settlement; and whatever difficulty there is, lies in the interpretation of this memorandum in view of what subsequently happened.

The plaintiff, in whose custody the car then was, was to forthwith deliver it to the defendants, "who shall forthwith proceed to place the same in complete repair in every

respect (except tires) to the satisfaction of Thomas Russell, Esquire, who is accepted by both parties as umpire or referee between them." The defendants waived payment of an outstanding note for part of the purchase price, and agreed to pay the costs of the action. The agreement also provided that "in event of the said Russell pronouncing the car in a satisfactory condition the same to be delivered by the defendants to the plaintiff in settlement of this case. If the said Russell pronounces the car unsatisfactory, then the defendants forthwith to pay the plaintiff back the sum heretofore paid by her to them. Defendants to have the car ready for inspection by the said Russell within one month from the delivery of same to them by the plaintiff."

The plaintiff delivered the car to the defendants immediately, and the defendants had the same ready for the inspection of Mr. Russell within the month. Mr. Russell was, however, not available at the time, being absent from the country on business; but immediately on his return, on the 17th August, he made an inspection. In the meantime there had been some negotiations between the parties, and the plaintiff had had an inspection of the car, but contended that it was not then in a satisfactory condition. So far as I can see, nothing turns upon this, as it was ultimately determined to leave the matter to Mr. Russell.

As the result of his inspection Mr. Russell reported in writing, on the 19th of August, "that the car was in a satisfactory condition, with the exception of certain items which are requested to be put into shape for a later inspection." These points were "the repainting or re-enameling of the engine head, repairing of the head lamps and supplying with new lenses, the proper repairing of the tail lamp, the fixing of the ignition so that the engine would start on the batteries, the adjustment of the brakes to take hold a little better, and the supplying of a robe-rail and foot-rest.

It is clear that it cannot be said that Mr. Russell pronounced "the car in a satisfactory condition." It is argued that Mr. Russell did "pronounce the car unsatisfactory;" and the plaintiff bases her claim, in the first place, upon this theory.

Mr. Russell apparently thought that he had not yet made any pronouncement and that he had a right to make a further inspection. So far as the plaintiff knew, nothing was done

after this; and on the 9th of September, after vacation, an appointment was sought from the trial Judge, with a view of obtaining a judgment, which the plaintiff thought she was entitled to, for payment of the $1,580.

In reply to an intimation of the application for appointment, the defendant's solicitors wrote, saying, "The terms of the settlement have been lived up to by the defendants, and the automobile is now complete, ready for delivery, and has been since three days after the report by Mr. Russell. We now tender it to you, and will oppose any application."

The application was proceeded with, and failed; owing to the fact that the learned Judge was of opinion that the application could not be made in a summary way, no judgment having been taken based upon the settlement arrived at. It is said that the learned Judge expressed the opinion that no pronouncement had been made by Mr. Russell, and that the application was, therefore, premature. He tells me that he did not determine this question.

On the 30th of October Mr. Russell again inspected the car, and then found that while the specific defects mentioned in his letter of the 19th August had been remedied, the engine was not in a satisfactory condition. It was shewn that in the meantime two experts had been sent from the factory to Hamilton, and had spent several days in endeavouring to make the car satisfactory in operation, but in the result it was nothing better, it was rather worse. A new carburetter had been put in, without avail; a new magneto had been supplied; but the engine still lacked power.

Mr. Russell suggested that the engine be discarded entirely and a new engine substituted. This was accordingly done; and on the 1st of November, he again inspected, and reported, "that the car in question is in complete repair to my satisfaction."

The inspection of the 30th October was made in the presence of representatives of the plaintiff; the inspection of the 1st November was made without any notice to the plaintiff.

Thereafter the motion for judgment is said to have been renewed, and the trial Judge did not feel called upon to interpret the memorandum entered into, but merely directed that judgment be entered in accordance with the con-

sent minutes. There is no evidence that any such motion was made; and no judgment is produced.

The plaintiff now contends that even if she is not entitled to judgment based on the inspection made by Mr. Russell in August, she is entitled to recover because, if the defendants rely upon what was done between the 30th October and the 1st of November to form a foundation for Mr. Russell's report—as they must—then they did not comply with the settlement and "have the car ready for inspection by the said Russell within one month from delivery of the same to them by the plaintiff."

The defendants answer this contention by stating that time was not of the essence of the contract, and that even if time is to be regarded as of the essence of the contract the failure to have the car ready for inspection by the stipulated time does not, on the terms of the settlement, entitle the plaintiff to recover the $1,580, as this was only to be paid "if the said Russell pronounces the car unsatisfactory," and that he has not done so.

It is further contended by the plaintiff that what took place on the 30th of October amounted to pronouncing the car unsatisfactory. As to this, Mr. Russell's attitude is that while he did not then regard the car as satisfactory, he again postponed his decision, for the purpose of enabling further alterations to be made, after which a further inspection was to be had.

I think the plaintiff must recover. When the settlement was made the intention was that within thirty days the defendants were to place the car in a condition which was satisfactory to Mr. Russell on his inspection. The car was found to be in an unsatisfactory condition, and the right to receive the money back then arose. Mr. Russell had not the right to allow further experiments to be made upon the car, nor was any such right given by the agreement. Thereafter the whole engine was changed and another substituted. This was not what was contemplated. The car that was purchased was the car referred to; that car was to be repaired; and the settlement cannot be read as warranting the substitution of another engine after six months' abortive attempts to bring the car into a condition in which it would work.

There will be judgment for the return of the amount paid, with interest from 19th August, 1912, and costs. The amount must be settled by the Registrar or agreed upon, as it is not disclosed in the pleadings or evidence.

HON. MR. JUSTICE MIDDLETON. APRIL 14TH, 1913.

TRUESDELL v. HOLDEN.

TRUESDELL v. HOLDEN.

HOLDEN v. COLLINGWOOD SHIPBUILDING CO.

4 O. W. N. 1138.

Malicious Prosecution—Illegal Seizure — Conversion—Three Actions Arising out of Same Facts — Findings of Jury—Perversity and Inconsistency—Reasonable and Probable Cause Found — Evidence—Reference—Costs.

MIDDLETON, J., dismissed with costs two actions by the same plaintiff against the same defendant for malicious prosecution and illegal seizure of a boat, disregarding in the former the inconsistent and precise findings of the jury upon the facts and gave judgment for plaintiff for damages to be agreed upon as ascertained upon a reference in a third action brought by the defendant in the former actions against a bailee for conversion of the boat in question.

J. Birnie, K.C., for Truesdell.

A. E. H. Creswicke, K.C., for Holden.

R. E. Fair, for the Collingwood Shipbuilding Co.

HON. MR. JUSTICE MIDDLETON:—These three actions were tried before me at Barrie, on the 25th, 26th and 27th days of March; the first being tried with a jury, the other two without a jury. The actions were tried separately, but there are many facts in common.

Truesdell, a young man living in Collingwood, built a gasoline launch called the "Olive." On the 16th August, 1911, he mortgaged it to one Henry Poehlman, to secure $300. Poehlman, desiring his money, the mortgage being past due, and Truesdell desiring to obtain some further money to enable him to complete the furnishing of the boat, sought out Holden, who resided near Collingwood and who had money at his disposal.

On the 14th March, 1912, Truesdell mortgaged the boat to Holden to secure $485; the Poehlman mortgage being paid out of the proceeds, and the balance after deducting expenses being handed over to Truesdell to enable him to complete the equipment. The boat is described as "one gasoline yacht called 'Olive,' equipped with a seventeen horsepower Dixon engine, her tackel, apparel and furniture, now lying in the port of Collingwood."

Truesdell had purchased the engine in question from the Dixon Manufacturing Company, and there was a balance of some $307 due upon the engine. Holden, before making the loan, enquired from Truesdell whether there was any other charge against the boat than the Poehlman mortgage, and Truesdell informed him that there was not. In this he acted dishonestly, as he knew that there was supposed to be a lien upon the engine for the balance due on it. He equivocated by saying that he supposed that when Holden used the expression "boat" he meant the hull and was not referring to the engine.

The lien note was produced at the trial. Some suggestion was made, but failed in proof, that this lien note—which bears date September 1st, 1911,—was actually signed by Truesdell after the making of the mortgage, but antedated. I do not think that this is material, as the validity of the Dixon lien is not in question.

Holden's mortgage was made payable $235 on July 15th, 1912, and $250 on October 15th, 1912, bearing interest only after maturity. In August, the July instalment not having been paid, Holden received information of the Dixon lien, and naturally regarded this as very materially impairing his security. He made enquiries from the Dixon company, and was told that the lien existed and that the note was in the bank. He went to the bank, and verified this statement. He then seized the boat, and told the Dixon company that they need not take proceedings, as he would protect the lien.

Pressure was brought to bear upon Truesdell; and in the result he secured sufficient financial assistance from relatives to pay off the Dixon lien; and Holden accepted a new mortgage, dated August 28th, 1912, for $500, to secure the amount due upon the original mortgage, and expenses. This mortgage is made payable $100 the 1st January, $200 the 1st July, $100 the 1st October, and $100 on the 1st of

December, 1913. It was agreed at the time that Holden should be further secured by a policy of marine insurance upon the boat; and a policy was accordingly procured.

This insurance ran out, and a new policy was placed with another company, with the consent of both parties. When this insurance company found that the boat was being used to pick up logs in the Georgian bay, it deemed the risk unduly hazardous, and declined to carry it further, so long as that occupation was followed. The policy was therefore cancelled. Holden then became anxious as to his position, and determined that the boat should not be taken out until insurance was placed. In doing so, he was entirely within his rights; as, under the terms of the agreement, he was entitled to be secured by marine insurance. Holden and Truesdell together went, on the evening of the 9th of October, to the place where the boat was moored, and tied her up.

Much controversy took place at the trial as to what took place on that occasion. Truesdell gave Holden two keys to the cabin and the boat. Holden says that this was with the intention of placing him in control of the boat. Truesdell says the intention was that both parties should then be in joint possession of the craft. Both agree that whatever the intention was, the boat was to remain at its moorings until insured. The jury have taken the view that there was then an arrangement by which neither party should touch the boat, and that the keys were handed over by Truesdell as a guarantee that he would observe this agreement.

The same evening Holden went upon the boat and padlocked it with a new lock, of which he alone had the key; and he placed upon the boat a notice that he had seized it under his mortgage. He also further secured the boat by additional moorings.

The following morning Truesdell went to the boat, found what Holden had done, and, deeming it to be in breach of the agreement, he himself broke the agreement by taking possession of the boat, removing the lock placed upon it by Holden, and taking the boat away from her moorings. He returned with the boat, and tied it again. Holden, going in the afternoon to inspect, found Truesdell in possession and apparently about to start out with the boat again. Hol-

den did not realise that Truesdell had been out, and he sought to get possession of the boat. An altercation took place, in which it was made quite plain that Truesdell intended to retain possession and refused to allow Holden to have the boat. Holden thereupon consulted his solicitor, and they went before the magistrate, explained the facts to him, and laid an information against Truesdell for stealing the launch.

The jury has found in answer to a question, that Holden did not place the facts before his solicitor Allan, and that Allan and Holden did not fully and honestly place the facts before the magistrate. The only suggestion upon which this finding could be based was the fact that Holden told his solicitor that he was in possession of the boat under the seizure he made in the evening, and he also told his solicitor and the magistrate that Truesdell had given him the keys with the view of placing him in possession.

The jury has also found that when Truesdell went on the boat it was not in fact in Holden's possession, and that Holden had not then made a seizure. There was absolutely no evidence to justify this finding. Rightly or wrongly, Holden had taken possession under his mortgage.

Truesdell was not arrested on the information until late in the evening, as he took the launch away from its moorings before the constable reached the place, and secreted it in another part of the harbour; and thereafter successfully evaded the constable, who was searching for him, until late in the evening. The magistrate did not grant bail; but, by some method not explained, Truesdell secured his freedom very early on the following morning.

When the matter came before the magistrate he took the view—which to me seems extraordinary—that no offence had been committed; and he discharged the accused. Hence the action for malicious prosecution.

The boat was then in the custody of the police authorities; and the magistrate, by another extraordinary ruling, directed it to be given to the one who would first reach it. Truesdell, being far more agile than Holden, and having a bicycle, secured possession. Being thus in possession of the boat under *aegis* of the law, as embodied in the Collingwood police magistrate, Truesdell proceeded to use it, notwithstanding the agreement that it should not be touched, not-

withstanding his agreement as to insurance, and in open defiance of the rights of the mortgagee.

This state of affairs continued until the 25th of October; when the mortgagee, conceiving himself entitled to possession of the boat, arose very early in the morning and took possession in a way which would be free from ambiguity. He thought he had arranged with the Collingwood Shipbuilding Company to lift the boat from the water and place it upon a car; he also thought he had arranged with the Grand Trunk Railway to supply the car. He then took the boat into the Collingwood Shipbuilding Company's dock and had it lifted from the water and placed on the shore. It would have been placed upon the car, but the car had not yet been brought into the dock-yard.

When Truesdell went to the moorings for the purpose of taking the boat out in the morning he found that she was gone. He immediately and not unnaturally suspected Holden. He then searched for the boat, and by chance, looking into the dock-yard, saw her apparently awaiting the arrival of a car. He then resorted to the police magistrate, and laid an information against Holden for stealing the boat; whereupon the chief of police went to the dock-yard and forbade the manager of the dock from letting anyone remove the boat. The manager of the company, notwithstanding Holden's protests, refused to allow the boat to be shipped; and Holden countermanded the order for the car. His intention had been to have the boat shipped to his own premises at Nottawa some three miles away.

On Holden's appearance before the police magistrate the case was enlarged from Friday October the 26th until the following Tuesday; the boat being during that interval in the possession of the dry-dock company who claimed to hold it by virtue of the "injunction granted by the chief of police at the instance of Truesdell."

On the Tuesday, without taking evidence, the police magistrate announced his decision that the matter was a civil one and that the boat should be restored to the one last in possession. On the Thursday, Truesdell had gone upon the boat in the yard and he now claimed to be entitled under this adjudication. When the decision was pronounced he and Holden again raced for possession. Truesdell's youth and bicycle were strong elements in his favour. He

went by a short cut, jumped the fence, and when Holden arrived Truesdell was in possession, armed with a crowbar and ready to hold possession against the world.

At the time of Holden's arrival a riot was imminent. The large number of men working in the shipyards had become interested spectators. The manager of the works evicted both Truesdell and Holden, with their respective followings from the premises.

Holden took the position with the dock company that having placed the boat in their possession he was entitled to receive it from them. He said that the company, having received the boat as his bailee, must restore it to him; but possession was not given to him. Holden sought out the manager of the company during the dinner hour and he promised that if Holden went to the dock at 1 o'clock he would give him the boat. In the meantime the crane man of the dock company, about half-past twelve, put the boat in the water. By a singular coincidence Truesdell happened to be looking through the fence. He vaulted the fence, untied the boat, and let her drift from the dock out into the open harbour; then again vaulted the fence and escaped from the dock-yard. By another coincidence none of the dock company's men saw him do this. He had another gasoline boat in readiness for any such contingency, and, getting into this, he went out to pick up the "Olive," and had her taken out and moored to the buoy in the harbour; all before Holden arrived with the manager at 1 o'clock. The manager told Holden to go and get the boat and take her away; and appeared to be much surprised when Holden returned and complained of her absence.

Truesdell in the meantime procured a supply of gasoline, took it out to the boat moored in the harbour, and then took her to the Nottawasaga light house, where he pulled her up and stored her in a boat-house owned by the Dominion Government. Holden searched for the boat in vain, and its whereabouts was not discovered until the trial.

The second action above named is an action brought by Truesdell against Holden to recover a thousand dollars damages which he alleges he has sustained by reason of being deprived of the custody of the boat from the Friday till the following Tuesday, whilst she was in the Collingwood dock-yard.

The third action is brought by Holden against the shipbuilding company for the value of the boat, or, rather, for the amount due to him, which will be the measure of his damages by reason of the conversion of the boat, which he alleges took place when she was put in the water and allowed to be removed.

The possibilities of litigation are not yet exhausted; for the evidence at the trial indicates the possibility of an action by Truesdell for injuries which he says the boat sustained by being lifted from the water; also an action based upon his prosecution of Holden for stealing the boat.

At the trial before me, Holden, by his insolent conduct in the witness box and his grossly improper remarks to Truesdell's counsel, succeeded perfectly in alienating any sympathy the jury might have felt for him.

Before the case went to the jury I discussed with counsel the questions of fact necessary to be determined before I could decide the question of reasonable and probable cause; and a series of interrogatories were agreed upon which it was said covered all matters concerning which there was any dispute.

The jury returned this verdict: "We the jury unanimously agree to give our decision in favour of the plaintiff receiving five hundred dollars and each party pay their own costs;" and, in addition to the answering the questions submitted, returned reasons for their findings. These reasons by no means simplify my task. The jury have found that Truesdell had not any honest belief in a state of facts which would justify him in taking the boat from Holden's possession. They have found, entirely against the evidence, that the boat was not in Holden's possession and that he had not made a seizure. They have found that there was a mutual agreement by Holden and Truesdell not to touch the boat pending the attempt to obtain further insurance; which is not quite in accordance with the evidence, but probably means they they accept Truesdell's statement that he promised not to take the boat out from the moorings and that Holden promised that he would not actually seize.

The question "Did Holden know that Truesdell, in taking the boat, was doing so in the honest belief of his right to do so?" is answered by the jury "Yes;" quite ignoring that this is in conflict with the answer given to the question:

"When Truesdell took the lock from the boat had he an honest belief in a state of facts which would justify him in taking the boat from Holden's possession?" to which they have said "No."

The jury have added to this confusion by assigning as reasons for their answer to the first question: "1. Putting on the extra lock;" 2. Keeping a watch; (i.e., a watch to see that Truesdell did not take out the boat contrary to his agreement); 3. Holden was the first to break the agreement." They give as the reason for their answer to the latter question, "he was not justified according to their mutual agreement."

At the request of Truesdell's counsel I submitted the question, "Was Holden, when he laid the information, actuated only by the honest desire to bring a criminal to justice?" The jury answer "No." I also submitted the subsidiary question at his request, "If any other motive, what?" and the answer is "He desired either to obtain the boat or his money."

In the light of the facts as found, and doing my best with the matters not in controversy, I think there was reasonable and probable cause for the institution of the prosecution against Truesdell. He had agreed with his mortgagee not to remove the boat. He had taken the boat out in violation of this agreement. He was about to remove it again. He had forbidden the mortgagee to remain upon the boat. He intended to use the boat without insurance, notwithstanding the agreement to insure.

The refusal of the insurance company to carry the risk, and the experience that Holden had had with Truesdell, abundantly justified him in feeling "unsafe and insecure" within the meaning of the mortgage. Even if Holden had taken possession in violation of the understanding that he was not to seize, this would not justify Truesdell in his conduct. Not only was there reasonable and probable cause for the institution of a prosecution, but the failure of that prosecution reflects no credit upon those connected with the administration of justice in Collingwood. The suggestion that Holden acted improperly because "he desired to obtain the boat or his money" seems quite untenable. I think the owner of property is entitled to resort to the criminal law for its recovery, and that his desire to recover

his property does not deprive him of protection if the circumstances justify the prosecution.

In that view I think the action fails. I regret this the less because the assessment of damages is under the circumstances absurd. Truesdell was in custody for about seven hours before he secured his liberation by some means undisclosed. His conduct was certainly not free from blame; and in allowing as large a sum as they did, the jury must have been actuated by some improper motive.

Upon the second action—the claim for damages by being deprived of the use of the boat for five days—I think Truesdell entirely fails. Holden had a right to possession. Truesdell suggests that he would have made $35 per day. I do not believe him. His chronically impecunious condition indicates that log-picking is not quite so lucrative. If entitled to recover at all, I would assess his damages at thirty dollars. Besides this, at his own instance, the boat was held in the custody of the police for most of the time which elapsed from the time Holden took possession until Truesdell again stole the boat. This action is therefore also dismissed with costs.

The action against the Collingwood Shipbuilding Company is far more difficult. A good deal of evidence was given to shew that Holden was not altogether candid in the way in which he secured the lifting of the boat by the crane man; but the evidence opposed to him is also subject to criticism. In the result, the company found itself in possession of the boat as bailee of Holden, and it ought to have returned the boat to him. I cannot help feeling that the truth has not been told with reference to the way in which the boat was placed in the water at half-past twelve. So many coincidences happening indicate fraud and collusion.

I think, however, that I go far enough when I find that it was negligence on the part of the company to place the boat in the water and leave it unguarded and in a position from which it might readily be removed; in view of the acute struggle that had taken place for its possession just before twelve o'clock. For this negligence I think the company must answer to Holden.

Judgment will therefore be for the plaintiff against the company for the damages he has sustained. These damages are to be limited by the value or by the amount due upon

the mortgage, whichever is least. Upon payment, Holden is to assign his mortgage to the company; and if within two weeks the company offers to restore the boat to Holden's possession, I think I ought to relieve the company from liability. There will be a stay for twenty days to allow an application for relief to be made. If this is not done, and if the parties cannot agree as to the amount for which judgment should be entered, there will be a reference.

HON. MR. JUSTICE MIDDLETON. APRIL 14TH, 1913.

ROBERTS v. BELL TELEPHONE CO. AND WESTERN COUNTIES ELECTRIC CO.

4 O. W. N. 1099.

Negligence—Death of Telephone Lineman—Contact between Electric Wire and Telephone Wire—Negligent Construction and Inspection of Electric Wire—Telephone Wire Subsequently Placed — No Legal Liability on Electric Company—Dangerous Substance —Statutory Authority—Liability for Wrongful Act of the Third Party.

Action for damages for alleged negligence against an electric light company on account of the death of a telephone lineman killed by a shock received through the telephone wire he was stringing coming in contact with another telephone wire which had come in contact with a live wire of defendants. The electric wire was strung first and the telephone wire later, some two feet six inches below it. Owing to the sagging of the electric light poles due to improper guying the two wires came in contact and this condition of affairs continued for some months owing to lack of inspection.

MIDDLETON, J., *held*, that the electric company was not liable either for the improper guying or for the lack of inspection, because negligence must be founded upon a breach of duty to some one and at the time the electric wire was strung there was no other wire in existence in this place.

Urquhart v. *Farrant* (1897), 1 Q. B. 241, and other cases referred to.

That defendants were not liable on account of their want of care in handling a dangerous substance, because they were upon the highway by legislative permission which relieved them from liability unless negligence were shewn.

National v. *Baker* (1893), 2 Ch. 186, and *Eastern, etc.*, v. *Capetown* (1902), A. C. 381, followed.

Action brought by the widow of Herbert Roberts, on behalf of herself and infant children, to recover damages by reason of his death on the 16th September, 1912, tried at Hamilton on April 1st, 1913. The action was settled between the plaintiff and the Bell Telephone Company. That

company paid $1,200 damages; this sum being accepted by the plaintiff in full of its liability, and, the electric company consenting, without prejudice to her claim against the latter company. Tried at Hamilton on 1st April, 1913.

G. S. Kerr, K.C., and G. C. Thompson, for the plaintiff.

M. J. O'Reilly, K.C., for the defendants, the Western Counties Electric Company.

HON. MR. JUSTICE MIDDLETON:—At the time of the happening of the accident Roberts was engaged as an employee of the Bell Telephone Company, in the stringing of a wire called "a messenger wire," along Dufferin street, Brantford. A messenger wire is a naked steel wire from which a telephone cable is suspended. This particular messenger wire, at the intersection of Dufferin street and St. Paul street, passed over another messenger wire which carried a cable running along St. Paul street. In the course of his work Roberts came in contact with the latter wire, and received from it an electric shock which caused his death. It was afterwards found that a block away from this point the messenger wire on St. Paul street was in contact with a primary electric wire of the electric company, carrying 2,200 volts.

This electric wire was strung along Blake street, which runs parallel with Dufferin street, and when near the intersection of Blake and St. Paul streets the wire was strung diagonally across St. Paul street, above the Bell messenger wire, to the opposite side of the street, where it joined the main electric line passing up and down St. Paul street. The poles carrying this particular span were twenty-nine feet high, and the span was 113 feet. At the time of the accident it was found that the messenger wire was four feet six inches below a straight line between the electric light insulators.

The electric wire was put up in August, 1911, or earlier. The telephone messenger wire was not placed in position until some time in 1912. The evidence as to the relative position of the two wires at the latter date is exceedingly meagre and unsatisfactory. The electric wire, when placed in position, had, it is said, a sag of two feet. This would bring the wires within two feet six inches of one another,

assuming that no further sagging took place between the time of the stringing of the electric light wire and the time of the placing of the messenger wire.

It was shewn that the stretching of the copper wire on a span of this kind would be infinitesimal. The increase in the sag between the time of stringing and the time of contact was occasioned by the settlement or bending of the electric light poles, which were not sufficiently guyed to prevent the sagging. Experts stated that as a matter of calculation as well of experiment, if the tops of the poles each moved two inches inwardly, this would bring the wire down from the two feet to the four feet six inches. It is altogether probable that most of this settlement took place when the poles were newly erected; so that I am satisfied that there was not anything like a clearance of two feet six inches when the messenger wire was placed in position.

All parties agree that to insure safe construction wires should not be placed closer than three feet, as some sagging is inevitable and there is always danger of extra sagging being caused by sleet and ice.

I find as a fact that the Electric Light Company in the erection of its poles did not take adequate precautions, by guying or otherwise, to prevent the increase of the sag in their wire, and that they did not inspect the wires, or they would have discovered the contact, which existed from early in the summer until the time of the accident.

It was shewn in evidence that throughout the summer this wire, when swung by the breeze or otherwise, emitted sparks when it came in contact with the messenger wire; and some children were called to testify that their summer evening amusement was the making of fireworks by swinging on the guy wire so as to cause the wires to separate and come in contact, and to emit flames.

It is contended on behalf of these defendants that, however short of perfection their construction may have been, and however negligent their inspection may have been, they had no duty to the telephone company or its employees to protect the wire improperly placed by the telephone company in a dangerous position, and that the accident being in truth caused by the negligence of the telephone company, in placing its wires in undue proximity to the electric wires, neither the telephone company nor its employees is entitled to recover.

With some regret I find myself compelled to give effect to this contention; for two reasons.

In the first place I do not think that the construction which permitted the wires to sag to the extent they did, amounts to negligence. Negligence must be founded upon a breach of duty; and when these wires were placed upon poles 29 feet above the highway, no wires being then under them, I do not think that there was any duty owing to the telephone company or its employees calling for such stability of construction as to prevent what was, after all, a very slight increase in the sag of the wire. The same reasoning leads me to think that there was no duty to inspect the wires periodically for the purpose of seing that other wires had not been improperly placed in undue proximity.

During the course of the argument it was suggested that there would be liability apart from negligence, because the electric current was a dangerous substance within the principle of *Fletcher* v. *Rylands*. This argument ignores the facts that the erection of poles on the highway is authorized by the Legislature, thus giving an authority which relieves from liability unless negligence is shewn. *National* v. *Baker* (1893), 2 Ch. 186; *Eastern, etc.* v. *Capetown, etc.* (1902), A. C. 381.

In the next place the injury sustained by the plaintiff was, I think, the direct and proximate result of the negligence of the telephone company, and there was no reason why the electric company should anticipate and guard against that negligence. The question of the liability of the defendant for its negligence where the wrongful act of a third party intervenes has been the subject of much discussion recently. In *Urquhart* v. *Farrant* (1897), 1 Q. B. 241, it is laid down by the Court of Appeal that the question whether the original negligence was an effective cause of the damage is to be determined in each case as a question of fact. In *McDowall* v. *Great Western Railway Co.* (1902), 1 K. B. 618, the railway company was held liable where some boys loosed the brakes of a car which had negligently been left near an incline, so that it ran down the incline; because the railway company knew or ought to have known of the danger of this interference, and negligently omitted to take reasonable precautions to prevent the consequences of that interference. But upon appeal this decision was reversed, the

Court taking the view that upon the principle of *Urquhart* v. *Farrant*, the negligence of the defendants could not be regarded as the effective cause of the accident.

The question is also discussed in *Dominion Natural Gas* v. *Collins* (1909), A. C. 640; and the cases are well collected and reviewed in *Lothian* v. *Richards*, 12 C. L. R. 165.

This principle appears to me to be fatal to the plaintiff's case here. The action will, therefore be dismissed as to these defendants, without costs.