THE
ONTARIO WEEKLY REPORTER

VOL. 22 TORONTO, SEPTEMBER 26, 1912. NO. 16

DIVISIONAL COURT.

SEPTEMBER 12TH, 1912.

HERRON v. TORONTO RW. CO.

4 O. W. N. 12.

Negligence—Street Railway—Person Injured while Crossing Track—Uncertainty of Findings of Jury—New Trial.

Action for damages for injuries sustained by plaintiff and his rig by reason of a collision between the latter and a street car of defendants, alleged to have been caused by the negligence of the motorman in charge of defendants' car.

Upon written questions submitted, the jury found both plaintiff and the motorman guilty of negligence, but returned two inconsistent answers on the two questions dealing with ultimate negligence. On this being pointed out to them by the trial Judge, they retired again, and on their return had stricken out the answers to both questions. Not noticing immediately that both answers had been stricken out the trial Judge asked them orally in effect if their answer did not absolve the motorman of ultimate negligence causing the accident, to which they replied in the affirmative.

MEREDITH, C.J.C.P., thereupon dismissed action with costs.

DIVISIONAL COURT (RIDDELL, J., *dissenting*), *held*, that plaintiff was entitled to a specific finding on the question of ultimate negligence, and that there had been none. New trial directed, costs of trial and appeal to be costs in cause.

Per RIDDELL, J.:—The trial Judge was entitled to submit questions to the jury orally under s. 112 of the Judicature Act, and the jury's answer to the oral question submitted was an express finding on the question of ultimate negligence.

An appeal from a judgment of HON. SIR WILLIAM MEREDITH, C.J.C.P., dismissing the plaintiffs action with costs.

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

Alexander MacGregor, for the plaintiff, appellant.

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

HON. MR. JUSTICE CLUTE:—The accident occurred at the junction of Margueretta and Dundas streets, by a collision between a west bound car and the plaintiff's rig, whereby the plaintiff was thrown to the ground and received the injuries complained of.

The plaintiff had driven down to a bicycle shop on the south side of Dundas street, and had left his horse facing west. On coming out of the shop he picked up the weight which held the horse, put it into the buggy and waited until a car went east. He then got into the buggy, when he saw another east bound car and waited until that car went by. He says that he looked both ways before crossing over and did not see any west bound car. He judged that the east bound car was about 30 feet away from the buggy when he started to cross. It does not appear that he looked to the east again before crossing, and he says that he never "knew anything" until he heard the crash.

He further states that there was also another west bound car passed, and that the first west bound car and the first east bound car crossed "just back of the buggy." That is, as I understand the evidence, there were two east bound cars and two west bound cars, and he was struck by the second west bound car.

Many witnesses were called on both sides, and as pointed out by the trial Judge, there is not only a conflict of evidence, but a great difference of opinion among the witnesses for the plaintiff, and also differences of opinion between the witnesses for the defendants.

The case was very carefully presented to the jury and questions submitted. These questions and answers, as they were first brought in, and what took place subsequently are reported as follows:—

"His Lordship reads the jury's answers to the questions as follows:

Q. 1. Was the motorman guilty of negligence? A. Yes.

Q. 2. If so, of what negligence? A. By not applying the brakes when he first noticed plaintiff heading across the tracks.

Q. 3. Could the plaintiff by the exercise of reasonable care have avoided the accident? A. Yes.

Q. 4. If he could, in what respect was he negligent? A. In not seeing he had sufficient time to cross to the north side of the tracks in safety.

Q. 5. Was the accident caused:

(a) By the negligence of the motorman?

(b) or by the negligence of the plaintiff?

(c) or by the negligence of both? A. Both.

Q. 6. Could the motorman after he saw the plaintiff was about to drive across the tracks by the exercise of reasonable care, have avoided the accident? A. No.

Q. 7. If he could of what negligence was he quilty? A. In waiting until too late before applying the brakes.

Q. 8. At what sum do you assess the plaintiff's damages? A. $800.

His Lordship: Your answer to the 6th is inconsistent with the answer to the 7th.

Mr. Dewart: I submit not.

His Lordship: Plainly so—You find they are both guilty of negligence, and you find that the motorman was guilty in waiting till too late before applying the brakes. Now what does that mean in connection with 6?

Foreman of Jury: He was too near to the man in the rig to stop to avoid the accident.

His Lordship: Then why do you say that he was negligent in waiting until too late before applying the brakes? One or other of those answers is wrong, it strikes me, or are inconsistent with one another. Now, what is it you mean? Just state generally what idea you have in all this answer. Just state generally what you think was the position of the parties and the negligence of both.

Foreman: According to the evidence he had not a chance to do anything but what he did.

His Lordship: Then you should have answered this 7th question—you should not have answered the way you did. He was negligent in not applying the brakes; because that means that after he became aware the plaintiff was in danger he might have avoided the accident by putting on the brakes or by doing something. Is that what you mean, or do you mean the contrary?

Foreman: We mean the contrary—that he could not have done it in the time.

His Lordship: Then your 7th answer should be struck out. Now, which of these answers is to be taken as correct?

Foreman: We said he could not have avoided the accident when he noticed it.

His Lordship: Then the answer to the 7th should be struck out; because you say in effect that he could have avoided the accident if he had not waited until too late. I think you had better go back, consider it, and come back again. And make sure what you really mean."

The jury then retire, and after some time return again to the court-room.

"His Lordship: The only change is taking out the answer to 7. What you say in effect is that both these people were to blame, and that the motorman, after he saw that the plaintiff was in danger, could not have stopped his car. That is the effect of it?

The Foreman: Yes.

His Lordship: Mr. MacGregor, I must endorse the record dismiss in this action. The jury have been rather friendly to the Street Railway Company. I cannot help it.

Mr. MacGregor asks for a stay.

His Lordship: I had not observed that the jury had struck out the 'No' in answer to the 6th question. But I have asked them if their idea was that the motorman, after he saw the position in which the plaintiff was could not by the exercise of reasonable care have prevented the accident. They said that was their view. I will give you a stay."

It will be seen that the jury found that the motorman was guilty of negligence by not applying the brakes when he first noticed the plaintiff heading across the tracks; that the plaintiff by the exercise of reasonable care could have avoided the accident, and that he was negligent in not seeing that he had sufficient time to cross to the north side of the track in safety, meaning, as I take it, that he should have seen that he had not sufficient time to cross to the north in safety, and should have not therefore have attempted it.

They further say that the accident was caused by the negligence of both.

When they first returned to Court they answered the 6th question ("Could the motorman after he saw the plaintiff was about to drive across the track, by the exercise of reasonable care have avoided the accident?") "No." To the 7th, "if he could, of what negligence was he guilty?" they answered: "In waiting until too late before applying the brakes." The 6th and 7th questions being contradictory they retired, and on their return they had struck out the

answers to both the 6th and 7th questions. The trial Judge not observing at the moment that the answer to No. 6 was struck out, said: "What you say in effect is that both these people were to blame, and that the motorman, after he saw the plaintiff was in danger, could not have stopped the car," to which the foreman answered "Yes." And his Lordship said: "I must endorse the record dismissing this action." His Lordship then said, "I had not observed that the jury had struck out the "No" in answer to question 6, but I have asked them if their idea was that the motorman, after he saw the position in which the plaintiff was, could not, by the exercise of reasonable care have avoided the accident. They said that was their view.

On the argument the notes did not contain the word "not" in the two places above indicated, but this has since been corrected by the reporter with the approval of the trial Judge.

The question of ultimate negligence was clearly submitted to the jury, but as the answers now stand the jury have not dealt with that question unless it be that their answer to the second question was intended to deal with the question of ultimate negligence.

As the trial Judge points out "in the pleadings there is no statement as to the specific acts of negligence which the plaintiff charges the defendants' servants to have been guilty of; but as I would gather from the course of the trial and from the observations of the learned counsel for the plaintiff, the case is put upon the ground that there was a duty resting upon the motorman of the car, which he was propelling, the east bound car, somewhere about Margueretta street, to sound the gong for the purpose of warning people who were about to cross, warning people who were in the lawful exercise of their rights, travelling on foot or in vehicles; that the motorman did not do that; that in consequence of that the plaintiff was lulled into a feeling of security, had a right to expect that no car was approaching from the east, and that he might have safely crossed the track." Upon that question so submitted the jury did not find against the defendants. That, of course, would have been original negligence had the jury so found. His Lordship then proceeds: "Then another ground is that when the motorman saw, as it seemed to me he admitted he saw, the plaintiff's horse on the track in the act of crossing he did not sound the gong then to warn the man." That also

would be original negligence, and on this the jury have made no finding against the defendants. "The third ground is that, even if the plaintiff was, as the defendants contend he was, guilty of negligence in the way he attempted to cross the track, the motorman saw him, or ought to have seen him in sufficient time to enable him, if he had used the appliances which he had at his command as he ought to have used them, to have stopped the car and to have avoided the collision." This is a charge of ultimate negligence, and it has not reference to the ringing of the gong which covered the first two points, but has reference exclusively to what the motorman ought to have done after the plaintiff had been guilty of his act of negligence in attempting to cross the track.

Having regard then to the manner in which these several questions were put and the answer to No. 2, it appears to me that that has reference to this third ground—to the ultimate negligence. If that be so, the effect of this answer would give the plaintiff the right to recover notwithstanding the negligence of the defendants.

By the answer to question 5, however, both plaintiff and defendants were guilty of negligence. If the answer to question 2 was not intended by the jury to refer to ultimate negligence, then the jury, have not dealt with that question, the answers to 6 and 7 having both been struck out on the second occasion when they retired, unless they have sufficiently answered that question on their return.

The jury during the course of conversation said clearly enough that the motorman could not have avoided the accident when he noticed it; that is, I take it, when he saw the plaintiff. But on their second return when the answers to questions 6 and 7 had been struck out, only this was said, "The only change is in taking out the answer to 7. What you say in effect is that both these people were to blame; that the motorman after he saw that the plaintiff was in danger could not have stopped his car." It does not say that the motorman could not, had he exercised reasonable diligence, have avoided the accident after it appeared quite clear that the plaintiff was about to cross in front of the car, but it only says that he could not have stopped the car after *he saw* (not might have seen) the plaintiff. Of course, if there is no evidence that ought to have been submitted to the jury that the motorman by the exercise of reasonable diligence ought to have seen the plaintiff's rig in time to stop the

car, then the judgment should stand, but if it appears that there is evidence which would support such finding—that is of ultimate negligence—then that question has not been answered, and the case ought to go back for trial. It, therefore, remains to examine the evidence upon this point. It is apparent from the judgment that the trial Judge took the view that there was evidence which could properly be submitted on the question of ultimate negligence, and in my opinion, after a careful reading of the evidence, he was right in this view. I shall not quote all the evidence bearing upon this question, but sufficient, as I think, to shew that there was ample evidence to support a finding, had there been one, on the question of ultimate negligence; and, as pointed out by the learned Chief Justice, the strongest evidence supporting this view was given by some of the witnesses for the defendants. A fair summary may be found in the charge.

James Caines, with his wife, was waiting for a car at the north-east corner of Dundas and Margueretta streets. He says Herron was just about turning to come up Margueretta street. "His horse seemed to be about the south rail of the track, as far as I could judge.

Q. Which track? A. South track.

Q. When he was there, where was this east-bound car? A. It was east of us about a couple of car lengths. That is, the car was east of the east side of Margueretta street about two car-lengths when the plaintiff turned his horse up Margueretta street.

Q. What occurred next? A. Well, I saw Mr. Herron and he seemed to be straightening up to come up Margueretta street. To us he seemed to be coming across the track all right, but if the car had been going anyway reasonable Mr. Herron had lots of time to cross the track coming up Margueretta street, but before he had time the car struck him and he was upset.' This witness is positive that the gong did not ring.

Q. Where was the car when it struck Mr. Herron as regards Margueretta and Dundas streets? A. It was west of Margueretta, on the west side of the street; very close to the west side of the street.

Q. Would you give us as clear an idea as you can of where the car was when it stopped? A. Well, when that car stopped the east end of that west bound car was about in line with the fence line of the west side of Margueretta street.

Q. Were the brakes applied? A. The brakes were not applied before they struck the man. The car was going at speed when it struck the man, and it brought him about half a car length before it came to a stop."

On cross-examination he says:—

"A. I saw him on the opposite side of the street just turning to come up Margueretta street. His horse's head was about the south rail of the south track.

Q. Was the horse's head east or west of the body of the rig? A. His horse seemed to be turned up Margueretta stret.

Q. And at that time when you saw him in that position with his horse on the south rails and facing north towards the west side of Margueretta street, how far was the car away? A. About two car lengths.

Q. And that is the time you noticed the car? A. That is the time I noticed the car."

His wife, Caroline Caines, says:—

"Q. Did it slow down before it struck him? A. No, it did not."

Buchner, who has the bicycle shop referred to says:—

"Q. Your shop is opposite the west end of Margueretta street? A. Yes.

Q. What did you first know of the matter? A. Well, it was when I heard the fender, as I suppose, drop on the rail.

Q. Where was the car, do you say, when the fender dropped on the rail? A. It was somewhere about the centre of Margueretta street, facing——

Q. On Dundas street? A. Yes.

Q. Then what occurred? A. Well, I heard—it seemed to me when the fender dropped that they used only the ordinary brake just then. Then there was another brake, seemed to come on; there was a terrible rumbling, like applying the other brake."

Pearn, was a passenger on the car which struck the plaintiff's rig. He says:—

"A. I was standing about 8 or 10 feet from the front end of the car in the aisle facing the north.

Q. What did you first know about the matter? A. The first I knew about it was the crash.

Q. Was there any gong rung before the crash? A. There was no gong rung.

Q. Are you sure of that? A. Positively sure."

John Foster, was driving east on Dundas street, west of Margueretta street. He says:—

"Where were you relatively to Margueretta street? How near was the car that struck the rig to you when you saw it strike the rig? A. I was almost by the side of it.

Q. Where was the car when it struck the rig? A. Just in the middle of Margueretta street.

Q. How far would you say the west bound car was east of Mr. Herron when he went to cross the track? A. About 75 feet.

Q. Are you sure of that? A. Yes.

Q. About where, as regards Margueretta street, did these two cars pass one another? How far east? A. About 90 feet."

On cross-examination he said:—

"Q. He was in the act of crossing at the time that you say you saw the car coming west, 75 feet away? A. Yes.

Q. How far had he got with his horse at that time? A. The horse had crossed over the tracks and just as the buggy was on the track.

Q. That was when you saw the east bound car coming 75 feet away, was it? A. No, the west bound car.

Q. It was when the west bound car was 75 feet away, was that the time his horse had just got across the tracks and his buggy was on the tracks? A. Yes."

For the defence the motorman Thompson was asked:—

"Q. What was the first that you saw of Mr. Herron and his rig? A. Well, I had just been after passing a car going east bound. Just east of Margueretta street. Just on Margueretta at the east. I sounded the gong approaching the car and just as the car had got clear of me I noticed Mr. Herron's horse starting to come across, and I sounded the gong again. I saw that he was not going to stop. I would not say that I sounded the gong after that, but I put my best energies towards stopping the car, and I thought that I was going to succeed till I was about to hit him. Mr. Herron never seemed to see me until I was within 4 feet of him and then he looked around at the time.

Q. How far then was he away from you in a direction east and west, at the time that you say him first? A. Well, I was approaching Margueretta street when I saw his horse's head first. That was after the horse's head had passed."

The next question and answer is inconsistent with this:—

"Q. Give me the distance? A. I could not swear to exactly the feet; because I cannot. I suppose probably to give an estimate I would be 8 or 10 feet into Margueretta street; but I might be mistaken.

Q. How far back of that was it that you had passed the east bound car? A. Well, I would be just passing the other car then. The car would just be east of the line I would judge.

Q. And where did you say the car struck the rig? A. Somewhere about 4 feet east of the west line of Margueretta street.

Q. How far did it take you to stop this car? A. About a car-length I consider. I do not know how long a car is, about 35 feet I suppose.

Q. Have you ever stopped it shorter? A. Well, I might if I was going slow.

Q. If you had been going slower you might have stopped quicker? A. Yes.

Q. Which way was the head of the horse facing when you saw Mr. Herron first? A. He was swinging around to the north.

Q. To go up Margueretta street? A. Yes.

Q. And the head was around facing that way when you first saw the head? A. Yes."

Robert Bernstein, was walking on Dundas street:—

"Q. How far were you from Margueretta street when your attention was called to anything? A. We were just about at Margueretta street when we heard a gong.

Q. What else did you see? A. As soon as we heard the gong we saw the horse coming over the rails so we turned back. As soon as we turned back to look where the car was the buggy was turned over."

George Faulkner, says:—

"Q. What was the first thing that called your attention? A. The loud sounding of the gong."

On cross-examination he says:—

"Q. When you heard the gong ring what did you do? A. I looked to see—I at once came to the conclusion that there was something wrong.

Q. And it was right then that the crash came? A. Right then; right after the gong sounded. I looked out of the window and saw the man in the buggy, and it appeared as if he was pitched up."

Everett Holden, says:—

"Q. Where were you at the time? A. I was sitting near the front of the car at the time on the north side of the car.

Q. What was the first that attracted your attention? A. The first that attracted my attention was the man. He was sitting in the buggy and the horse was facing towards the west, and after we passed the east bound car about half way down the block the gentleman simply turned right round and drove right in front of the car going west. I could not say exactly where the car was.

Q. Do you remember how many cars you passed? A. No, I could not say.

Q. How far was the west bound car from Margueretta street when this man turned? A. Well, I could not say. I should imagine about three lengths of the car, that is roughly.

Q. Then what happened as far as the car was concerned? A. The motorman rang the bell, I should imagine about twice. That was all the time he had. Then he put on the brakes and stopped the car as quickly as he could."

According to this witness, when the motorman saw or might have seen the plaintiff, his car was three car lengths east of Margueretta street.

"Q. And did you notice where the car was after it had stopped? A. Well, I should think it would be about four or maybe six feet east of the west side of Margueretta street—in that neighbourhood.

Q. And where did you say the car was when the gong was rung? A. Well, it would be about 60 feet I should imagine, when he started to ring the gong. The man was driving north at the time.

Q. And you looked when you heard the gong? A. I was looking out at the front of the car at the time on the streets.

Q. And you could clearly see the man at the time 60 feet away? A. Yes."

Harold Judge, was strap-holding on the front end of the car about three feet from the door.

"Q. Then just tell me what you saw? A. The car would be probably two lengths from Margueretta street east of Margueretta street, when I heard the gong, and looking out I saw the buggy with Mr. Herron, I suppose, in the buggy. I did not notice anything different until I heard the crash and looking out I saw Mr. Herron on the fender.

Q. At the time you looked, and the car was two lengths east of the east side of Margueretta street, where was Mr. Herron's rig? A. He was coming across the track turning north-east.

Q. How far had he got? A. Well, he would be about between the two tracks, I would imagine.

Q. What do you mean by that? A. Between the east and west track.

Q. The devilstrip? A. Yes.

Q. Did the motorman do anything? A. He rang the bell once.

Q. In addition to the ringing of the gong, what else was done? A. I heard the motorman put the brakes on, and I was almost thrown off my feet, that was all, I heard the crash, of course."

On cross-examination, he said:

"Q. When did you first see Mr. Herron? A. Well, as I said, about two car lengths east of Margueretta."

William J. Rashleigh, was the conductor on the car in question. He says:

"Q. What was the first that attracted your attention? A. Ringing of the gong and the sudden applying of the brakes.

Q. Where was the car relatively to Margueretta street at the time you heard the gong ring? A. Just about on the east side of Margueretta street.

Q. And brakes you say put on? A. Yes."

Walter McRae, a master mechanic swears the car in question was 40 feet in length. He says that the car could be stopped, going at the rate of 10 or 12 miles an hour, in about two car lengths. He also says that going 8 miles an hour it could be stopped in two car lengths.

"His Lordship: Do you want this jury understand that it could not be stopped any quicker going 8 miles an hour than it could going 12? A. Yes, it would."

Then he further says that going 12 miles an hour it could be stopped at 90 feet.

From these witnesses it appears that there is evidence by some of the witnesses that the east and west bound cars crossed each other east of Margueretta street; that according to several of the witnesses the plaintiff's horse and rig could be seen from two to three car lengths east of Margueretta street, when he was in the act of crossing to the north. According to the plaintiff's own evidence he actually

stopped the car within about a car length, although the mechanical engineer speaks of two car lengths as necessary to stop the car going 8 miles an hour, which was about the rate at which the car in question is said to have been moving.

If the jury believed this evidence they could well find as they did find that the negligence of the motorman was, in not applying the brakes when he first noticed the plaintiff heading across the tracks, and this was the answer which they brought in to question 7 "In waiting until too late before applying the brakes."

The case is then reduced to this:

(1) No negligence found against the defendants as to speed or not ringing the gong, which, upon the charge, were referred to as original negligence on the part of the defendants;

(2) Negligence on the part of the plaintiff in not seeing that he had time to cross the track;

(3) Ultimate negligence on the part of the motorman in not applying the brakes at an earlier stage when, according to the witnesses and his own evidence, he might have stopped the car notwithstanding the negligence of the plaintiff.

The evidence is very contradictory upon almost every point. Five of the witnesses of the plaintiff swear positively that the gong did not ring. A number of witnesses for the defendants swear that it did.

The jury not having found in favour of the plaintiff upon this issue, it must be taken that the gong did ring.

In one view of the findings they may mean that when the motorman saw the plaintiff it was too late to stop the car.

The result of the jury's finding and of what took place at the trial with reference to their answers and questions put by the learned trial Judge leaves it uncertain, in my opinion, as to what they meant.

I think there was evidence of ultimate negligence that could not be withheld from the jury, and that they have given no clear and sufficient answers to the questions submitted to them.

There should, therefore, be a new trial. Costs of the former trial and of this appeal to be costs in the cause.

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

HON. MR. JUSTICE RIDDELL (*dissenting*):—The plaintiff had a horse and buggy standing on the north side of Dundas street, east of Margueretta street, the horse facing west. Coming out from a shop, he intended to drive away; he picked up the weight, put it into the buggy, and himself stood by the side of the buggy till a car went past east. As he picked up the weight, the horse turned his head to the car to go across; the plaintiff got into the buggy and sat there till another car went by to the east—then he picked up the lines and his horse started to cross—the last east going car having got about 30 feet away by this time. Two cars had passed to the west during this period. When crossing he saw a third west bound car when it came within four feet of his buggy, he grabbed the whip to get over, but did not succeed in escaping, the car struck the right hand front wheel, he was thrown out and hurt.

He brought an action which was tried before the C.J. C.P., and a jury, at Toronto.

While the statement of claim does not particularize the negligence complained of, it is apparent from the proceedings at the trial that three acts of negligence were alleged: (1) not sounding the gong thereby lulling the plaintiff into a sense of security with the particular case; (2) not sounding the gong when the motorman saw that the plaintiff's horse was on the track, and (3) "the motorman saw him or ought to have seen him in sufficient time to have enabled him, if he had used the appliances which he had at his command, as he ought to have used them, to have stopped the car and have avoided the collision."

After much evidence had been given and after a careful and unexceptionable charge question were left to the jury, which they answered thus:

"Q. 1.—Was the motorman guilty of negligence? A. Yes.

Q. 2.—If so, of what negligence? A. By not applying the brakes when he first noticed plaintiff heading across the tracks.

Q. 3.—Could the plaintiff by the exercise of reasonable care have avoided the accident? A. Yes.

Q. 4.—If he could in what respect was he negligent? A. In not seeing he had sufficient time to cross to the north side of the tracks in safety.

Q. 5.—Was the accident caused (a) by the negligence of the motorman? (b) or by the negligence of the plaintiff? (c) or by the negligence of both? A. Both.

Q. 6.—Could the motorman after he saw the plaintiff was about to drive across the tracks by the exercise of reasonable care have avoided the accident? A. No.

Q. 7. If he could of what negligence was he guilty? A. In waiting until too late before applying the brakes.

Q. 8.—At what sum do you assess the plaintiff's damages? A. $800."

The learned Chief Justice was not satisfied with the answers and the following is the official report of what then took place:

"His Lordship: Your answer to the 6th is inconsistent with the answer to the 7th.

Mr. Dewart (counsel for the defendants): I submit not.

His Lordship: Plainly so—You find they are both guilty of negligence and you find that the motorman was guilty in waiting till too late before applying the brakes. Now what does that mean in connection with 6?

Foreman of Jury: He was too near to the man in the rig to stop to avoid the accident.

His Lordship: Then why do you say that he was negligent in waiting until too late before applying the brakes? One or other of those answers is wrong, it strikes me, or are inconsistent with one another. Now, what is it you mean? Just state generally what idea you have in all this answer. Just state generally what you think was the position of the parties and the negligence of both.

Foreman: According to the evidence he had not a chance to do anything but what he did.

His Lordship: Then you should have answered this 7th question—you should not have answered the way you did: He was negligent in not applying the brakes; because that means that after he became aware the plaintiff was in danger he might have avoided the accident by putting on the brakes or by doing something. Is that what you mean, or do you mean the contrary?

Foreman: We mean the contrary—that he could not have done it in the time.

His Lordship: Then your 7th answer should be struck out. Now, which of these answers is to be taken as correct?

Foreman: We said he could not have avoided the accident when he noticed it.

His Lordship: Then the answer to the 7th should be struck out; because you say in effect that he could have avoided the accident if he had not waited until too late. I think you had better go back, consider it, and come back again. And make sure what you really mean.

The jury then retire, and after some time return again to the court-room."

They had struck out the answers to questions 6 and 7 altogether, but it was not noticed that they had struck out the answer to question 6. The report continues:

"His Lordship: The only change is taking out the answer to 7. What you say in effect is that both these people were to blame, and that the motorman, after he saw that the plaintiff was in danger, could have stopped his car. That is the effect of it?

The Foreman: Yes.

His Lordship: Mr. McGregor, I must endorse the record dismissing this action. The jury have been rather friendly to the Street Railway Company. I cannot help it."

Were it not for what follows, I should have thought that what the learned Chief Justice said was "the motorman . . . could not have stopped his car." This as reported was a finding that the motorman could have stopped the car that he was guilty of the ultimate and causal negligence, and would entitle the plaintiff to a verdict.

But the report continues thus:

"Mr. McGregor (counsel for the plaintiff) asks for a stay.

His Lordship: I had not observed that the jury had struck out the "No" in answer to the 6th question. But I have asked them if their idea was that the motorman after he saw the position in which the plaintiff was could by the exercise of reasonable care have prevented the accident. They said that was their view. I will give you a stay."

There seems to have been some misapprehension at the trial and perhaps the report is not accurate. Neither party, however, offered or asked to have the reporter's notes examined to find if the official report is accurate: and we must deal with the case upon the material before us upon this appeal by the plaintiff.

On the notes as they stand, it would appear that the learned Chief Justice was referring to the first question and the answer already found—and not at all to the sixth and seventh questions.

Whether the jury so meant or whether they had changed their mind and thought the sixth question should be answered in the affirmative, may be doubtful—and if the case turned upon this, a new trial should be had.

But I do not think the matter of any importance in the present case. While it is the best and most convenient practice to submit in writing all questions which the jury are to answer, there is nothing in the Stat. (O. J. A. sec. 112) to compel this to be done; and I would consider that the answers of a jury to questions submitted orally from the bench are answers to questions within sec. 112. But it must be not tentative, but final answers that are to be so taken—consequently in this case we must, I think, look to the answers given after the jury returned the second time.

The result will be that the jury have found (1) negligence by the motorman (2) which would not have caused the accident had the plaintiff exercised reasonable care, but (3) "the motorman after he saw that the plaintiff was in danger could have stopped his car." Or if this be not the case, but the negligence referred to in the answer to the first question is the same as that referred to in answer to the oral question: then the case is as put by Mr. Justice Meredith in *Jones* v. *Toronto, and Y. R. Co.* (1911), 20 O. W. R. at p. 468, "no negligence on the part of the defendants causing the injury, negligence on the part of the plaintiff causing it, but . . . the defendants by the exercise of ordinary care might have avoided the injury." It makes no difference which way it is put—if the last finding of the jury be justified by the evidence, the plaintiff is entitled to his verdict.

The question is: Could the jury upon this evidence have been justified in finding that the motorman could and should have stopped the car by any exertion at or after "the point at which it became reasonably apparent that the plaintiff intended to proceed in his course across the track: per Garrow, J.A., *Jones* v. *T. & Y. R.* (1911), 20 O. W. R. at p. 464. Any negligence prior to that time is "met by the finding of contributory negligence": per Meredith, J.A., s.c. p. 468.

The only evidence apparently bearing upon that point is that of the motorman: he says:—

"Well, I had just been after passing a car going east bound just east of Margueretta, just on Margueretta at the east. I sounded the gong approaching that car, and just as the other car had got clear of me I noticed Mr. Herron's horse starting to come across, and I sounded the gong again. I saw that he was not going to stop. I would not say that I sounded the gong after that, but I put my best energies towards stopping the car, and I thought that I was going to succeed till I was about to hit him."

The view of the plaintiff and consequently that of the motorman had been at first obscured by the car going east.

"Q. But in the position where you were, with the east bound car where it was, was it possible for you to see him? A. No.

Q. Were you on the lookout? A. Yes.

Q. Was there anything to take your attention away from your work at that time? A. Nothing at all.

Q. And were you on the job? A. I was on the job.

Q. From the time that you saw Mr. Herron until you brought the car to a stop, how far did the car go? A. I judge about a car-length.

Q. Where was the horse at the time the rig was struck? A. It had just crossed.

Q. The horse was clear of the north track? A. Yes.

Q. What kind of appliances had you on this car? A. Air-brakes.

Q. What condition were they in on that day? A. In good order.

Q. Did they work? A. Worked satisfactorily.

Q. Did you apply the reverse at all? A. I did.

Q. And how did it act? A. Worked all right.

Q. What kind of a stop did you make? A. I made a quick stop, as quick as I could.

Q. Were there any appliances there that you did not use? A. Well, I used the best appliances that I knew how to use at the time and the quickest.

Q. And you understand how to use them? A. And I knew how to use them.

Q. Was there anything else you could have done to have made a shorter stop? A. I do not know of anything else; not any better."

I think that it could not be found on this evidence that the motorman was guilty of negligence after he saw or could have seen that the plaintiff "intended to proceed in his course across the track."

The plaintiff can tell nothing about the matter: he did not see the car "till it came crash right up against the rig about four feet off"—"it was right on top of me or close to me before I seen anything." Buchner heard the brakes put on but does not assist on this point.

McCormick says when he noticed the horse crossing the track then he heard the motorman ring the gong—"the door was open and the car began to slow down, but it did not quite stop before it struck the buggy—the motorman shut off the power, and put on the brakes and rang the bell."

Holden says the motorman "stopped the car as quickly as he could." Judge "heard the motorman put the brakes on, and , . was almost threwn off his feet." Cowan "the car approached him as if it were stopping—in a slow manner."

None of those witnesses helps at all in the enquiry now in hand—and I cannot see that any case is made of ultimate or casual negligence.

In my opinion the appeal should be dismissed with costs.

Note.—Since the above was written we have been informed by the official stenographer that his transcript of his notes is erroneous in leaving out the word "not" in two places. He says his notes read:

"His Lordship: The only change is taking out the answer to 7. What you say in effect is that both these people were to blame and that the motorman, after he saw that the plaintiff was in danger, could *not* have stopped the car. That is the effect of it?

The Foreman: Yes."

The second passage should read:

"His Lordship: I had not observed that the jury had struck out the 'No' in answer to the 6th question. But I have asked them if their idea was that the motorman, after he saw the position in which the plaintiff was, could *not*, by the exercise of reasonable care have prevented the accident. They said that was their view."

This clears up much difficulty and makes, in my view, inevitable the conclusion I have already arrived at.

HON. SIR WM. MULOCK, C.J.EX.D. SEPT. 11TH, 1912.

RAINY RIVER BOOM CORPORATION v. RAINY LAKE LUMBER CO.

4 O. W. N. 5.

Water and Watercourses—Floatable River—Unlawful Erection of Boom in River — Ashburton Treaty — Ultra Vires State Legislation.

Action to recover certain sums of money for booming, sorting, rafting and driving defendant company's logs in the Rainy River during the years 1906 and 1907.

Plaintiff company, incorporated under Minnesota laws, was authorized, by its charter, to erect booms in the Rainy River and to charge tolls for booming logs. Defendant company, in common with others, floated its logs down the Rainy River, this being the only practicable method, and plaintiffs' booms, which were on the Canadian side of the river, were of some assistance in separating their logs from those belonging to others. The Rainy River is a navigable stream, and the international boundary between the United States and Canada runs up its thread, the stream being free to the citizens of both countries under the Ashburton Treaty. Plaintiffs' claim was based on implied contract and on the right under its charter to collect tolls.

MULOCK, C.J.Ex.D., *held*, that there were no circumstances from which any implied contract to pay could be inferred, and that plaintiffs could not force their services on defendants.

That plaintiffs' erections in Canadian waters were in violation of the Treaty and wholly unauthorised, and that plaintiffs had no right to divert defendants' logs into foreign territory and seek compensation for services in respect thereof.

Hiscox v. *Greenwood*, 4 Esp. 174, referred to.

That the clause in plaintiffs' charter permitting them to levy tolls was in breach of the Ashburton Treaty, and, therefore, *ultra vires* of the State legislature of Minnesota.

Action dismissed, with costs.

G. F. Shepley, K.C., for plaintiffs.

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

HON. SIR WM. MULOCK, C.J.Ex.D.:—This action is brought to recover certain sums of money from the defendant company for booming, sorting, rafting and driving the defendant company's logs down the Rainy River during the years 1906 and 1907. It may be convenient to refer to the plaintiffs as the boom company and to the defendants as the lumber company.

The boom company was incorporated by articles of incorporation issued under the laws of the State of Minnesota and dated the 23rd February, 1889, which articles purported to empower the boom company to construct and maintain booms and other words on the Rainy River, to

drive and sort logs passing through its booms and to charge tolls for the services so rendered. Thus authorized, the boom company in or about the year 1869 constructed a portion of its works. On the 27th February, 1905, amending articles were issued declaring that the general nature of the boom company's business should be "the improvement of the Rainy River from its mouth at the Lake of the Woods to the falls of said river at International Falls . . . by cleaning, deepening . . . the channel . . . and so keeping and maintaining said river and the said improvements and works in repair as the render driving logs and floating timber thereon reasonably practicable and certain, and to drive, tow, boom, assort, hold, distribute and otherwise handle logs . . . in said river . . . and to collect tolls and charges for such services," etc.

On the 6th April, 1905, the War Department of the Government of the United States granted a permit to the boom company to extend and thereupon it did extend its works easterly.

The general nature of these works may be described as follows: Piles were driven along the stream at places sometimes in the middle and at others near to but not in the middle of the stream, and booms connected by chains were secured in a continuous line along these piles up the stream, except where at one place towards the easterly end an opening was left for the purpose of enabling vessels to pass through. To the east of this opening was erected a sheer boom which ran in a north-easterly diagonal direction across and up the stream to the Canadian shore. At the lower or westerly end of the boom were cross booms, sorting gaps and pockets whereby logs could be held and sorted.

The lumber company is a corporation incorporated under the laws of the province of Ontario and carries on its lumbering business in that province. Its saw-mills are situate in Ontario on the northerly shore of the Rainy River, some distance below the westerly end of the boom company's works, and the logs in question were cut on Canadian limits for the purpose of being manufactured into lumber at the lumber company's mills in the said province of Ontario. In connection with its mills, the lumber company had also erected a boom some two and a half miles in length along the Rainy River for the purpose of catching

and securing its logs as they floated down the river. This boom was in existence and in effective condition in the years 1906 and 1907, and was then sufficient to enable the boom company to separate from the logs of other persons all its own logs as they floated down the river and to take proper care of them.

The Rainy River commences at the foot of Rainy Lake, being separated therefrom by the International Falls, and flows westerly some 80 miles into the Lake of the Woods. Throughout its whole length it is a navigable river, floatable for logs from shore to shore, and is several hundred feet wide with a current of from two to three miles an hour, and its floatable character was not improved by the boom company's works.

A number of lumber companies, including the defendant company, conduct lumber operations on the upper waters contributory to the Rainy River, floating their cuts of logs down to their respective mills, situate along the river bank. Their practice was to cut logs in the winter and haul them on the ice. Then in the spring the logs mixed together and floated down the river towards the mills, each mill having certain boom accommodations of its own. One of these companies is the Rat Portage Lumber Company, which owns two mills; one of them being situate higher up the river than are those of the defendant company, and other of the mill owners. Its other mill is at Kenora at the foot of the Lake of the Woods. At the westerly end of the boom company's boom it is necessary to separate the logs of the Rat Portage Lumber Company from those of the other owners operating lower down the river.

The Rat Portage Lumber Company controls the Boom Company and it would seem that the original object for which the latter's boom was constructed was to enable the Rat Portage Lumber Company to separate its logs from those of other companies.

The Rainy river runs between the province of Ontario and the State of Minnesota, and under the Ashburton Treaty it is established as an international river, and its thalweg constitutes the boundary line along its course between Canada and the United States.

The lumber company erected its mills and booms in the year 1904, and in the years 1906 and 1907, continued lumbering operations on its limits in the vicinity of

Rainy Lake, watering its logs in that lake and its tributaries in common with the logs of other lumbermen, all of which mixed together floated down the lake, over the falls and into the Rainy River. At this point if uninterfered with the logs would have distributed themselves over the whole river on their way down, although probably the greater prportion would have been carried by the current towards the southerly side of where is now the plaintiffs' boom, but the sheer boom caused all the logs to pass to the south of and inside the main boom, thereby preventing a substantial portion of them floating down (which they otherwise would have done) in Canadian waters along the north side of the boom. The lumber company being prepared to separate its logs from the rest objected to the boom company handling or in any way interfering with them. The boom company, however, at the westerly end of its works required to separate the logs of the Rat Portage Lumber Company from those of the other mill owners and did so, by allowing, during the years 1906 and 1907, all the logs except those of the Rat Portage Company to pass unsorted through the sluiceways, each company, including the defendant company, separating its logs from the others as they floated down the river after having passed the westerly end of the plaintiffs' works. The Rat Portage Company's logs thus separated amounted to about one-third of the whole quantity, and the only service rendered to the defendant lumber company by the works and operations of the boom company in respect of the logs of 1906 and 1907 was this separation of the Rat Portage Lumber Company's logs from the rest of the logs. There is no evidence shewing that the plaintiffs' works and operations benefited the defendants by preventing the logs of 1906 and 1907 coming to the defendants' works in undesirable quantities. There is a conflict of testimony as to whether the boom company sorted the logs of 1906 and 1907 into separate pockets for the respective owners, but I accept Mr. Matthiew's evidence that the only sortation was in respect of the Rat Portage Lumber Company's logs. The extent, however, of the sortation does not determine the question of liability, but merely goes to that of damages, if any, to which the boom company may be entitled.

The Boom Company rests its right to payment for whatever services it may have rendered to the lumber company on two grounds: first implied contract; and, second,

legal authority to maintain the works and to charge and collect reasonable tolls for services rendered.

As to the first ground, Mr. Shepley's argument is that the boom company having erected its works the lumber company, by allowing its logs to be mixed with those of other owners and to pass into the boom company's works, rendered a separation necessary, and thus impliedly requested the boom company to make that separation for reward. It is true that the boom company caused its logs to be deposited on the ice during the two winters in question. Other operators having acted similarly the whole cut became mixed and required separation, but such action on the part of the lumber company did not, I think, constitute an implied request to the boom company to make this separation. The destination of the lumber company's logs was its mills on the Rainy River. There it had erected booms, pockets and other devices whereby, if permitted to use the river uninterfered with and unaided by the plaintiffs' works, it could have separated and taken care of its own logs. All the witnesses agree that having regard to rapids and other conditions above Rainy River it was impossible to float the lumber company's logs in cribs or in any other way, except as separate single pieces. Unless, therefore, that method of floating was adopted the lumber company would have been unable to make use of its standing timber. Thus it was necessary to float the lumber company's logs loose from the limits by the route pursued to the Rainy River. This necessity, added to the fact that the defendant company was deriving no benefit from the unauthorized interference of the plaintiff company with its logs on the way to the mill, and had forbidden the plaintiff company to interfere with them, negatived the inference of an implied contract.

Mr. Shepley argued the case as if the lumber company was solely responsible for the mixing of its logs with those of other owners, and, therefore, was liable to the other owners for the costs of unmixing. Such, however, is not this case. The mixing was the result of common action. If the plaintiff company were one of the owners it would have had to share the responsibility for such mixing, and its only right, I think, would have been to remove its property at its own expense, but whether such be the law as between different owners, I fail to see how a stranger can step in and against the protest of an owner

meddle with his property and then in his own name maintain an action for such services. If, at the request of the Rat Portage or any other company it performed any service it may have a cause of action against such moving company, but not, on an implied contract, as against the present defendant company.

For these reasons, I am of opinion that the defendant company is not liable to the plaintiff company on any implied contract.

The other ground on which the plaintiff company rests its claim is that it is legally entitled to maintain its works as a whole, including the sheer boom, which is wholly within Canadian territory, and, by means of its works, to take and retain possession and control of the lumber company's logs as they float down the stream and until they are caught by the cross booms and sorted into pockets, and to charge the company for such service. The defendant company denies the right of the plaintiff company to interfere with its logs or to payment for such services.

Much the same question as is involved here came before the Circuit Court of the State of Minnesota and was there determined adversely to the plaintiffs, and that decision is pleaded in bar to the present action. By the treaty between Great Britain and the United States of the 9th August, 1842, commonly known as the Ashburton Treaty, the Rainy River is made part of the boundary line between Canada and the United States, the treaty declaring that it "shall be free and open to the use of the subjects and citizens of both countries." The middle of the channel, or thalweg of the river, marks the line of separation between the two countries. (Wheaton's Elements of International Law, 4th ed., p. 297), this treaty confirming the presumption of law that the right of navigation is common to them both.

The sheer boom is a necessary and material part of the plaintiffs' works. Without it a substantial portion of the in question would have floated down the river on the north side of the boom. This sheer boom, however, diverted many (although what quantity cannot be determined) from their natural course into the plaintiffs' works. The sheer boom, built wholly on the Canadian side of the dividing line between the two countries, has no legal authority for its existence. No legislation of a foreign power could

entitle the plaintiff company to erect or maintain this sheer boom and by means of it to divert the property of a Canadian citizen from Canada into the United States and there to cause it to pass into the custody and control of a foreign corporation. Such was the practical effect of the maintenance of the sheer boom as regards a substantial portion of the logs in question. Thus the plaintiff company illegally acquired possession of a portion of the defendants' property, removed it from Canada and now claims compensation for services in respect thereof. If a person wrongfully takes possession of a chattel property of another and whilst in such possession alters, improves or otherwise deals with it, he is not entitled to payment for such services. (*Hiscox* v. *Greenwood*, 4 Esp. 174; *Cheshire Railroad Co.* v. *Foster*, 51 N. H. 490; *Purves* v. *Moltz*, 5 Robertson N.Y. 654; *Silsbury* v. *McCoon*, 6 Hill, N.Y. 425; *Bryant* v. *Ware*, 30 Me. 295.)

The evidence shews that without the sheer boom some of the defendants' logs would have floated down the river on the north side and others on the south side of the boom, but what proportion in each case is quite uncertain. The direction and velocity of the winds, the quantity of logs in the river at one time, also the proportions of the defendant company's logs and other owners' logs then floating together are all factors which would have affected the course taken by the logs. There is no evidence shewing to what extent these influences affected the direction taken by the defendants' logs in the seasons 1906 and 1907.

The plaintiffs claim at the rate of 35 cents per thousand feet, board measure, of logs of the defendants passing through their works during those years, but even if they are entitled to payment at that or any other rate for such logs as if uninterfered with would have floated inside the plaintiffs' works, it seems to me impossible to determine the proportion not affected by the wrongful action of the plaintiffs in taking possession of a portion of the defendants' logs by means of the sheer boom. To do so it would be necessary to seduct from the mixed mass of logs that passed through the boom of the company's works in the two years in question, the quantity of the defendant company's logs wrongfully taken possession of by means of the sheer boom. To say what that quantity was would be the merest guess-work. There is no reasonable evidence whereby to determine it.

Even if the plaintiff company were otherwise entitled to recover for services in respect of logs lawfully in its possession, inasmuch as the confusion was caused by the unlawful acts of the plaintiff company, the onus is upon it to shew affirmatively the quantity of the defendants' logs which lawfully came into the plaintiffs' possession. For reasons already given, there is no evidence from which this can be shewn, and, therefore, the plaintiff company cannot recover. (*Warde* v. *Eyre*, 2 Bulstr. 323; Anon, Poph. 38.)

On another ground I think the plaintiffs' action must fail. All the works in question constituted one structure. It may have facilitated the floatation of logs, but treated as a whole it was in the river without legal authority. A bridge along a public road may be a necessity, but if erected without legal authority its mere construction does not authorize the person building it to exact tolls from the public who in using the bridge are still exercising their right to travel, free of tolls, along the highway. In the absence of authority to exact tolls or in the absence of a contract, express or implied, on the part of users of improvements on a highway to pay tolls, the person erecting such improvements has no right to exact tolls from such users. The principle is the same whether the public way be on the water or on the land. Here, in spite of the illegal works on the river it remained *publici juris*.

As said in *Tanguay* v. *Price*, 37 S. C. R. 667, "The defendant's logs were lawfully in the water while on their way down and until they were stopped by the plaintiff's barriers, and they continued to be lawfully there after they were stopped . . . the service rendered to the defendant by the plaintiff's boom although of great value was involuntary and accidental and could afford no ground of action."

Thus far I have dealt with the question in the view that the sheer boom is an inseparable part of the plaintiffs' works, but assuming that it is not, then the question is can the plaintiffs recover in respect of the remainder of the works? The main boom, beginning at the west end of the gap below the sheer boom, extends westerly down the river some two and a half miles, when it reaches the catch booms, pockets, etc.

I accept the evidence of Euclid I Bourgois as to the position of this main boom in its relation to the thalweg

and find that the easterly one-half mile of this main boom is wholly within Canadian territory, its easterly end being 310 feet north of the thalweg, and it being at point marked 2 on Ex. 17 (being a point about half a mile further westerly) 340 feet north of the thalweg.

This portion of the main boom, like the sheer boom, is unlawfully in the river. If it and the sheer boom had not existed it is reasonable to suppose that many more logs would have passed down the river on the Canadian side of the boom. Witnesses speak of the logs coming over the falls at times in quantities sufficient to cover the river from bank to bank.

There was some opinion evidence as to what proportion of logs was diverted by the sheer boom inside the plaintiff company's works, but it is valueless, there being no reliable data from which to form such opinion, but there is an entire absence of evidence as to the effect of the illegal half mile of boom structure.

What I have said in respect of the legal consequence of the existence of the sheer boom applies also to the case of the unlawful half mile of main boom.

But apart from the question whether the works of the plaintiff company in whole or in part are lawfully in the river, it is to be observed that the right to erect and maintain them is quite different from the right to collect tolls, which is the only issue involved in this action. The defendant company is asking no relief but simply resisting a money claim. The works may or may not improve the navigability of the river; they may or may not be lawfully there, but so far as the defence is concerned the sole question is whether the plaintiff company is entitled to recover money damages in respect of the defendants' logs which passed through the works in the years 1906 and 1907.

The legislation of the State of Minnesota is the only legislative authority upon which the plaintiff company relies as authorizing them to impose tolls. Had the State Legislature power to grant such authority?

Under the Ashburton Treaty the citizens of the two countries became entitled to the free use of the river. The Legislature of the State of Minnesota has purported to deprive them of that right by granting permission to the plaintiff company to exact tolls. The undisputed evidence

is that the State Legislature had no jurisdiction to so repeal that clause in the treaty.

I therefore think that the provision in the plaintiff company's charter purporting to entitle them to impose tolls or other charges is ultra vires the State Legislature and null and void. The permit granted by the War Department does not assist the plaintiff company; it merely sanctions an extension of its works subject to the condition that "the company shall not exact tolls or charges for the passage of logs or rafts or other forms of navigation."

Mr. Shepley sought to shew that this condition was void. It is not, however, necessary to determine that point; but it is sufficient to say that nothing in the permit authorizes the imposition of tolls or other charges.

I therefore think that the plaintiff company has no legislative authority to exact tolls or other charges.

Notwithstanding the existence of the plaintiffs' works the navigation of the river for all purposes remains free to each citizen of the two countries, unless he shall by contract, express or implied, deprive himself of such right.

The defendant company has not so deprived itself, and, therefore, the plaintiff company is not entitled to maintain this action, which is dismissed with costs.

DIVISIONAL COURT.

AUGUST 20TH, 1912.

RE CALEDONIA & COUNTY OF HALDIMAND.

3 O. W. N. 1654.

Way—Bridges—Duty of County Council to Build, Maintain, and Repair — Municipal Act, 1903, s. 616 — Width of Stream — Measurement at High Water.

DIVISIONAL COURT, *held*, that a stream which is over 100 feet in width at certain times of the year, is more than 100 feet in width within the meaning of s. 616 of the Municipal Act, 1903, and should be built, kept, and maintained in repair by the county.

New Hamburg v. *Waterloo*, 22 S. C. R. 296, followed.

An appeal by the Corporation of the County of Haldimand from the decision of the Judge of the County Court of the County of Haldimand, dated May 14, 1912, declaring that Black creek where it is crossed by a bridge on the

main highway passing through the village of Caledonia is more than one hundred feet in width, within the meaning of sec. 616 of The Consolidated Municipal Act, 1903, 3 Edw. VII., ch. 19, and that such bridge should be built, kept and maintained in repair by the Municipal Council of the County of Haldimand.

The appeal to Divisional Court was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE TEETZEL, and HON. MR. JUSTICE KELLY.

T. A. Snider, K.C., for the County of Haldimand, appellants.

H. Arrell, for the Village of Caledonia, respondents.

HON. MR. JUSTICE KELLY:—Black creek is a stream emptying into the Grand river within the village of Caledonia. Just above this point it is crossed by a bridge connecting a main highway leading through the county. The land both to the east and the west ends of the bridge is low lying.

The evidence shews that in the springtime of every year, and at other times as well, the water in the creek at the bridge rises to such an extent as to be more than 100 feet in width; at such times the water overflows the road for a considerable distance at either end of the bridge.

The conditions are such as in my opinion justify the finding of the learned Judge of the County Court, and bring the case within the authority of *New Hamburg* v. *Waterloo*, 22 S. C. R. 296, in which it was laid down by Gwynne, J. (at p. 299), that "after heavy rains and during freshets, which are ordinary occurrences in this country, the waters of the streams and rivers are accustomed to be much swollen and raised to a great height, and a bridge, therefore, which is designed to be the means of connecting the parts of a main highway leading through a county, which are separated by a river must necessarily be so constructed as to be above the waters of the rivers at such periods, and the width of the rivers at such periods must, therefore, in my opinion, be taken into consideration in every case in which a question arises like that which has arisen in the present case under the sections of the Act under consideration."

The appeal will, therefore, be dismissed; there will be no order as to costs.

HON. SIR WM. MEREDITH, C.J.C.P., and HON. MR. JUSTICE TEETZEL, agreed.

HON. SIR G. FALCONBRIDGE, C.J.K.B. AUGUST 31ST, 1912.

BELL TELEPHONE CO v. AVERY.

3 O. W. N. 1664.

Injunction—Restraining Blasting in Streets of Town—Diligence—Skill and Care—Addition of Parties.

Motion by the plaintiffs to continue an injunction and for leave to add parties.

R. McKay, K.C., for the plaintiffs.

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

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Leave is given to add A. Avery & Son as party defendants, if plaintiffs be so advised.

The interim injunction granted by the learned Local Judge is of most innocuous character; it restrains defendants "from negligently and without due skill and care blasting upon the streets of North Bay in proximity to any portion of the plant of the plaintiffs so as to destroy or injure the said plant or any part thereof."

The law holds defendants to an application of diligence, skill, and care, in carrying on their operations, and the injunction does not restrain the proper execution of their work.

The injunction will be continued to the trial.

Costs of application to be costs in cause unless trial Judge shall otherwise order.

HON. SIR G. FALCONBRIDGE, C.J.K.B. SEPTEMBER 4TH, 1912.

WALKER AND WEBB v. MACDONALD.

GRAHAM v. MACDONALD.

4 O. W. N. 22.

Principal and Agent—Commission on Sale of Land—Parties brought Together by Agent — Sale Effected — Different Agents Claiming the Commission — Evidence — Relief over Against Third Party.

Paton v. *Price*, 21 O. W. R. 753, and *Burton* v. *Hughes*, 1 T. L. R. 207, approved.

Actions by real estate agents to recover commission on the sale of land of defendants to G. J. Foy Ltd., brought in as third parties.

Plaintiffs Waker and Webb and plaintiff Graham both claimed a commission on the same sale.

W. E. Raney, K.C., and H. E. Irwin, K.C., for the plaintiffs Walker and Webb.

D. I. Grant, for the plaintiff Graham.

G. F. Shepley, K.C., and G. W. Mason, for the defendants.

E. J. Hearn, K.C., and R. J. Maclennan, for third party G. J. Foy, Ltd.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Plaintiff Graham is entitled to the commission. There will be judgment for him for $1,750 and costs.

Plaintiffs Walker and Webb are not so entitled. Their action is dismissed with costs.

As to the third party (G. J. Foy Ltd.) R. T. Blachford was a most unsatisfactory witness, both in demeanour and judged by the other ordinary tests of credibility. I hesitate to brand him as deliberately untruthful. He was apparently a sick man and perhaps his recollection was at fault. But I prefer to accept the evidence of Macdonald and Granville, wherever he contradicts them or either of them.

Macdonald had shewn him Graham's card and Blachford expressly repudiated Graham. Yet when he ascertained (if

he did not know it all along) that Graham was, to put the case mildly, busying himself about the matter, it never occurred to him as a proper thing to do, to tell Macdonald. He assured defendants that he came to close the deal himself, that no one but Williams was in any position to look for commission and that he would look after Williams. The clause in exhibit 5 "No agent introduced buyer and seller," was read over to him and he well knew the object of its insertion. He must be taken to have intended the vendees to act on it, and on his silence as to what he knew about the action of those who now claim commissions.

The vendors acted on these representations and reduced their price from $72,000 to $70,000.

Therefore the third party G. J. Foy Ltd. is bound to make this good to defendants and defendants will have judgment against third party for $1,750 plus plaintiff Graham's costs plus defendants costs in the Graham suit and costs of making G. J. Foy Ltd. third party, and of the trial. In other words, defendants are entitled to complete indemnity, as to Graham and to their own costs.

The same result would follow as to third party if Walker and Webb were adjudged entitled to the commission instead of Graham.

It behooves the man who has property for sale, to walk and talk warily.

It was suggested in this case that defendants would be liable for two commissions. See *Burton* v. *Hughes*, 1885, 1 T. L. R. 207; *Paton* v. *Price*, 21 O. W. R. 753.

Thirty days' stay.

HON. MR. JUSTICE BRITTON. SEPTEMBER 11TH, 1912.

QUEBEC BANK v. SOVEREIGN BANK.
(No. 1.)

4 O. W. N. 22.

Timber—Contract—Guaranty for Payment for Timber—Bank Act—Securities Under—Correspondence.

Action for the price of certain spruce delivered to the Imperial Paper Mills Co., Ltd., during the months of July, August and September, 1907, for which it was alleged defendants agreed to pay.

BRITTON, J., gave judgment for plaintiffs for $20,932.45 and costs.

Tried at Toronto without a jury.

F. E. Hodgins, K.C., and D. T. Symons, K.C., for the plaintiffs.

James Bicknell, K.C., and W. J. Boland, for the defendants.

HON. MR. JUSTICE BRITTON:—This action was commenced on the 6th day of March, 1908. The trial of it was commenced before me at Toronto on the 7th day of February last.

The trial did not proceed continuously, but was adjourned from time to time.

Evidence *viva voce* was given at great length, and the documentary evidence was very voluminous. The action is for the recovery by the plaintiffs from the defendants, of the price, agreed on as is alleged, of certain spruce—3,934 cords at $6 per cord—delivered by the plaintiffs to the Imperial Paper Mills Company, Limited, during the months of July, August, and September, 1907. The circumstances under which the parties to this action came to the agreement, in pursuance of which the delivery of wood followed seem to be fully and correctly set out in the statement of claim. Briefly stated, this was the position. Both banks, parties hereto, were creditors of, and largely interested in the Imperial Paper Mills Co., which had carried on business at Sturgeon Falls. The plaintiffs had advanced large sums of money to that company, and under the Bank Act, had taken security for such advances upon logs got out by the company, which logs were on the way to the mill. On the 21st February, 1907, George Edwards and John Craig were interim receivers and managers of the company, and in order to keep the com-

pany's mill running, and as a going concern pending proposed reorganization proceedings, brought about a agreement, by which the plaintiffs were to deliver at the company's mill certain spruce and balsam freed from the plaintiffs' lien or claim, and the defendants were to pay the plaintiffs therefor at the rate of $6 per cord.

Under, and in pursuance of this agreement, the plaintiffs delivered from time to time a large amount of wood, and the defendants paid for all delivered prior to 1st July, 1907, but the defendants then stopped payment. This action is brought for the wood delivered after the 1st day of July, 1907, and speaking generally, for wood delivered during July, August, and September of that year. The defences pleaded are: (1) that the agreement relied on by plaintiffs is merely a guarantee by the defendants that they will pay a debt to be incurred by the receivers and managers of said company, and that no such debt has been incurred; (2) that as against any such debt or liability by the receivers and managers they have, and the defendants in this action have, the right to contend that the securities which were taken by the plaintiffs from the company were and are inoperative by reason of a trust deed by the company to secure certain debenture holders, and also that these securities are invalid by reason of non-compliance with the Bank Act—and (3) that of the logs actually delivered by the plaintiffs to the company, 3,000 cords, at least, were the property of the defendants, and not the property of the plaintiffs.

The liability of defendants for the wood delivered, depends upon their letters. On the 21st February, 1907, in answer to a proposal made by plaintiffs, the defendants promised to guarantee payment on the 15th April following for 2,000 cords of spruce and balsam to be taken by the company on or before the 1st of April, 1907, at the rate of $6 per cord. This guarantee was by letter of C. M. Stewart, then the general manager of defendants' bank, addressed to the general manager of plaintiffs' bank. Other things were guaranteed by that letter—but these other things were made subject to, and conditioned upon the creation of new securities proposed by the company. These new securities were not created. The standing agreement is that mentioned above, and in the subsequent correspondence is referred to as clause one, of the letter of 21st February, 1907.

On the 29th April, 1907, the general manager of defendants wrote, in reply to letter of plaintiffs' referred to

the agreement in clause one of the letter mentioned as the only one which would "hold good."

On the 16th May, 1907, Mr. Jemmett had come in as joint general manager of defendants, and he wrote on that day discussing certain matters to be left in abeyance—and then said:—

"In the meantime it is understood that you will continue delivering to The Imperial Paper Mills Company, Limited, of such portions of the wood hypothecated to you which they may require for use—this bank guaranteeing payment to you, payment at the price agreed on for such wood as they may take. Should we at any time desire to discontinue this guarantee, we will at once notify you, payment being made to you in due course for all wood delivered by you in the ordinary way before the receipt of the notification."

On the 23rd July, 1907, the defendants' general manager again wrote to plaintiffs, and after dealing with difficulties, in connection with the company, of which there were many, said:—

"In the meantime it will be quite in order if agreeable to you, that you should continue to allow delivery to the mills of such wood covered by your assignments as they may find it to their advantage to use, we continuing until further notice our guarantee, that any such wood taken by the company will be paid for on the terms, which are now in force."

On the 31st July, 1907, defendants' general manager again wrote and after referring to matters not in controversy as to a mill, known as, "McNeil Mill," said:—

"Payment, however, for wood supplied to the Imperial Paper Mills will, of course, be made on the fifteenth day of each first succeeding month as heretofore." The plaintiffs did continue to deliver and the company's mills continued to take—and there has not been payment for that delivered and sued for as above stated.

The contract is one of guarantee for payment of wood which plaintiffs claimed under their securities, and which they would not have allowed to go to the mill unless paid for, or guarantee for payment given. It was in a way a guarantee of a debt of the company to the plaintiffs. The debt of the company had been incurred, and what purported to be security for that debt had been given. All parties regarded the security as valid. The logs were called logs of the Quebec Bank—and in

consideration of getting pay for these logs the plaintiffs allowed the logs to be taken by the company for their mill.

There was no intention on the part of plaintiffs or defendants or the company, that the plaintiffs should convert their secured claim into an unsecured one.

There was no intention or suggestion that the plaintiffs' claim against the defendants should be subject to or affected by any right of set-off by the company.

As to the quantity of wood—the number of logs—which the plaintiffs allowed to be taken by the mill—under and in pursuance of this agreement with the defendants, the plaintiffs' claim is made from the reports of the officers of the company accepted by defendants. The plaintiffs gave general evidence—but from the reports, there can be no doubt of the correctness, in the main, of the figures.

The amounts from 1st July, 1907, are as follows:—

Quebec Bank stock of wood in yard on July 1st, 1907—1,300 cords.

	cords	used	yard.
1st to 8th July	480	385	95
9th to 15th July	451	225	226
16th to 23rd July	379		379
24th to 31st July	388		388
1st to 8th August	391	172	219
8th to 15th August	210	49	161
16th to 23rd August	72	72	

Also used from pile and to be deducted from pile—62 cords—making 134 cords used in mill during that week.

24th to 31st August	180	120	60
1st to 8th September	24		

used 108 leaving 84 to be deducted from pile.

9th to 15th September, nothing taken from river, but 192 cords from pile under conveyor.

16th to 23rd September	191½
used	73½
24th to 30th September, nothing used	1½
1st to 8th October, none used	3½

The operation by old receiver closed on 7th October.

Mr. Clarkson took possession on 8th October, 1907, and on the 19th October the defendants took possession for operation of the mill.

On the 8th October, 1907, there was on the premises of the mill—under the conveyer, wood which was taken out of

the river by the company—as the wood of the plaintiffs—and cut at the cutting mill of the company into blocks measuring 2,440 cords. The quantity actually used in the mill—after it was cut into blocks during the time mentioned was about 1,530 cords. The plaintiffs claim for only 1,455 cords, apart from and over and above the blocks under the conveyer. The difference may probably be explained in this way, that some of the wood, actually delivered after 1st July was paid for. The plaintiffs' claim is made up from the beginning, including the first delivery after the date of the agreement, making the total number of cords used in the mill 7,997, and the defendants paid for 6,542 cords, leaving 1,455 cords. No point was made by either plaintiffs or defendants of this discrepancy—and, of course, the plaintiffs cannot get more than this for the 1,455 cords, apart from the blocks.

I am of opinion that the guarantee extends to all the logs delivered to the company, and which the company took possession of and cut into blocks.

That was preliminary to further use. The plaintiffs had no market for these blocks after they were stored upon the mill premises. The mill used, when it suited their convenience, much or little of the pile. The separation was merely a matter of book-keeping—charging to the mill the wood when reduced in the process of manufacture and to the yard —the wood when only cut into blocks. The plaintiffs are not estopped from claiming now according to the true meaning of the guarantee, merely because the plaintiffs' manager rendered accounts for only that used in the mill.

The letter of 21st February, 1907, says, "Spruce and balsam to be taken by the company." In Mr. Stewart's letter of 29th April, he speaks of the bank's guarantee as "for wood consumed by the Imperial Paper Mills Company."

Mr. Jemmett, in his letter of 16th May speaks of the guarantee as for such wood hypothecated to plaintiffs, as the company may require for use.

In the letter of 23rd July, Mr. Jemmett speaks of the guarantee as one for payment of such wood covered by the bank's assignments, as the mills might find it to their advantage to use.

The mill in taking these logs out of the river intended to use them for the purposes of the mill, and did use them to the extent of cutting them in the usual and ordinary way as

they would deal with their own logs—or as they would with these; if plaintiffs had waived hypothecation to them.

The plaintiffs' claim for 2,475 cords in the blocks. There were 2,440 cords there on 1st October. One cord taken out of the river, and added before the 8th October. More was added after—but the plaintiffs cannot recover in this action for wood taken possession of by the new management. It may be that the plaintiffs could recover, possibly ought to recover, by deducting for the additional cords from the credit given for money paid by Clarkson—but no argument was addressed to me on this point—so I will allow for only the 2,441 cords.

In the written argument put in by counsel for defence—it seems to be almost conceded, that after all, the only question is one of fact—viz., whether the company really got logs on which plaintiffs had a lien to a greater number than the defendants have paid for.

It is strongly contended, that by a mistake of the receivers and managers of the company, logs really belonging to the Sovereign Bank were improperly credited to the Quebec Bank, and that the Quebec Bank has actually been paid for all—or nearly all, the logs in the river in the year 1907, hypothecated to them. It is important to note when this defence was made. On the 19th November, 1907, the plaintiffs made a formal demand for payment of the claim now sued for. On the 21st December, defendants' manager replied and claimed the right to set off an alleged debt of the plaintiffs to the receiver of about $6,900. I do not find in the evidence that up to this time, there was any dispute as to plaintiffs securities covering the spruce and balsam taken by the company or as to the quantity taken and completely used. It was only when litigation became necessary that the defences other than the right to set-off were put forward. A defence that the logs delivered were not the plaintiffs' logs—or that the plaintiffs prior to July, 1907, took possession of defendants' logs and delivered them as plaintiffs' own logs—would require to be supported by the clearest possible evidence. As to the logs used in the mill—they are in pulp or paper, impossible of identification. No evidence has been given by defendants, that the blocks which were to be sawn in all the year 1907, were of logs owned by defendants. The wood was delivered as plaintiffs' it was accepted by the company as the plaintiffs.' The reports and measurements were mainly made by Mr. Craig. He was not for, at least, part

of the time on friendly terms with the managers—general or local of plaintiff's bank. There can be no doubt that he acted honestly in his measurements and reports during 1907, and if there had been the slightest suspicion of any mistake or fraud on the part of the plaintiff's bank, it would have been an earlier investigation.

There is no evidence whatever that at any time the Sovereign Bank wood was appropriated by plaintiffs'—the evidence is wholly that of those who measured and computed from returns made and from documents given, and I am asked to say that the plaintiffs have been over-paid, and the defendants under-paid for logs hypothecated to them respectively. I cannot so say.

If the plaintiffs had in the river during the year 1907—the time mentioned in exhibit 3, logs sufficient to answer their claim, it is impossible for me to say upon the evidence, and in the face of the company's report made from week to week, that such an enormous mistake has been made, as to over credit the Quebec Bank with an amount sufficient to wipe out their present claim. I have not asked for a copy of the Court stenographer's notes, but I have gone carefully over my own notes of evidence, and I have attempted a comparative statement as found in the books and papers put in, and my conclusion is, and I so find, that the plaintiffs in July, August, and September, had logs in the river—which logs with those cut and under conveyer, were more than sufficient to make the wood mentioned in the reports. These logs when in the river and until taken by the company's jack ladder, were in the constructive possession of the plaintiffs, that the defendants recognized the plaintiffs claim to those logs, and the defendants accepted the account of the company as to the reduction into cords—and the defendants were willing and ready to pay the plaintiffs' claim until they were prevented from doing so by the receiver and manager of the company.

The Sovereign Bank had logs in the river in 1907. The defendants say they cannot account for—that they are short 5,237 standard cords, which these logs should have produced, and the argument is that the plaintiffs by mistake, improperly got credit for these. No such shortage as resulting from logs of wood into which defendants' logs were converted, was proved. The onus was not up plaintiffs to account for de-defendants' logs. It is said defendants' loss is explained by

an over-credit to the plaintiffs of 5,424 cords. That is 187 cords more than the defendants even claim.

In short, the mathematical computation after the wood was delivered and used cannot be relied upon as against the evidence of the reports when all interest had the chance of inspection—and calling in question anything of which there was suspicion of wrongdoing. Some of the witnesses went so far as to say that if the plaintiffs get the amount of their claim in this action, they will get pay for 5,600 cords to which they are not entitled. I do not think such a result as a true result possible. It is inconceivable—that with Craig on the watch-tower, any such result could have been attained.

Having regard to the spruce logs in the river at the end of 1906, and again at end of 1907—and to the manner in which logs were taken from the river I am not able to accept the evidence for the defence—that the plaintiffs improperly got credit for defendants' logs.

There should be judgment for the plaintiffs for $20,932.45 made up as follows:—

1,455 cords at $6	$8,730	
2,441 cords in blocks	14,646	
	$23,376	
Less received from E. R. C. Clarkson on account blocks	$6,446	66
	$16,929	34
Interest 15th December, 1907, 4 years 8¾ mos. at 5%	$4,003	11
	$20,932	45

The date of payment for the wood used by Clarkson is not given although it may be found in the correspondence filed—exhibit 34 shews when wood taken and used. No question was raised as to the payment or amount of it—and plaintiffs asked for interest on only the balance. The plaintiffs are entitled to interest from 15th December, 1907.

In this case the record was before me at the trial. If it was sent to me after the trial—it remained with me for only a few days—when it disappeared. Search has been made for it, but without success, and I have endorsed my judgment upon a copy of the pleadings furnished by Mr. Boland, of counsel for defendants.

Thirty days' stay.

HON. MR. JUSTICE LENNOX. SEPTEMBER 10TH, 1912.

JOE NIGRO v. CHARLES DONATI.

4 O. W. N. 2.

Negligence—Master and Servant—Negligence of Foreman—Deduction of Money Paid for Relief of Workman.

LENNOX, J., in an action for damages for personal injuries caused by an explosion of dynamite alleged to have been the result of the negligence of defendant's foreman, gave judgment for plaintiff under the Workmen's Compensation Act for $1,446, being $1,500, less the amounts paid by defendant for hospital and doctor's bills, and costs.

A. E. Cole, for the plaintiff.

K. H. Keefer, K.C., for the defendant.

HON. MR. JUSTICE LENNOX:—It is not denied that it was an explosion of dynamite that caused the injury complained of in this action. This is the contention of the plaintiff, and the evidence for the defence affords frequent reference to hole No. 3 as being charged with dynamite—the defendant himself suggesting that it must have been a very light charge.

It is not suggested either that it was accidentally charged, as by dynamite dropping into it, or accident of that kind. The five holes were drilled on the morning of the accident, and the drilling was only completed a few minutes before the explosion of this hole No. 3. The hole in question was deliberately, or at all events intentionally, charged by someone. There was only one person who had a right to do this. This was Frank Galzarino, the foreman who came upon the works that morning, and who was expressly and distinctly put in superintendence of the works being carried on, and particularly of the blasting operations; and which included, as incidents thereof, drilling, plugging, cleaning out, loading, covering and firing. There would be other duties in connection with the blasting of course—these are the manifest ones. The defendant put the plaintiff under the charge of the foreman, as his assistant. He assisted in exploding the first and second holes and the foreman then set him at work cleaning out the third hole, and watched him for at least part of the time he worked at this. The defendant came along and assisted the plaintiff at this work and had

only temporarily stepped aside, to look for or speak to the foreman, in possession of the dynamite, and swears that no one else at the works, that morning, had dynamite. The suggestion, therefore, in argument that the plaintiff may have charged the hole into which he was forcing a drill, with a heavy sledge, is not only without a tittle of evidence, but without a vestige of reason to support it.

I am asked to infer that the plaintiff maliciously committed this crime, and deliberately exposed himself to its results, yet in the same breath, it is argued—and it is to all intents and purposes the sole defence set up—that I cannot possibly come to the conclusion, or in other words, find as a fact, that Frank Galzarino put dynamite in hole No. 3 and yet remained within the danger zone. I can only find it, of course, if there is direct or circumstantial evidence to support it. Juries are doing that thing all the time with the approval of the Courts on grave criminal charges. Nobody imagines the foreman intended to do wrong or was guilty of worse than forgetfulness or negligence—in such a case, criminal forgetfulness and negligence. If this accident had resulted fatally, and the foreman was charged with manslaughter, resulting from criminal negligence on his part, could I have said that the circumstances afforded no evidence for the consideration of the jury? Well, then, upon the undisputed facts and circumstances given in evidence in this case, I am not prepared to accept Galzarino's statement that he did not put dynamite in the hole in question, although it is possible that he is saying what he believes to be true, and, on the contrary, I think that the only reasonable conclusion to be reached is, and I find it as a fact, that Frank Galzarino did place dynamite in hole No. 3.

It is argued that he is a disinterested witness. So he is, in a sense, and he is an experienced man; but experienced men are forgetful and sometimes careless, and his reputation and earning power cannot be said to be unaffected by the issues in this case.

It was not contended that defendant was not responsible for the negligence of the foreman, however, that does not relieve me from the duty of carefully considering the provisions of The Workmen's Compensation for Injuries Act, and I think it is clearly a case where the injury was caused by the negligence of a person in the service of the employer who had superintendence entrusted to him whilst in the exercise

of such superintendence. Section 3, sub-section 2. It was argued that the defendant would also be liable under sub-sec. (1). I express no opinion as to this. I am, however, of opinion that the case comes within the provisions of sub-sec. 3.

Then as to damages. They should not be extravagant. The defendant has acted well. He was not careless in the selection of his foreman; he was not negligent so far as the evidence goes in the carrying on of his works, and he was not ungenerous when the calamity came upon the plaintiff. There was evidence of payments and these were argued as evidence of liability. I don't think the defendant made the contributions upon that basis, and in every case, unless it has to be utilized to give a colour and meaning disputing facts, I shall, as here, in the interest of humanity and decency, count contributions made for the relief of the plaintiff, not to the prejudice, but to the credit and advantage of the defendant.

I was not very favourably impressed by the plaintiff's evidence. He clearly exaggerated the result of his injuries. I am satisfied that he will be able to do some work, and earn money, though he will certainly be seriously handicapped in the struggle. I am not disposed to accept his statement of average winter earnings of $5 a day, and in any event, this evidence is not relevant. It is not what is earned in other occupations, or even what the plaintiff was earning at the work in question, but the average earning for three years in that occupation, or $1,500 whichever is the larger of the two sums. There is no evidence on this heading. I know the plaintiff was getting $2.75 a day at the time. This, with steady employment, would come to more than $800 a year, but there is no evidence as to duration of employment. It is not the class of evidence contemplated in the statute, and I am not disposed to strain, to assist the plaintiff, upon this point.

The utmost, therefore, that the plaintiff is entitled to is $1,500. The defendant has paid towards doctor's bills, and hospital expenses, $54. I think I have power to deduct this, and it ought to be deducted.

I, therefore, direct that judgment be entered for the plaintiff against the defendant for $1,446 and the costs of this action.

I direct that execution be stayed for 30 days.

MASTER IN CHAMBERS. SEPTEMBER 12TH, 1912.

INGLIS v. RICHARDSON.

4 O. W. N. 23.

Discovery—Examination of Plaintiff—Sale of Wheat—Destroyed by Fire—Loss by whom Borne—Former Dealings between Parties—Passing of Property.

Motion by defendants for further and better examination of plaintiff for discovery.

The action was to determine whether defendants, vendors, or plaintiff, the purchaser, should bear the loss by fire of certain wheat indicated by defendants to be in a certain elevator in Owen Sound, and destroyed before delivery to plaintiff. On his examination for discovery plaintiff refused to answer any questions as to his former dealings with defendants or with the storage company.

MASTER-IN-CHAMBERS ordered that he attend and answer the questions in issue.

Costs to defendants in cause.

Action brought to recover price of 3,000 bushels of wheat acknowledged to have been paid to defendants on two sales of 2,000 bushels each. It was agreed that plaintiff received from defendants in such payments orders on the agent of the Canadian Pacific Railway at Owen Sound to deliver the requisite quantity to plaintiff out of defendants' wheat in the company's elevator there. There was a sale of 2,000 bushels on 6th November last and 2,000 more on 30th November. Of this quantity only 1,000 bushels had been delivered to plaintiff when the elevator was burnt on 11th December and all the wheat was destroyed.

On 22nd May plaintiff sued to recover the purchase-price of these 3,000 bushels on the ground of non-delivery—and it was admitted that the point for determination was whether the loss was to be borne by plaintiff or defendants? This depended upon whether, under the facts, the property had passed to plaintiff or was still in defendants.

On examination for discovery plaintiff would not answer questions as to any former dealings with defendants, though admitting that he had bought a great many bushels from them before; and had been doing so during the last 12 or 14 years. After describing the usual course of his dealings he would not admit that this was the usual course and that it was followed in the sales now in question.

He also declined to answer questions as to whether he paid storage or any other charges to the Canadian Pacific

Railway for storing the grain or otherwise—and other questions bearing on the question of the usual course of dealing.

The defendants moved for further examination.

W. N. Tilley, for the defendants' motion.

C. A. Moss, for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—In the statement of defence delivered on 11th June, the defendants say that these sales were made "according to the usual and ordinary practice followed by them in their business dealings with the plaintiff," setting out this practice correctly as is admitted. It is said in Benjamin on Sale (5th Eng. ed., p. 338), "where the subject matter of the contract is an unascertained part of a particular homogeneous mass of the same quality, as so many bushels of wheat out of a larger quantity in a warehouse, it is impossible to deduce a consistent doctrine from the reported cases which are in hopeless conflict" on the question of the passing of the property.

At p. 310 it is also said: "Whenever dispute arises as to the true character of an agreement the question is one rather of fact than of law." Applying the above to the present case it seems to follow that defendants should be allowed to have discovery from plaintiff of all facts which may (not necessarily which must), assist their contention that the property in the 3,000 bushels had passed to plaintiff before the fire. It would seem useful to know *e.g.*, if plaintiff paid storage; if he delivered the defendants' orders to the agent at Owen Sound, or if he always or usually kept them; if he had any insurance on this grain. Did he pledge it in any way to the bank? There may also be other facts which may throw light on this question, said by Benjamin to be involved in so much doubt and difficulty.

It seems a case in which the principle of Rule 312 should be followed and that the scope of discovery should not be narrowed on either side, so as far as practicable "to secure the giving of judgment according to the very right and justice of the case."

The plaintiff should reattend at his own expense and answer questions as indicated above.

It does not seem necessary to rule separately on each of the questions unanswered. What has been said indicates sufficiently what opinion I have formed on the propriety of

the motion and the scope of the examination. On this discovery should not be given grudgingly. It can safely be left to the trial Judge to decide what is relevant, and what is not. No doubt the case will be tried without a jury. It may be helpful to consider what is said in Benjamin, at p. 339, as to the light in which a sale of grain stored in elevators is looked on in America.

The costs of the motion will be to defendants in the cause.

DIVISIONAL COURT.

SEPTEMBER 14TH, 1912.

KINSMAN v. KINSMAN.

3 O. W. N. 966; 4 O. W. N. 20.

Promissory Notes—Given for Shares in Company—Fraud—Counterclaim—Conflict of Oral Evidence—Correspondence—Effect of—Reversal of Finding of Fact by Trial Judge.

Action by one Emily Kinsman for delivery up and cancellation of certain notes for $2,500 and $1,000 given defendant Maria Kinsman on the ground of fraud and deceit, and counterclaim by said defendant for $3,500, the par value of certain stock which defendant alleged plaintiff agreed to take off her hands at par at any time she was requested so to do, and which she neglected and refused to accept. The notes in question were given after the insolvency of the company upon the misleading representation of defendant's husband that if the said notes were given he could recover some $18,000 from the bank for the company's creditors. This representation was innocently made and was based upon the maker's belief that though a layman, he understood the law bearing upon the matter.

RIDDELL, J., directed that the notes in question should be cancelled as far as plaintiff was concerned, but that judgment should be given for defendant on her counterclaim for $3,500.

No costs of action to either party.

An executory contract induced by innocent misrepresentation can be set aside.

Reese River Co. v. *Smith*, L. R. 4 H. L. 64, referred to.

DIVISIONAL COURT, *held*, that the agreement to take over the stock, set out in defendant's counterclaim, had not been established.

Appeal allowed, and counterclaim dismissed, respondent to pay costs of appeal.

An appeal by the plaintiff, Emily S. Kinsman, from the following judgment of HON. MR. JUSTICE RIDDELL, in favour of the defendant Maria L. Kinsman on her counterclaim, after trial without a jury, at Hamilton, on 28th March, 1912.

S. F. Washington, K.C., for the plaintiff in the first action, and with A. Weir, for the defendants in the second action.

W. M. McClemont, contra.

HON. MR. JUSTICE RIDDELL (3rd April, 1912):—R. E. Kinsman had a business in Hamilton, which he turned into a joint stock company. A relative of his, a dentist in Sarnia, Homer F. Kinsman, was asked by R. E. Kinsman to take some stock in the company; the dentist had no money, but his wife, Maria L. Kinsman, had. R. E. Kinsman and his wife, Emily S. Kinsman, went to Sarnia and endeavoured to induce Mrs. Maria L. Kinsman to take stock. She offered, instead, to lend money on a mortgage upon property in Hamilton owned by Mrs. Emily S. Kinsman. Finally, Mrs. Emily Kinsman agreed that, if Mrs. Maria L. Kinsman would take stock in the company, she and her husband would take it from her at any time she wished and repay her her money. Mrs. Maria did take in all $3,500 stock. While the company was a going concern, Mrs. Maria demanded her money, first for $1,000 stock. R. E. Kinsman sent her a note for $1,000, saying that his wife was too ill to sign it. This was not satisfactory, and the whole amount was demanded. The Hamilton Kinsmans had difficulty in raising the money, and did not pay. The company failed.

It came to the knowledge of Dr. Kinsman that R. E. Kinsman had paid the bank on his own debt some $13,000 of the company's money, which with interest would amount to about $18,000 at the time of the transactions in question in these actions. He thought it would be a good scheme for the company to sue the bank to recover this $18,000, and also to buy in the assets of the company for the benefit of the shareholders. He thought that if his wife had security for her $3,500, she would help him financially in the purchase of these assets. He was afraid, too, that some creditor would attach the property of Mrs. Emily Kinsman. He had read some law-book, and became filled with the idea of a *lis pendens*—he was his own lawyer, with proverbial result.

He came to Hamilton full of his scheme, and went to the house of Mrs. Emily Kinsman—there meeting R. E. Kinsman, her husband, he asked to see Mrs. Emily, but refused to discuss matters with the husband at all. At length being admitted to her room, he launched out into a statement that he had a scheme whereby $18,000 could be realized for the shareholders, and asked Mrs. Emily to sign a note for $2,500 for the stock, and also put her name on the note for $1,000 her husband had already given. I have no doubt whatever, that what he said led her to understand that the giving of the note was part of the scheme to realize the

$18,000. He had the new note dated back so as to be due before the day upon which it was signed, explaining that this was to enable him to register a *lis pendens* on her property and so get in ahead of other creditors. I do not think that the Doctor had any intention to defraud Mrs. Emily or any one else; but I think he, in a muddled sort of way, did not distinguish between his two projects and objects—one to get security for his wife's debt from Mrs. Emily, and the other to recover back money from the bank for the benefit of all concerned. I do not think that, even at the trial, he had these two matters disentangled in his own mind.

By similar representations, he procured the signature of E. Palmer Kinsman, son of R. E. and Emily Kinsman, to the new note. Having secured the signatures of mother and son, he went away. Shortly after, these signatures were repudiated.

In all the transactions (from the conduct and demeanour of the witnesses) the evidence of Dr. Homer Kinsman and his wife, Maria Kinsman, is to be fully believed—the recollection of E. Palmer Kinsman is not to be relied upon.

Mrs. Maria Kinsman brings action upon the note for $2,500 against Mrs. Emily and her son—they counterclaim for cancellation of the notes. Mrs. Emily Kinsman and her son also bring action against Dr. Kinsman and his wife for cancellation of the notes; Mrs. Maria Kinsman counterclaims for the face value of the stock, which she contends (and, as I find, rightly contends) Mrs. Emily agreed to pay her for.

Both actions were tried before me at Hamilton.

In the view I take of the case, the notes must be cancelled, except so far as the signature of R. E. Kinsman to the $1,000 note is concerned.

There was indeed no fraud on the part of Dr. Kinsman, nor was there any threat of criminal prosecution, nor anything in the way of wilful misrepresentation such as is stated in the pleading; but, there is no doubt, I think, that he represented the taking of the notes as an integral part of the scheme for securing $18,000 for the shareholders.

Of course, fraud—fraudulent intent—must be proved in an action for deceit: *Derry* v. *Peek* (1889), 14 App. Cas. 337; *Smith* v. *Chadwick*, 9 App. Cas. 157, 190; a principle which has been reiterated by the Judicial Committee in

Tackey v. *McBain*, [1912] A. C. 186. And an executed contract induced by misrepresentation cannot be set aside unless the misrepresentation be fraudulent. *Angel* v. *Lewis*, [1911] 1 K. B. 666, and cases cited; *Abrey* v. *Victoria, etc., Co.* (1912), 21 O. W. R. 444. But the rule does not extend to executory contracts: *Reese River Co.* v. *Smith* (1869), L. R. 4 E. & I. 64; *Angus* v. *Clifford*, [1891] 2 Ch. 449; *Adam* v. *Newbigging* (1888), 13 App. Cas. 308.

The son, E. Palmer Kinsman, is consequently relieved from liability; but the mother should pay the amounts for which Maria Kinsman counterclaims.

There will be no costs to any party.

Thirty days' stay.

The appeal to Divisional Court was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE TEETZEL, and HON. MR. JUSTICE KELLY.

I. F. Hellmuth, K.C., and W. M. McClemont, for the appellant.

A. Weir, for the respondent, Maria L. Kinsman.

HON. SIR WM. MEREDITH, C.J.C.P.:—The action was brought by the appellant and E. Palmer Kinsman, against the respondent and her husband, Homer F. Kinsman, for the delivery up and cancellation of a promissory note, dated 2nd January, 1911, made by the appellant and E. Palmer Kinsman in favour of the respondent, and the delivery up and cancellation, and another promissory note for $1,000 bearing the same date, made by the appellant and her husband in favour of the respondent, or the cancellation of the appellant's signature to it, on the ground that they had been obtained by the respondent through her husband as her agent by fraud.

The defendants pleaded as a defence to the action a denial of the fraud alleged, and that the promissory notes were given in pursuance of an agreement entered into between the appellant and the respondent, that in consideration of the respondent subscribing for $3,500 of the capital stock of the R. E. Kinsman Lumber Company, Limited, if she at any time desired to get her money back for the stock the appellant would take the stock from her and pay her the face value of it, and the respondent and her husband by way of counterclaim repeat the allegations of their statement of

defence and claim against the appellant, the $3,500 on her undertaking and agreement to take the shares and pay for them.

By the judgment pronounced at the trial it was ordered and adjudged that the note for $2,500 should be delivered over to the plaintiffs in the action to be cancelled, and that the signature of the appellant on the note for $1,000 should be cancelled, but that it should "remain so far as the signature of R. E. Kinsman thereon is concerned," and that in all other respects the action should be dismissed; and it was further ordered and adjudged that the respondent should recover on her counterclaim against the appellant $3,500, and it is from the judgment on the counterclaim that the appeal is brought.

There was a direct conflict of testimony as to the agreement alleged to have been made by the appellant, which forms the subject-matter of the counterclaim, and if the case turned upon the oral testimony only, and the learned Judge had reached his conclusion as to the credibility of the witnesses after seeing and hearing all the witnesses, his finding could not properly be disturbed.

I am, with great respect, of opinion that the documentary evidence adduced at the trial and that put in by leave on the hearing of the appeal is quite inconsistent with the existence of an agreement by the appellant to take the shares off the respondents' hands at face value or on any other terms, and makes it clear, I think, that any agreement on the subject that was made if any was made, was an agreement by the husband of the appellant and by him alone.

According to the testimony of the respondent, the appellant was on her way to visit some one in Holland, Michigan, and with her husband stopped over at the respondent's house in Sarnia, and on this occasion she was applied to by the appellant and her husband to subscribe for shares in the company; that she at first refused to do so, but offered to lend them some money on a mortgage "if they wanted to mortgage their place;" that the appellant said she owned the place and that it was unencumbered, and that she would not mortgage it, but that "they wanted to sell the stock very much," that if the respondent would take stock that at any time "she wanted her money back" she would take it over; they would take over the stock and pay" the respondent her money back; that no conclusion was then come to, and the

appellant went on to Holland, and on her return stopped over at the house of the respondent; on this occasion she said she hoped that the respondent had decided to take the stock, that she need not be afraid, that at any time she wanted the money back "they would take it back they would take the stock over themselves and pay me my money back;" nothing was concluded on this occasion, but the respondent says she asked the appellant what her place was worth, and was told that it was worth $6,000 and increasing in value; and that she said she would go to Hamilton and look at the place before taking the stock; that she went to Hamilton in the fall of the same year, and looked the place over. What occurred on this occasion is thus stated by the respondent, p. 48:—

"Q. What conversation had you with her on that occasion? A. Well, she told me that her father had built the place, had done the carpenter work, for a while she had lived with them, and that the place was good security, that I need not be afraid. Well, I said, 'I may want this money in a great hurry, I may want it in a short time. I suppose you would have no difficulty in raising it for me, because I would not be lending anything like the value you say your place is. I suppose you could raise that amount any time I should want it, if I should want it in a hurry,' and she said she would."

And after this the respondent "took the stock."

The respondent also testified that she attended a meeting of the company in January, 1910, that the appellant met her at the train and that the respondent told her that she wanted her stock "out" that the appellant said: "perhaps after the meeting I would decide to leave it there as they had had a very good year," but that the respondent refused to do so and said she wanted it.

What followed is thus detailed:—

"Q. And what did she say as to that? A. She told me to see her husband about it, they would arrange to pay it. They would have to pay it if I wanted it, and that whatever arrangement they made she would be perfectly willing.

Q. Did you see him about it? A. Yes, I did, after the meeting.

Q. And why was it not arranged then? A. It was, he said he could not pay it all just then, but she would take the $1,000 and pay me a $1,000 on it and take back this stock right away.

Q. Yes? A. He was to send me that $1,000 in cash in a couple of weeks when I was down there at that meeting.

Q. In January, 1910? A. Yes.

Q. And the $1,000? A. Inside of a month anyway, he said he would do it.

Q. Pay that $1,000? A. And if he could not send the money he would send a note at short date.

Q. Did the $1,000 come? A. No, it did not.

Q. Or the note? A. Nothing."

The respondent testified that she next saw the appellant in Hamilton on Thanksgiving Day in the same year. What occurred then is detailed by her as follows:—

"Q. And what took place on that occasion? A. I told her I had come down to see why they had not paid me, they would have to arrange it right away.

Q. And what did she say? A. She said I need not be afraid, I need not worry myself, they would take back the stock, and I knew she owned the house, and that her husband had been sick or they would have paid me long before, I was not to worry them just then, I was just to let it stand at that until he got better. She did not want me to see him at all, she did not want me to talk with him about business or any business. She said it was impossible for me to talk to him about business.

Q. Did you see him? A. I insisted on seeing him, just before I left, and just before I left I saw him in a room. I would not leave unless I saw him——he came into the back parlor and I saw him there.

Q. What took place? A. He kept out of my way, they were trying to avoid this.

His Lordship: You had better stick to the story, what took place between you and him?

A. He agreed at that time, she said there was a lot of money coming in out of his own private fund, and he agreed at that time to send me the money within a very short time, I guess probably three weeks or else a note signed by his wife and himself for that, and the $2,500, he was to pay at the same time you know."

The testimony of the respondent is corroborated in the main by that of her husband, and Margaret Kinsman, a 14 year old daughter of the respondent corroborates the testimony of her mother as to a conversation said to have taken place Thanksgiving Day in the year 1910, between her and

the appellant, although there are some important differences in their statements of what was said. The respondent says nothing as to any amount being mentioned, while, according to the daughter's testimony, the first thing said was said by her mother, and was that "she wondered why they had not sent her the $1,000 before this," and that the appellant replied "that they would only her husband had been sick that summer," and that the respondent said she wanted them to send the other $2,500 as soon as they could. The daughter also testified that "Mother said that if Emily Kinsman's husband signed a note for $1,000 instead of the money, mother would rather have her money, but if she did send a note Emily Kinsman would have to sign it, and Emily said she would and mother said if they sent notes for any of the rest of the money Emily Kinsman would have to sign them, and she said she would sign them," p. 60. Not one word of all this about the notes or about the $2,500 was told by the respondent in her account of the conversation, on pp. 50 and 51, which I have quoted. The only mention the respondent makes of $2,500 is in her account of a conversation at the same time with R. E. Kinsman, in which she says he promised to send her the money "within a short time, I guess probably three weeks or else a note signed by his wife and himself for that, and the $2,500 he was to pay at the same time you know," p. 51.

The alleged agreement to take back and pay for the stock, as well as the conversation deposed to by the respondent, were categorically denied by the appellant and her husband.

Even if there were no correspondence to throw light upon the transaction and nothing but the oral testimony to guide, I should have hesitated long before coming to the conclusion that the agreement which the respondent sets up was proved. The evidence on the part of the respondent is, as I have said, met by directly contrary evidence on the part of the appellant, and in my judgment a very clear case should be made by the respondent in order to fasten upon the appellant the liability which is sought to be imposed upon her without a scrap of writing to support the statements of the respondent and her husband as to the making of the somewhat unusual agreement which the appellant is alleged to have made.

The testimony of a party seeking to fasten such a liability on another as to what were the terms of the agreement alleged to have been made, should at least, be clear and

specific, and in that respect the testimony of the appellant is wanting, and, in my opinion, unsatisfactory, as I think appears from the extracts from it which I have made.

As I have said, however, the correspondence in my opinion makes it clear on which side the truth lies.

The correspondence on the subject of taking stock in the company begins with a letter from R. E. Kinsman to the respondent's husband, bearing date the 12th February, 1906, in which the latter is informed that the writer has turned his "business into a limited liability company," and is told that the writer would like him to buy some shares preferably of the preferred stock. The letter also contains this statement, "Now if you feel so inclined and can subscribe for a good number of shares, all right, but if not, take a few any way. If there is any further explanation you would like regarding it, the next time I am in London I will run up and spend the night with you and give you such explanation."

There is a postcript to this letter, written by the respondent's son Palmer, which reads: "Cheer up Homer and get in on the ground floor. It has steamboating all beat to death."

The next letter is dated 10th April, 1906, and is from R. E. Kinsman to the respondent's husband; it gives further particulars as to the prospects of the company, and says: "Now, as I said, while I don't want to be too pressing about the matter, I want, of course, to sell a good deal of this preferred stock, and would like you to take some, but, of course, if you decide not to, why there is no harm done."

Nothing appears to have been done until the close of the year, 1906, when, as appears from a letter from Palmer Kinsman to the respondent's husband, dated 3rd January, 1907, an application was sent in by the latter for $2,000 of the preferred stock; on receipt of this application, four certificates were made out, each for $500 shares in the name of the respondent; the money to pay for the shares appears not to have accompanied the application, but was probably sent afterwards by express, as suggested in this letter.

The letter which accompanied the application, if there was one, is not among the exhibits, nor is it among those produced by the appellant on the argument.

$1,000 of common stock were subscribed for by the respondent on the 4th March, 1907, but there is no correspondence produced with regard to this subscription.

A certificate for 5 additional shares of preferred stock was issued to the respondent on the 31st December, 1907. No

correspondence with regard to these shares is produced, except a letter from the respondent's husband to R. E. Kinsman, dated 30th December, 1907, in which the writer asks that "the certificate for 5 shares we are taking from J. A. Brown," be dated January 1st, 1909, and forwarded with the stock Palmer transferred to the writer. A letter, dated 6th January, 1908, from R. A. Kinsman to the respondent's husband sending the certificates as requested; a letter dated 10th January, 1908, returning the certificate, which had been made out to the respondent's husband instead of as intended to the respondent, and asking to have it corrected; and a letter of 13th January, 1908, from the company to the respondent's husband, returning both certificates.

Brown had been induced by the respondent's husband, who was canvassing for subscribers, to subscribe for these shares upon the promise that the respondent, when Brown wanted his money, would take the shares off his hands; and in accordance with this arrangement Brown got back his money and transferred the shares at first and by mistake to the husband—the mistake being afterwards corrected.

There is some further correspondence in January, 1908, and in February, 1908, and 1909, but it is unimportant except as shewing that the respondent's husband was canvassing for subscribers for preferred stock.

After the last of these letters, there is a gap in the correspondence until 30th March, 1910, when the respondent wrote to R. E. Kinsman the following letter:—

"Sarnia, Mar. 30th, 1910.

"Dear Ed.:—

I was very much disappointed in not getting the money for that common stock. As I told you I need it now and although I have lost that piece of property I told you of (The Bell Telephone Company having bought it), there is a piece on the other side that will suit us just as well. You speak of a large sum coming in in April that you expected before, and that you could let me have the money then. I would be very glad if you could take it off my hands by then. I may not need the money for a great length of time, but cannot say for sure. No doubt you will want the stock yourself, and I would rather have preferred when I take any more, but, just now I want the money and as you agreed to take it over if I did not want it I hope you will try and oblige me as soon as possible.

We did not write sooner as we were expecting every day to hear about the dividends and word as to when you could take the stock.

Very sincerely,
Mina Kinsman."

It is to be observed that in this letter the arrangement as to taking over the stock is said to have been made with R. E. Kinsman, and to have had relation to the common stock, and not a word is said as to any agreement that the appellant should take it over.

I am quite unable to understand how this letter can be reconciled with the testimony of the respondent, or its being consistent with the existence of any such agreement as she sets up.

On the 18th of the following April, the respondent writes to R. E. Kinsman saying that his wife had received no answer to her letter, and asking if it had been received. This letter contains this sentence: "When Mina took stock in the company it was on your assurance that if at any time she needed money out of it, you would take over sufficient of the stock to make up what she required, this you assured her of in my hearing, and she is only asking you to do as you said you would do."

How is it possible to reconcile this statement of what the arrangement was with the writer's testimony as to what it was?

The letter indicates what possibly was the understanding of the parties at the time, that there was to be no legal obligation to take over any of the stock, for in it the writer speaks of R. E. Kinsman "straining a point to oblige Mina" (his wife).

R. E. Kinsman's answer to this last letter is dated 22nd April, 1910, and as it appears to have an important bearing on the matters in dispute, I set it out in full. It reads as follows:—

"I received your second letter this morning before leaving for Toronto, where I am writing from. I would have answered the first one (should have done so), but have been hoping from week to week to be able to send the amount of your dividends and to be able to say something definite regarding the sale or taking over the $1,000 of Com. stock, thus the time has gone by. I guess its worried me more than you, for I always like to use others as I would like them to

use me, but when I can't it worries me. Upon my return home we will send you cheque for dividends. I can't, however, send the cash for the stock. There are those now owning stock could and would buy it at a disc. so as to make something more than dividends, but I hold out no such inducement.

"As I said, however, I will take it over myself, but cannot do so just now. You must remember I do not pretend to have any money to speak of, and what I have is in the business. When you took stock and I said I would take it over if you should want to dispose of it and could not sell to someone else, I naturally expected (though don't think I said so), as any business person would, that you would let me know sometime before you would want the transaction completed (the length of this time in proportion to the amount and conditions). Now, I think, if you just think of it you will conclude a month or 3 months is not a reasonable time within which to expect me to come up with $1,000 cash. If I had money at command it would be different. Then consider we have been paying out money on logs all winter and these are now ready to be sawn, which calls for cash, and in order to do this I have had to privately do some financing for the company. Yourselves are worth many times what I am and in negotiable shape, still if you were called on for this amount you might find you needed a little time within to raise it. Just as you would like to feel you should do so, so as not to cause you a loss. The sum of money I wrote we expected in Jan. but did not get and would not until April, has not come yet, or only a small part of it. As soon as I can possibly raise the $1,000 I will do so. In the meantime if you like I will give you my own notes to that amount, you at the time transferring the stock to me, and agreeing to renewing a reasonable part of these notes, a reasonable time if upon their maturity I can't pay them in full, and the notes to bear 7% per annum interest. I am anxious to cause you as little uneasiness as possible, and no one would be better pleased than I if I was able to hand over the $1,000 cash now or 3 months ago as soon as I knew you wanted it. If, however, I had cash available like that I would be buying all the stock (not waiting to be asked to buy it or any portion of it). Let me know which way you prefer and in the meantime believe me I am doing my best and will continue to do so to accommodate you.

We are all well as usual and will be glad to see either of you and the children whenever you can come or call to see us.

Having a lot of writing to do, I must close.

Your cousin,

Ed."

This letter, like those of the respondent and her husband, treats whatever promise was made as to taking over the stock as being the promise of R. E. Kinsman and not the promise of his wife or of both of them.

It is important also as it contains the first reference to the giving of a note for the price of the common stock. The suggestion is that the writer will give his own notes to that amount on the $1,000 of common stock being transferred to him.

There is no reply to this letter produced.

The next letter is from R. E. Kinsman to the respondent's husband, and is dated 27th April, 1910, and sends $258 to pay the dividends of the respondent and her husband on their shares.

There is now another gap in the correspondence; the letter next in date produced is from the respondent to the appellant and is dated 7th November, 1910—a few days after the Thanksgiving visit to which reference has been made. I refer to it only because its tone is very different from what I would have expected if what is said by the respondent and her daughter to have happened on that occasion had actually occurred.

On the 17th December, 1910, R. E. Kinsman writes to his "dear cousins" (the respondent and her husband) that owing to a heavy loss it is impossible for him "to raise the money now," and he adds "so can do nothing for some months; this is poor satisfaction I know. All I can do is keep this $1,000 in mind."

On the 25th of the same month the respondent's husband writes to R. E. Kinsman, and referring to a rumour that the dividend is to be passed, to which he is opposed, says:—

"It is this sort of question coming up that makes Mina dissatisfied with her common stock and as you said in your last letter that you are not in a position to take over the $1,000 of common stock Mina has decided to "let you have it and is willing to take your notes as you offered to do in a letter you wrote us last fall. This will not inconvenience you in any way and will really amount to the same thing as

Mina taking preferred for it, except that the notes will mature while the preferred would stand, and we want to use the money."

It is, in the face of such a letter as this, impossible for me to believe that there was a binding contract with the appellant to take over not only the $1,000 of common stock but also the $2,500 of preferred. There is not in the letter a suggestion, much less a stipulation, that the appellant should join in the notes with R. E. Kinsman for the $1,000, and this too, but a few weeks after, according to the testimony of the repondent and her daughter, the respondent had insisted that the appellant should join in the notes for the stock if R. E. Kinsman was unable to pay and desired to give notes for it, and according to the respondent's testimony R. E. Kinsman had promised that his wife would do, and according to the testimony of the daughter the wife herself had promised to do.

The next letter bears date the 19th January following and is from the respondent's husband to R. E. Kinsman. In it the writer suggests that the result of the arrangement to which his wife had assented would be that if a dividend were declared on the common stock R. E. Kinsman would get the benefit of it, and says that that would not be fair to his wife, and that they expected to be allowed what the stock had earned, even though it was not declared as a dividend, and that his wife was willing to take preferred stock for the common if the profits were allowed as shewn by the year's business, which would enable R. E. Kinsman to take over the $1,000 of preferred at the end of the year, and that would do away with personal notes, and would, he thought, be the better way. The writer goes on then to say that his wife would prefer to have the money than the note or the preferred stock, and asks to be informed if R. E. Kinsman concurs in what he had written about the profits, "seeing that Mina is going out of the common stock."

On the same day a friendly letter was written by the respondent to the appellant. The only reference to business it contains is a statement that the business meeting (i.e., of the company) would be soon, and that it was likely that she or her husband would go down to it; that her husband wished her to go, that he thought she would understand all about it if she attended the meetings, and that she would perhaps go. Not a word as to sending the money for the stock or a

reference to a note for it in which the appellant was to join if the money was not available.

The next letter is dated 1st February, 1911, and is from the respondent's husband to R. E. Kinsman. In it the writer says that he had not received a reply to his last letter, and that his wife was becoming very much annoyed at R. E. Kinsman's neglect, and the letter concludes with the following:

"It is a simple matter for you, as president of the company, to change the 10 shares of common to preferred, and then at the end of the year it will be quite a usual act of a company to redeem that portion of the preferred stock, and the common you receive in exchange for the preferred is certainly worth the extra undeclared dividend above par."

R. E. Kinsman's reply to this letter is dated 2nd February, 1911, and in it he proposes to undertake to make up to the respondent 7 per cent. per annum from the time she took this $1,000 of common stock to 31st December, 1910, and says that this should be satisfactory to her, and he would "do as stated in my conversation, take this $1,000 of common and give you my note at one year at 7 per cent. per annum from Dec. 31st, 1910, you at the same time transferring the stock to me." Then follows a calculation shewing the amount he is to pay to make up the 7 per cent. per annum to be $66.60, which he promises to pay "sometime about July."

In a postscript he adds: "This is my own private matter mind. I simply step into your place."

On the 9th of the same month, the respondent's husband replied to this letter as follows:—

"Your delayed letter of February 2nd received, and your offer regarding the taking over of the stock and the dividends you are allowing, viz.: the 7 per cent. for the time the common stock has been held, is entirely satisfactory to us, and for you kind consideration of our wishes you will please accept our sincere thanks.

"I must point out to you however that your statement of dividends paid on the said common stock is incorrect in the first item, as the amount received for the part of the first year we held it was only $55.89 instead of $80, which will make amount due to make up the 7 per cent. to be $90.71.

"I do not quite understand what is required re the transferring of the stock to you; but if you will send the necessary instrument for so doing, when you send the note, Mina will sign it and return it the next day together with the stock certificate which she holds.

"We are all well and hope you are continuing to improve in health."

The proposition of R. E. Kinsman to give "my note" is accepted on the terms proposed by him, and he is thanked for his kind consideration "of our wishes." Not a word as to the appellant joining in the note, on the contrary R. E. Kinsman's offer to give his note is said to be "entirely satisfactory to us."

The respondent's husband wrote again to R. E. Kinsman on 9th March, 1911, saying that he had written several weeks ago "accepting your arrangement," and not having received a reply he wondered if his letter had miscarried, and asking for a reply.

R. E. Kinsman's note for the $1,000 is dated the 1st June, 1911, and is payable in one year with interest at 7 per cent.

There is no correspondence to shew when or how this note came to the hands of the respondent, but according to the testimony of the respondent's husband it was received in July, 1911 (p. 70), and a letter from the respondent's husband to R. E. Kinsman dated 29th July, 1911, is produced in which the writer says: "We expected to have been in Hamilton soon and to have taken the stock certificate with us, but have had to change our plans. We are mailing same to you to-morrow or Tuesday," and adds that his wife would like to have the difference in dividends, payment of which in July had been promised.

According to the testimony of the respondent's husband (p. 70), after receiving the note he had a conversation with R. E. Kinsman in which he told him that he had brought down the certificate for the $1,000, also his note which was to have his wife's name on it, and he would give up the stock certificate in exchange for the note if his wife would sign it; that R. E. Kinsman said his wife was ill, probably at the point of death, and could not sign the note; and that it was then arranged between them that he should hold the certificate until the note was signed by the wife. The date of this conversation is not given, but it is said

to have taken place in Hamilton after a meeting of the shareholders which the respondent's husband had attended.

I am unable to reconcile this testimony with the correspondence as to the note or with the letter of the 29th July. The statement of the letter as to sending the certificate is quite inconsistent with any such conversation having taken place or any such arrangement having been made.

The letter of the 29th July, was acknowledged and replied to by R. E. Kinsman on the 10th August following, in which he says that the certificate was not enclosed, but he supposed "you omitted it," and referring evidently to the $90.71, the difference in the dividend which he had promised to pay in July, adds, "That account I can't pay now, but hope to later."

The next letter, dated 23rd August, 1911, is from R. E. Kinsman to the respondent's husband, and refers to his having been in Hamilton the other afternoon, and promises to send a statement as soon as his son Horace returns.

The next letter is from the respondent's husband to R. E. Kinsman, and bears date the 31st of the same month, and evidently refers to a proposition R. E. Kinsman had made to give a note for the $90.71, and asks him to make it at not more than 60 days.

The respondent's husband again writes to R. E. Kinsman on the 13th September, and complains that he had not heard from him as promised in the letter of the 23rd August.

To this letter R. E. Kinsman replied on the 18th September, saying that when the respondent's husband was in Hamilton he had intended sending his note, but as things had turned out he saw no way of paying it in the near future, and there was no use of sending a note, that he would have to wait until he could get the money or a portion of it that he was not going to give any more notes or accept any more drafts from any person until he saw a way of paying them.

With this last letter the correspondence appears to have ended.

The company made an assignment for the benefit of its creditors on the 2nd September, 1911, and turned out to be hopelessly insolvent.

On the 25th September the signature of the appellant to the $1,000 note which her husband had given was ob-

tained by the respondent's husband, and the joint note of herself and E. Palmer Kinsman for $2,500 which had been ordered to be delivered up to be cancelled, was also obtained by him.

Were it not that the learned trial Judge had accredited him "as transparently honest," I should have been inclined to think that the signatures to these notes were obtained by the fraud of the respondent's husband; that finding that the company was insolvent and that the money which his wife had invested in its shares was probably lost, he concocted the plan of representing that it was necessary that these signatures should be obtained in order that a large payment to a creditor might be attacked as a preferential one, and the assets of the company bought in by himself and the directors, so that they could be realized to the best advantage for the benefit of the shareholders, and "if need be of the creditors," in order that by means of this plan he might obtain the signatures and shift the burden of the loss from the shoulders of his wife to those of the appellant and her son.

His testimony as to the reason he gave for wanting the signatures to the notes and for antedating the $2,500 note is scarcely intelligible, and not at all satisfactory. Why should the appellant and her son be willing to put the respondent in a position to "enter" a "*lis pendens*" against their properties, and why should E. Palmer Kinsman become liable for the $2,500?

The learned trial Judge has preferred the testimony of the respondent's husband as to what occurred when the notes were signed to that of the appellant and her son. I prefer the latter. My learned brother had, no doubt, an opportunity of seeing and hearing the witnesses to whom he has given credit, but he did not see the appellant or her husband, as their testimony was taken *de bene esse* and read at the trial. A reading of the testimony of the appellant leads me to the conclusion that her evidence was given with clearness and candor, and it is quite possible that had my learned brother seen and heard her and her husband a different conclusion as to the credibility of the witness might have been reached by him.

However, that may be, the testimony of the respondent and her husband is discredited by their own letters, and it is, to my mind, out of the question that against the denials of the appellant and her husband, and in the face of these let-

ters it should be determined that the respondent has satisfied the onus of establishing the agreement which she sets up in her counterclaim.

Almost any one of the letters I have quoted is sufficient to turn the scale in favour of the appellant, but the cumulative effect of the whole correspondence is, in my opinion, to lead irresistibly to the conclusion that the case attempted to be made by the respondent is disproved.

I am, for these reasons, of the opinion that the judgment directed to be entered on the counterclaim should be reversed and that judgment should be entered dismissing it with costs, and that the respondent should pay the costs of the appeal.

Having come to that conclusion, it is unnecessary to consider whether, had the promise alleged to have been made been proved, the respondent would have been entitled to recover $3,500. It may be open to serious question whether in that case she would have been entitled to recover in respect of the $1,000 of common stock subscribed for on the 4th March, 1907, or the $500 of preferred stock subscribed for by Brown and transferred by him to her.

HON. MR. JUSTICE TEETZEL:—While the judgment is supported by the evidence of the respondents, if believed, it is so inconsistent with the plain inferences to be drawn from the letters written by the respondent between the time of the alleged agreement and the failure of the Kinsman Company that I think if those letters, some of which were first produced on the argument of the appeal, had been pressed upon the attention of the learned trial Judge he would not have accepted it.

To begin with, the alleged agreement was a very improbable transaction under the undisputed circumstances. The letters referred to are entirely consistent with the evidence of the appellant, and, as I have said, inconsistent with that of the respondent as to the alleged agreement, and I think that giving them proper effect the appeal should be allowed.

HON. MR. JUSTICE KELLY:—For the reasons set forth in the judgment of his Lordship the Chief Justice, I concur in that judgment.

COURT OF APPEAL.

JUNE 18TH, 1912.

NELLES v. HESSELTINE.

Continuation of ante 432.

HON. MR. JUSTICE MEREDITH (*dissenting*) :—It is well to state the material facts affecting this motion, because it is, I venture to assert, upon a very plain and distinct misunderstanding of one of the most material of them that this Court has come to the harsh conclusion that this application should be refused. The reason given for that refusal is, and is plainly stated to be, that, "Instead of taking an appeal within 60 days after the judgment of the 21st April, 1908, as they had a right to do, the company chose to acquiesce in the judgment, and to take their chances of shewing on the reference what they had previously claimed, namely, that the stock and bonds in question were really of no value." How it could be imagined that the applicants chose to acquiesce in the judgment when no one can even reasonably assert such a thing and when no one, not even the Chief Justice of this Court, when recently dealing with this motion in the first instance, ever dreamed that they had any such right of appeal, I feel bound to say, goes beyond my comprehension. To prevent any sort of misunderstanding, let me quote the words of the Chief Justice contained in his written judgment disposing of the motion, of the 16th day of March last: "And, in view of the several decisions on the point, found in the Supreme Court reports, which I have again read and considered, it does not seem open to question that the judgment of the 21st April, 1908, falls within the prescribed category of non-final, and, therefore, non-appealable judgments."

The first suggestion that the judgment might really after all have been an appealable one came from Mr. Lefroy upon his argument of this appeal; and, in all probability, but for that suggestion this Court would have been accepted and acted upon the opinion of the Chief Justice, that it was not final and was not appealable.

And so the whole fabric of this Court's conclusion, being based upon such an error in fact, must fall to the ground. If

the application is to fail it ought to fail only for some real and substantial reason.

Now let me proceed with my statement of the real facts of the case; facts regarding which there can be no substantial controversy.

The case is, in all its aspects, plainly an appealable one; the amount involved is many times greater than the minimum amount of an appealable case; the questions involved are not only serious ones of fact, but are important and difficult ones in company law; and not only did this Court differ to a very considerable extent from the trial Judge as to the relief which should be granted, but there was also some difference of opinion in this Court, one of the Judges holding that the plaintiffs' action should be altogether dismissed; so that the case was one in which an appeal might reasonably be taken, and was also one in which I find difficult to believe that anyone would have advised against an appeal.

Then it is quite plain, from the affidavits and from the circumstances of the case, that the applicants always desired and intended to appeal, but they were prevented by that which their counsel and solicitors, as well indeed as everyone concerned in the case, including, as I have said the Chief Justice of this Court, thought was the settled practice of the Supreme Court in such a case as this, namely, that it was not appealable until after the reference, directed in the judgment now sought to be appealed against, was concluded.

And it is also quite plain to me that had any earlier attempt to appeal been made it would have been met with vigorous opposition by the plaintiffs on the ground that it was premature; opposition which I cannot but think, having regard to what has happened, would have been successful.

The plaintiffs have, of course, now changed their tune, contending that the judgment of 21st April, 1908, was appealable and ought to have been then appealed against; but that change, as I have mentioned, came only upon the argument of this appeal, after Mr. Lefroy's discovery of, and reference to, sec. 38 of the Supreme Court Act. But having so changed their position it is quite fair to take them at their word now and to deal with the case as if their present contention were right; and as if the Chief Justice of this Court was wrong in saying in his judgment, to which I have already referred, "I am fully sensible of the unfortunate situation which the applicants seem to occupy at present, of not having ever had an opportunity afforded them of appealing from

the judgment in question to the Supreme Court, owing to the form of the judgment and the view taken by the Supreme Court as to its jurisdiction to entertain an appeal in such a case."

And doing so the matter stands thus; the applicants really might have appealed from the judgment of 21st April, 1908, but did not because it was believed that no appeal would lie until after the reference, a belief which was shared in not only by foremost lawyers, but foremost Judges until the argument of this appeal, however it may be since.

Parliament has conferred upon this Court power to extend the time for appealing in such a case, and it is commonly held that in such a case as this this Court alone has such power; and, having it, can there be any real reason, any reason not based upon a mistake as to a most material fact, why the power should not be exercised? A case in all its essentials plainly an appealable one, especially an appealable one; and one in which an appeal undoubtedly would have been taken, but for the mistaken notion, so far and so high-spreading as I have mentioned, that an appeal would have been premature if taken before the reference was concluded; a mistake under which it is quite plain, from their conduct upon the motion before the Chief Justice as well as here, the plaintiffs shared with all the goodly company it also covered.

And what can be said against it that is really substantial and true? How can the plaintiffs be injured beyond reparation in costs? If the result of the appeal should be to dismiss their action, then by allowing them all their costs, between solicitor and client if you will, they will be left without any reasonable ground of complaint; whilst if leave to appeal be refused in such a case, the Court imposes upon the applicants a great debt which they never owed—the gravest kind of an injustice is done to them; and gives to the plaintiffs a small fortune they never had any legal right to receive. On the other hand if the judgment be sustained the plaintiffs will be recompensed in costs in respect of the proceedings upon the further appeal and have interest upon their judgment; and neither party will have any just cause for complaint. There will be some delay, but there always is in an appeal; and that delay will be no greater than it would have been if the appeal had been taken before the reference; and it cannot lie very well in the plaintiffs' mouth to complain of that delay for very substantial purposes when their opposition to this application,

based upon technical objection, has caused and is causing greater delay.

Parliament intended that the power it conferred upon this Court to extend the time for appealing should be exercised; if it is not to be exercised in such a case as this can anyone suggest a case in which it should be exercised? There has been no intended delay; that which everyone considers must be done—the reference—before an appeal could be had was being done; it is not said that there was any undue delay, against the plaintiffs' will, in prosecuting the reference; if there had been they would have had their remedy upon it. And the practice in regard to appeals in cases in which a reference is directed has been and is so uncertain and unsatisfactory as to excuse almost anything, and to perplex the best as well as the worst of men. I do not consider whether under sec. 38, the applicant had an immediate right to appeal against the judgment of 21st April, 1908; there is a good deal to be said against it especially in a case such as this in which by the judgment the plaintiffs' final recovery is simply one for damage for breach of a contract. And I may add that the judgment of the Supreme Court in the case of *Clark* v. *Goodall*, 44 S. C. R. 284, seems to me to be quite against the view that this case comes under sec. 38, and would also observe that sec. 38 is subject to and controlled by sec. 40. It is not necessary to consider that question; it is enough to accept the plaintiff's changed views upon the subject and to make an order accordingly extending the time under any power—whether under sec. 40 or sec. 71, or otherwise—this Court may have.

I would allow this appeal and consequently allow the motion which the Chief Justice refused; in which case the applicants should eventually pay the cost of that motion, and the plaintiffs the costs of this appeal.

HON. SIR JOHN BOYD, C. SEPTEMBER 20TH, 1912.

MASTER IN CHAMBERS. SEPTEMBER 14TH, 1912.

BROWN v. ORDE.

4 O. W. N. 18, 36.

Defamation—Slander—Pleading—Statement of Defence—Justification—Fair Comment—Particulars.

Motion by plaintiff to strike out certain paragraphs of the statement of defence and the particulars furnished of same as being embarrassing. Defendant set out certain facts upon which he claimed the statements made by him were fair comment. Plaintiff in this motion claimed that this was an attempt to evade a plea of justification of the actual language used.

MASTER-IN-CHAMBERS, *held*, that "a defendant cannot be required to change his pleading, if he is prepared to rely on the plea of fair comment and hopes to shew that the facts given in his particulars are substantially true and that the comments made by him and based upon those true facts were fair and such, as in the opinion of the jury, might reasonably have been made, even though it involve a personal attack."

Peter Walkers v. *Hogdson*, [1909] 1 K. B. 239, followed.

Motion dismissed, costs to defendant in cause.

BOYD, C., affirmed above judgment.

After the decision in this case reported in 22 O. W. R. 38, 231; 3 O. W. N. 1230, 1312, the plaintiff moved to strike out paragraphs 6 and 7 of the statement of defence and the particulars furnished as to the same as being embarrassing.

John King, K.C., for the plaintiff's motion.

H. M. Mowat, K.C., for the defendant, contra.

CARTWRIGHT, K.C., MASTER:—The statement of defence admits publication as alleged in the statement of claim, but denies the innuendo; says that the words complained of are not actionable without proof of special damage, and pleads qualified privilege on the ground that when the defendant spoke the words in question it was at a meeting of ratepayers in the city of Ottawa, who had a common interest with him in the matters under discussion and that defendant was protecting his private interest in the question of the efficiency of the administration of the affairs of the city.

Then follow paragraphs 6 and 7:—

"6. During the year which preceded the holding of the said meeting, there had been great dissatisfaction on the part of the ratepayers of the city of Ottawa with the management of the affairs of the city by the Board of Control and City Council, and the subject of the management and con-

trol of the affairs of the city and its ratepayers had become a matter of unusual public interest and concern, and the defendant says that any words used by him on the occasion in question in this action were fair comments made in good faith and without malice in respect to the management and control of the affairs of the said city and its ratepayers as a matter of general public interest and concern.

7. In so far as the words used by the defendant on the occasion in question consist of allegations of fact, they are true in substance and in fact; so far as they consist of expressions of opinion, they are fair comments made in good faith and without malice, upon facts which are matters of public interest and concern."

The plaintiff on 4th April last filed a joinder of issue and reply—and five days later asked for particulars of the "specific actions of the Board of Control and City Council referred to in paragraph 6"—and "of specific allegations of fact which are referred to in paragraph 7, and which are therein alleged to be true."

On 10th April particulars were given. Those under the 6th paragraph consisted of 8 matters in respect of which it was said the ratepayers were dissatisfied, which were also those referred to in the 7th paragraph as matters of public interest and concern. Under this latter paragraph the specific allegations said to be true were also given. These were in effect that the plaintiff was not as competent to be a controller as Mr. Davidson had been, he having been a very successful man of great ability and of municipal and business experience, whereas the plaintiff had been conspicuously unsuccessful in business matters of his own and in those of others entrusted to him. The ground of the motion is that the defendant (if I rightly apprehend counsel's argument) should have pleaded a justification of the innuendo and set out facts on which he relies as to this and that he is attempting to evade this by the course adopted, as he has distinctly said in paragraph 7 of his particulars that he has not made nor does he make any charges of misconduct against the plaintiff as a member of the Board of Control or of the Council.

The cases cited which are most in point are the following:—

Crow's Nest Pass v. *Bell* (1902), 4 O. L. R. 660; *Digby* v. *Financial News*, [1907] 1 K. B. 502; *Hunt* v. *Star News-*

paper, [1908] 2 K. B. 309; *Peter Walkers* v. *Hodgson*, [1909]1 K. B. 239.

The last is the one nearest to the present. This seems to shew that the defendant cannot be required to change his pleading, if he is prepared to rely on the plea of fair comment, and hopes to shew that the facts given in his particulars are substantially true, and that the comments made by him and based upon those true facts were fair and such as in the opinion of a jury might reasonably have been made (see 251 *supra*); also at p. 257, it was said by Kennedy, L.J., quoting Lord Atkinson's judgment in *Dakhyl* v. *Labouchere*, [1908] 2 K. B. at p. 329: "A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from those facts."

It therefore follows that the motion must be dismissed with costs to defendant in the cause only, the point being one of some difficulty. Plaintiff may have leave to amend if it is thought that this will be of any service.

Plaintiff appealed from above judgment.

J. King, K.C., for the plaintiff, appellant.

H. M. Mowat, K.C., for the defendant, respondent.

HON. SIR JOHN BOYD, C., dismissed the appeal with costs in the cause.

INDEX

TO THE

Ontario Weekly Reporter, Vol. 22

Tax sale — Action to set aside — Irregularities. *Sutherland* v. *Sutherland*, 296.

Tax sale — Indian lands — Indian Act, R. S. O. (1897), c. 51, ss. 58-60—Intervention of Superintendent-General. *Richards* v. *Collins*, 592.

BANKS AND BANKING.

Advances by bank on security of raw material — Bank Act, secs. 74, 88, 89 — Substitution of goods — Promissory notes — Payment — Receipt of proceeds of manufactured goods when sold — Estoppel. *Quebec Bank* v. *Craig*, 874.

Advances by bank to milling company — Security taken on timber under promise in writing to give security — Validity of security under s. 90 of the Bank Act — Company in liquidation — Issues to be determined — Forum for — Right of bank to defend action without leave and press claim to timber — Description of property — What is necessary to identify? — Lien of bank for payment of Government dues — Rights of liquidator — Receiver — Action for injunction — Damages — Costs. *Imperial Paper Mills Co.* v. *Quebec Bank*, 703.

Deposits and withdrawals by infant — Bank Act, s. 95 — Action to recover money withdrawn when a minor. *Freeman* v. *Bank of Montreal*, 276.

BILLS, NOTES AND CHEQUES.

Promissory notes—Given for shares in company — Fraud — Counterclaim—Conflict of oral evidence — Correspondence — Effect of — Reversal of finding of fact by trial Judge. *Kinsman* v. *Kinsman*, 979.

BOUNDARIES.

Lots — Erection of fence — Action to restrain interference with — Onus — Highway — Allowance for — Dedication — Estoppel. *Lake Erie Excursion Co.* v. *Berti*, 42.

BROKER.

Purchase by customer of shares on margin — Contract — Terms — Failure to keep up margin — Resale by broker. *Gray* v. *Buchan*, 830.

CANCELLATION OF INSTRUMENTS.

Deed by lunatic — Onus of proving execution during lucid interval. *Hoover* v. *Nunn*, 28.

Sale of farm, chattels and canning factory — Agreement entered into by reading advertisement in newspaper—Negotiation conducted on basis of the advertisement—Action to set aside agreement, deed and mortgage — Ground purchaser did not get what advertisement called for — Part of farm having been previously deeded to wife of grantor as a gift. *Stocks* v. *Boulter*, 464.

CHARGE ON LAND.

In favour of absentee — Sale free from charge — Payment into Court — Amount of charge — Will — Terms — Payment out. *Gallagher, Re*, 226.

Registration — Cloud on title — Action for removal from registry — Damages. *Fee* v. *MacDonald Mfg. Co.*, 314.

COMPANY.

Contract—Oral agreement—Superintendent of company — Failure of plaintiff to satisfy burden of proof. *McFarlane* v. *Collier*, 579.

Management — Directors — Payment for services as workmen and clerks — Companies Act, 7 Edw. VII. c. 34, s. 88. *Matthew Guy Carriage & Automobile Co., Re*, 34.

Sale of plant and assets — Secret profit by directors—Action for accounting — Fraud — Directors held trustees — Reference to take accounts — Costs. *Hyatt* v. *Allen*, 469.

Shares — Seized and sold by sheriff under execution — Execution Act, 9 Edw. VII. c. 47, ss. 10, 11 — No proper service of notice — Place of head office of company changed. *Maloof* v. *Labad*, 99.

Shares — Transfer — Refusal of company to register — Indebtedness of transferor to company arising after transfer — Companies Act, R. S. C. (1906), c. 79, ss. 64, 67 — Mandamus. *Polson Iron Works, Re*, 84.

Winding-up — Liquidator — Claim of ownership of ship in course of building —Bill of sale — R. S. O. (1897), c. 148. *Canadian Shipbuilding Co., Re*, 585.

Winding-up — Sale of lands of company by mortgagee — Leave to proceed with sale after winding-up order — Terms — Costs. *Dominion Milling Co., Re*, 836.

CONSTITUTIONAL LAW.

Sunday observance on electric railways—Ontario Railway Act, s. 193 (1)—Intra vires. *Kerley* v. *London and Lake Erie Transporation Company*, 646.

CONTRACT.

Agreement to extend railway to town — Breach — Damages — Measure of. *Wood* v. *Grand Valley Rw. Co. & A. J. Pattison*, 269.

Breach — Action for damages — Injunction — Supply of natural gas — Non-fulfilment of conditions — Joint contract — Relief from forfeiture — Parties — Judgment in previous action—Res judicata. *Welland County Lime Works Co.* v. *Augustine*, 235.

Building contract — Extras — Counterclaim — Refusal of contractors to execute contract for another building — Contract let at higher rate — Neglect to re-advertise after rejecting lower tenders — Tender not accepted by corporation under corporate seal — Costs. *Teagle & Son* v. *Toronto Board of Education*, 254.

Breach — Purchase of assets of company — Liabilities assumed by stockholder—"Without corresponding Value" — Transfer of shares — Damages — Reference — Rectification of contract. *Grice* v. *Bartram*, 182.

Building contract in writing — Provide materials and perform all work — Specifications for dwelling house — Costs. *Hamilton* v. *Vineberg*, 238.

Construction — Correspondence — Transfers of land held in escrow — Undertaking not registered — Action for reconveyance. *Wiley* v. *Trusts and Guarantee Co., et al.*, 625.

Construction — Supply of natural gas — Breach — Continuing breach — Damages — Costs. *Sundy* v. *Dominion Natural Gas Co. Ltd.*, 743.

Convict undergoing confinement for indictable offence — Freedom to contract — Criminal Code, s. 1033 — Imp. Statutes, 33 & 34 Vict., c. 23 — Not applicable in Canada. *Young* v. *Carter*, 643.

Interlineation — Effect of — Sale of shares — Option or completed agreement — Evidence — Onus — Corroboration. *Clark* v. *Wigle*, 748.

Rescission of sale of mining properties — Non-payment of instalments — Reference — Order for further payments of arrears of instalments. *Leckie* v. *Marshall*, 870.

Sale and purchase of mining claims — Completed agreement—Fraud and Misrepresentation—Failure to Establish — Royalty — Covenant to pay — Ore not found in paying quantities — Payment of lump sum in lieu of royalties. *Dube* v. *Mann*, 751.

COSTS.

Illegal exchange of land contemplated by municipal council — Action by ratepayer to prevent — Scheme abandoned — Right of ratepayer to his costs of action. *Pringle* v. *Stratford*, 215.

Security—Claimant of fund in Court — Residence out of jurisdiction — Real actor. *Riddell, Re*, 40.

Security — Defendant out of jurisdiction — Counterclaim — Want of connection with plaintiff's cause of action—Not sufficient property within jurisdiction. *Cartwright* v. *Pratt*, 92.

COVENANTS.

Building restrictions — Construction of — "Detached dwelling house"—Erection of apartment house—Judicature Act, s. 81 — Authority of previous decision — Covenant — What constitutes — Subsequent purchaser — Status to sue. *Pearson* v. *Adams*, 909.

Building restrictions — Construction of — Erection of apartment house —Judicature Act, s. 81 — Authority of previous decision. *Pearson* v. *Adams*, 71.

Building restrictions — Breach — Semi-detached building — Width of land — "Appurtenant" — "Front" of building — "Main hall" — Distance from centre of street. *Holden* v. *Ryan*, 767.

CRIMINAL LAW.

Abortion — Suppying drug or other noxious thing — Criminal Code, s. 305—Evidence — Motion for leave to appeal —To Court of Appeal — From conviction of County Court. *R.* v. *Scott*, 9.

Common betting house — Keeping — Jurisdiction of magistrate — Code ss. 773, 774 — Amended by 8 & 9 Edw. VII. c. 9. *Rex* v. *Honan*, 527.

Disorderly house — Keeping — Code s. 228 — Conviction by magistrate — Weight of evidence — Excess of penalty — Amendment. *Rex* v. *Marcinko*, 846.

Practice and procedure — Amendment of indictment — Changing offence charged — Code, ss. 405, 405a, 889, 890. *Rex* v. *Cohen*, 456.

CROWN LANDS.

Crown lands — Patent — Misdescription — Application for same lands — Dispute — Finding of Minister of Lands, Forests and Mines — Patent for same lands issued to second applicant—Certificate of title — Action by first patentee to establish title — R. S. O. 1897 c. 138, s. 169—Parties—Attorney-General — Intervention. *Zock* v. *Clayton*, 813.

DAMAGES.

Personal injuries — Negligence — Elements of damage — Pecuniary loss — Pain and suffering — Increase on Appeal of damages awarded by trial Judge. *Van Horn* v. *Verrall*, 860.

DEBTOR AND CREDITOR.

Judgment debtor — Company. — Examination of director — Officer — C. R. 902. *Powell Rees* v. *Anglo-Canadian*, 529.

DEFAMATION.

Slander — Pleading — Statement of defence — Justification — Fair comment — Particulars. *Brown* v. *Orde*, 1002.

DISCOVERY.

Affidavit on production — Railway accident — Reports for information of solicitor — No special direction — Reports made to Railway Board of Commissioners — Claim of privilege — Sufficiency — Examination of servant of company. *Shapter* v. *Grand Trunk Rw. Co.*, 252.

Examination of defendant — Motion by plaintiff for order requiring defendant to answer questions which he declined on advice of counsel. *Canadian Oil Co.* v. *Clarkson*, 230.

Examination of officers of company — Con. Rule 439 (a). *Ontario & Minnesota* v. *Rat Portage Lumber Co.*, 129.

Examination of officer of company — Not authorized to do business in province — Name on charter and prospectus — Order granted. *Powell Rees* v. *Anglo-Canadian Mortgage Co.*, 295.

Examination of plaintiff — Action on life insurance policy — Question as to age of assured — Marriage certificate — Relevancy of production — Indirect method of cross-examination upon affidavit on production. *MacMahon* v. *Railway Passengers Ins. Co.*, (No. 2), 32, 196.

Examination of plaintiff — Fitness for public office — Questions relating thereto must be answered — Action for slander — Innuendo. *Brown* v. *Orde*, 38.

Examination of plaintiff — Sale of wheat — Destroyed by fire — Loss by whom borne — Former dealings between parties — Passing of property. *Inglis* v. *Richardson*, 977.

Examination of witness pending motion for injunction—Fishing excursion — Information sought beyond what allowed by rules — Refusal to order witness to answer. *Rickart* v. *Britton Mfg. Co.*, 81.

DIVISION COURTS.

Increased jurisdiction under 10 Edw. VII., c. 32, s. 62 — Ascertainment of amount — Proof of documents, etc. *Renaud* v. *Thibert*, 923.

DOWER.

Basis upon which dower should be allowed—Lands purchased—Mortgages given as part payment — Wife joined to bar dower — Question whether wife takes dower in whole value of lands or value less mortgage? *Auger, Re*, 118.

DRAINS.

Construction of road ditch by municipality — Flooding lands — Action for damages — No negligence shewn. *Baldwin* v. *Township of Widdifield*, 267.

Outlet liability — Municipal by-law — Jurisdiction of township council — Municipal Drainage Act, s. 3, s.-s. 3, 4, s. 77. *Orford, Township of*, v. *Township of Aldborough*, 853.

EJECTMENT.

Action in — Peninsula in lake — Survey — Road allowance — Crown patent — Paper title. *Mann* v. *Fitzgerald*, 690.

ELECTIONS.

Municipal — Candidates elected by acclamation — Property qualification — Sale of by candidates — Right to hold office — Mortgages taken as part payment. *R. ex rel. Morton* v. *Roberts*, *R. ex rel. Morton* v. *Rymal*, 50.

ESTATES.

Distribution of estate — Will — Loss on realization of security — Apportionments between capital and income—Account. *Leadlay* v. *Leadlay*, 14.

EVIDENCE.

Examination of party as witness on "pending" motion — No notice of motion served — Appointment for examination set aside. *McLaren* v. *Tew*, 617.

Foreign commission — Allowed by Master-in-Chambers — Middleton, J., allowed plaintiff to elect whether to furnish security for costs or have commission vacated. *Hawes Gibson & Co.* v. *Hawes*, 46.

Foreign commission — Motion for anticipated — Application premature — No precedent for. *MacMahon* v. *Railway Passengers Assce. Co.*, (No. 1.), 31.

Foreign commission — Order for terms—Discovery to be had first. *Campbell* v. *Sovereign Bank & International Assets Co.*, 91.

Foreign commission — To Ireland — Inquiry as to next of kin of deceased intestate — Order granted on terms of giving security for costs. *Corr, Re*, 537.

EXECUTORS AND ADMINISTRATORS.

Executors and administrators — Application to Court for advice — Question whether lands or proceeds belong to estate — R. S. O. (1897), c. 129, s. 39 (1) — Con. Rule 938. *Turner, Re*, 543.

Executors and administrators — Sale of lands by — Action to enforce specific performance — Appeal — Notice — Amendment — Con. Rules 312, 789. *Foxwell* v. *Kennedy*, 21.

HUSBAND AND WIFE.

Alimony — Quantum of allowance — Custody of children — Desertion. *Karch* v. *Karch*, 534.

Alimony — Settlement of former action — Agreement — Conveyance of land and chattels — Effect on new action — Reference—Quantum of alimony. *Morgan* v. *Morgan*, 25.

Authority of wife to pledge husband's credit — For necessaries — Action to recover on current account — Statute of Limitations. *Scott* v. *Allen*, 597.

Dower — Forfeiture — Adultery — R. S. O. (1897), c. 164, s. 12. *Re Soper*, 851.

Marriage — Action for declaration of nullity — Consent of minutes of judgment — Refusal of Judge to give judgment — Amendments to Marriage Act—7 Edw. VII. c. 23, s. 8 — 9 Edw. VII. c. 62. *Dilts* v. *Warden*, 228.

"Oil lease" of wife's lands made by husband — Confirmation by wife—Alteration of lease — Payments received by husband for wife — Estoppel. *Maple City Oil & Gas Co.* v. *Charlton & Ridgetown Fuel Supply Co.*, 882.

INFANTS.

Custody — Adoption — Right of parent against grandparent — Welfare of child — Agreement under seal — 1 Geo. V. c. 35, s. 3 — Habeas corpus. *Hutchinson, Adah May (an infant), Re*, 390.

Custody — Habeas corpus — Application by father against maternal aunt. *Hart, Re*, 200.

INJUNCTION.

Restraining blasting in streets of town — Diligence — Skill and care — Addition of parties. *Bell Telephone Co.* v. *Avery*, 963.

INSURANCE.

Fire — Insurance brokers — Failure to effect insurance — Action for negligence. *Binkley* v. *Stewart*, 330.

Fire — Notice of loss in writing — Misrepresentation of value of goods insured — Previous fire in other premises —Materiality of question — Sufficiency of particulars and proofs of loss — Further proofs required — Action brought within 60 days after latest proofs supplied — Relief against imperfect compliance with statutory conditions — New action brought and consolidated with premature action — Amendments. *Strong* v. *Crown Fire Ins. Co.*, 734.

Life — Application fraudulent — Insured suffering from tuberculosis—Knowledge and Participation of fraud by beneficiary. *Strano* v. *Mutual Life Assurance Co.*, 311.

Life — Benefit certificate — Apportionment of benefit — Change of beneficiaries by will — Identification of certificate — Sufficiency — Insurance Act, R. S. O. (1897), c. 203, s. 160. *Watson & Order of Canadian Home Circles, Re*, 834.

Life — Benefit society — Adopted daughter — Death of — Claim by her children — Rules of society — Adoption discussed. *Fidelity Trust Co.* v. *Buchner*, 72.

Life — Policy — Condition — Breach — Assured taking employment on railway without permit — Knowledge of agent of insurance company — Acceptance of premiums by company — Authority of agent — Absence of notice to or knowledge of company. *Smith* v. *Excelsior Life Assce. Co.*, 863.

Police benefit society — Action for retiring allowance — By-laws of association — Plaintiff forced to resign from police force — Right to pension. *De La Ronde* v. *Ottawa Police Benefit Fund Assoc.*, 123.

INTOXICATING LIQUORS.

Conviction — Selling without license — Three informations filed together — Each criminal case must stand on its own merits. *R.* v. *Lapointe*, 601.

Liquor License Act — Amending Act, 2 Geo. V. c. 55, s. 13 — Intra vires — Conviction of person found drunk in local option municipality — Jurisdiction of magistrates. *Rex* v. *Riddell*, 847.

JUDGMENT.

Erroneous recital in judgment settled and entered — Motion to vary — After hearing of appeal — Consolidation of actions. *Strong* v. *Crown Fire Ins. Co.*, 309.

Foreign — Action to recover on — Defence — Fraud — Obtained in Yukon territory. *Johnston* v. *Occidental Syndicate Ltd.; McDougall* v. *Occidental Syndicate Ltd.*, 478.

Summary — Con. Rule 603 — Action against directors of company for wages — Ont. Companies Act, 7 Edw. VII. c. 34, s. 94. *Rogers* v. *Wood*, 48.

Summary — Con. Rule 603 — Action by solicitors for costs — 2 Geo. V. c. 125, s. 6 — Sum fixed as solicitor and client costs — Solicitor's Lien — Taxation of costs — Defence. *Gundy* v. *Johnston*, 798.

LUNATIC.

Issue to determine — Marriage of alleged lunatic — Over 80 years of age— To woman of 30 — Action to declare marriage void — Inquiry as to mental condition. *Fraser, Michael, Re*, 353.

Sale of lunatic's lands — Mortgage for part payment — To accountant of S. C. Jud. — Payment into Court. *Gibson, Re*, 8.

MEDICINE AND SURGERY.

Malpractice — Evidence — Negligence — Damages — Costs. *Rickley* v. *Stratton*, 282.

MINES AND MINERALS.

Execution — Interest in unpatented mining claim—Certificate of record issued —Not exigible under execution. *Clarkson* v. *Wishart, Re*, 901.

Mining Act — Grant of mining land — Reservation of pine timber — Right of grantee to cut for special purposes — Trespass — Cutting pine — Right of action. *National Trust Co., et al.* v. *William Miller, et al.*, 485.

Prospecting and discovery by miner on Crown lands after expiry of license — Renewal after discovery and staking — Effect of Ontario Mining Act, ss. 22 (1), 84, 85 (1) (a), 176 (1), 181 (1) — Criminal offence. *Sanderson* v. *Saville, Re*, 672.

MORTGAGES.

Security for bonds of railway company — Interest in arrear — Acceleration of payment of principal — Action for principal and interest — Claim for foreclosure and possession — Payment of interest pendente lite — Right to possession — Receiver — Breaches of Covenants—Default in payment of taxes — 10 Edw.. VII. c. 51, s. 6 — Costs. *National Trust Co.* v. *Brantford St. Rw. Co., Grand Valley Rw. Co. & Edward B. Stockdale*, 839.

Subsequent incumbrances — Judgment for redemption or sale — Final order of sale—Motion to open up Master's report — Assignees of equity of redemption — Parties. *Home Building & Savings Association* v. *Pringle*, 791.

MUNICIPAL CORPORATIONS.

By-law — Building restrictions — Motion to restrain erection of garage. *Toronto* v. *Wheeler*, 326.

By-laws — Building restrictions — Permit issued for apartment house — Motion to restrain erection of building. *Toronto* v. *Williams*, 899.

By-law — Restricting buildings — To be 25 feet from street line — Application of by-law to corner lots — 4 Edw. VII. c. 22, s. 19. *Dinnick* v. *McCallum, Re*, 546.

By-laws — Building restrictions — Using building for store — Injunction to restrain — Granted — 6 months' stay. *Toronto* v. *Foss*, 328.

Contracts — Supply of water to municipality — Action to recover for. *Canadian Electric Co.* v. *Perth*, 319.

Expropriation — Works and property of gas and electric light company — Municipal Act (1903), s. 566 (4). *Sarnia Gas Co.* v. *Sarnia*, 558.

NEGLIGENCE.

Engineer on steamer — Killed by falling through open hatchway — Action for damages by widow — No implied license to enter upon steamer — Evidence —Action failed. *King* v. *Northern Navigation Company*, 697.

Father permitting infant son to use firearm — Criminal Code s. 119—Liability of father for resulting damage. *Moran* v. *Burroughs*, 12.

Highway — Snow and ice — Injury to pedestrian — Damages. *Yates* v. *Windsor*, 608.

Injury to scow — Damages. *McLean* v. *Downey*, 782.

Obstruction on highway — Telephone pole erected by unauthorized person — Liability of municipality — Municipal Act (1903), s. 606. *Howse* v. *Southwold*, 212, 797.

Physician answering hurry call—Before dawn — Rig crashed into obstruction on highway — Dr. hurled out and injured internally — Absence of warning — Liability of municipality—Refusal to submit to operation — Reasonableness — Neurasthenia — Varied expert evidence — Finding of fact by Judge — Duty of Appellate-tribunal — Quantum of damages. *Bateman* v. *Co. of Middlesex*, 685.

Master and servant — Dangerous work — Warning — Lack of proper appliances — Prohibited acts — Inadvertence — Contributory Negligence — Not expressly found by jury. *Mercantile Trust Co.* v. *Canada Steel Co.*, 568.

Master and servant — Fatal Accidents Act — Contributory negligence—Damages — Findings of jury. *Lefebvre* v. *Trethewey Silver Cobalt Mine Limited*, 694.

Master and servant — Injury to servant — Findings of trial Judge — Accident not negligence — Action dismissed. *Rawlings* v. *Tomiko Mills*, 249.

Master and servant — Negligence of fellow servant — Action under Workmen's Compensation Act — Evidence — "Superintendence" — Question as to—Findings of jury. *Demers* v. *N. S. Silver Cobalt Mining Co.*, 97.

Master and servant — Negligence of foreman — Deduction of money paid for relief of workman. *Nigro* v. *Donati*, 974.

Railway — Fireman killed in collision with snow plough — Misdirection —New trial. *Jones* v. *Canadian Pacific Rw. Co.*, 439.

Railway — Injury to person in charge of live stock while being carried at half fare — Liability of railway. *Robinson* v. *Grand Trunk Rw. Co.*, 290.

Railway — Person lawfully in station yard killed by being thrown from wagon — Dom. Rw. Act, s. 284 — Defect of roadway. *Thompson* v. *Grand Trunk Rw. Co.*, 524.

Railway — Trespasser on tracks injured — Warning of approach of engine. *Cunningham* v. *Michigan Central Rw. Co.*, 481.

Railway — Servant of two railways —Person killed at a crossing of one railway by the other—Negligence of joint servant — Liability of each railway. *Pattison* v. *Can. Pac. Rw. Co. & Can. North. Rw. Co.*, 131.

Railway crossing — Accident at — Husband and daughter killed — No sign board — Evidence to justify jury's findings — Railway Act, ss. 242, 243, 274. *Crouch* v. *Pere Marquette Rw. Co.*, 333.

Servants — Dangerous machine — Infant injured — Absence of warning — Questions not raised at trial. *Stokes* v. *Curled Hair Co.*, 474.

Servant disfigured and disabled for life — Action for damages — Using smaller hooks for larger ones—Evidence that caused accident. *Smith* v. *Hamilton Bridge Co.*, 872.

Street railway — Passenger after alighting — Crossing tracks — Struck with car from opposite direction. *Cooper* v. *London Street Rw. Co.*, 87.

Street railway — Passenger alighting — Injury by car starting with jerk —Findings of jury—Judgment for plaintiff. *Jacob* v. *Toronto Rw. Co.*, 180.

Street railway — Person injured driving across track — Judgment for plaintiff — On findings of jury. *Goodchild* v. *Sandwich, Windsor & Amherstburg Rw. Co.*, 152.

Street railway — Person injured while crossing track — Uncertainty of findings of jury — New trial. *Herron* v. *Toronto Rw. Co.*, 933.

PARTICULARS.

Statement of claim — Action for breach of contract with company — Accounting for commission. *Grocock* v. *Edgar Allen & Co.*, 219.

Statement of claim — Negligence action — Death in railway accident — Res ipsa loquitur — Discovery. *Madill* v. *Grand Trunk Rw. Co.*, 233.

PARTIES.

Adding — Motion to dismissed — Improper joinder — Limitation of action. *Broom* v. *Toronto Junction*, 41.

PARTNERSHIP.

Action against — Failure to establish partnership — Assignment of interest in business — Attack by creditors — Assignee disclaimed. *Jamieson Meat Co.* v. *Stephenson*, 6.

Dealing in land — Agreement — Advances — Division of profits — Expenses. *Galbraith* v. *McDougall*, *McDougall* v. *Galbraith*, 928.

Dissolution — Taking partnership accounts — Goodwill — Compound interest — Profit and loss account — Depreciation of plant and machinery. *Foster* v. *Mitchell*, 571.

PLEADINGS.

Statement of defence — Motion to strike out part — Embarrassing — Action for interference with riparian rights —Injunction — Damages — Equitable relief — Trying actions by piecemeal. *Ontario & Minnesota Power Co.* v. *Rat Portage Lumber Co.*, 1.

PLEDGE.

Shares as security — Agreement—Power of sale improperly exercised — Sale at undervaluation — Collusion — Sale set aside. *Bartram* v. *Grice*, 191.

PRINCIPAL AND AGENT.

Agent's commission on sale of land — Exclusive agency for time limit —Sale after expiration of. *Sibbitt* v. *Carson*, 640.

Agent's commission on sale of lands — Purchaser found by agent — Abandonment of purchase — Subsequent purchase through another agent — Causa causans of sale. *Travis* v. *Coates*, 917.

Agent's commission on sale of land — Purchaser procured who refused to carry out purchase — Right of agent to commission. *Robinson* v. *Reynolds*, 124.

Authority of agent — Bonds purchased by agent — For principal — Dispute as to ownership — Evidence — Finding that bonds were purchased for principal. *Northern Sulphite Co.* v. *Craig*, 563.

Commission on sale of land — Parties brought together by agent—Sale effected — Different agents claiming the commission — Evidence — Relief over against third party. *Walker & Webb* v. *Macdonald; Graham* v. *Macdonald*, 964.

PROCESS.

Writ of summons — Service on foreign company — Motion to set aside —Assets in Ontario — Con. Rule 162—Conditional appearance. *Rainy River Navigation Co.* v. *Ont. & Minnesota Power Co. & Minnesota & Ont. Power Co.*, 221.

Service of — Writ of summons — Out of jurisdiction — Leave to enter conditional appearance — Question as to where causes of action arose — Place of payment. *Farmers Bank of Canada* v. *Heath*, 614.

Service of writ of summons — Out of jurisdiction — Motion to set aside — Irregularities. *Edgeworth* v. *Allen*, 617.

PROHIBITION.

Prohibition — Co. C. Judge — Jurisdiction—Appeals from conviction under R. S. C. (1906), c. 85, s. 321 — Time for hearing and decision of appeals — Costs — Taxation by Co. C. Clerk — Practice — Discretion of High Court. *R.* v. *Hamlink*, 107.

RAILWAYS.

Board of Railway Commissioners — Jurisdiction — Municipal streets — Railway upon or along highway — Leave to construct — Approval of location — Condition imposed — Payment of damages to abutting land-owners — Construction of R. S. C. (1906), c. 37, ss. 47, 155, 159, 235, 237. *Grand Trunk Pacific Rw. Co.* v. *Fort William Landowners & Fort William Land Investment Co.*, 303.

Board of Railway Commissioners —Jurisdiction — Passengers — Discrimination in carrying — Excursion fares — 7 & 8 Edw. VII. c. 61, s. 9—Railway Act, s. 317. *Canadian Fraternal Association* v. *Canadian Passenger Association*, 300.

Express rate — Competition with post office parcel post — C. R. C. No. 2, s. D.—Jurisdiction of Dom. Rw. Board —Discretion of carriers. *Express Traffic Association* v. *Canadian Manufacturers' Association and Boards of Trade of Toronto, Montreal and Winnipeg*, 262.

Farm crossing — Cost of to be paid by railway company — Railway Act, ss. 252, 253. *Riddell* v. *Grand Trunk Rw. Co.*, 331.

Freight rate — Unreasonable — Application for reduction — Discrimination — Fifth class rate — Only a paper rate — No competition. *Welland* v. *Canadian Freight Association*, 260.

Highway crossed by railway — Protection — Watchman in charge — Apportionment of expense. *Grimsby Beach Amusement Co.* v. *Grand Trunk & Hamilton, Grimsby and Beamsville Electric Rw. Cos.*, 258.

Highway — Opening across railway —Jurisdiction of Board of Railway Commissioners — Public interest — Protection — Railway Act, ss. 2 (21), 237. *St. Thomas* v. *Grand Trunk Rw. Co.*, 257.

Right to cross private way — Adjoining highway — Order of Dom. Rw. Board. *Canadian Northern Ontario Rw. Co.* v. *Hugh Bradish Billings*, 659.

SALE OF GOODS.

Conditional sale of manufactured goods by manufacturer — Name and address of — Abbreviation of — Conditional Sales Act, R. S. O. (1897), c. 149, s. 1—Bona fide purchaser without notice of lien — Agreement between purchaser and manufacturers—Liability on. *Ericsson Mfg. Co.* v. *Elk Lake Telephone & Telegraph Co.*, 161.

Contract — Implied warranty — Intention of parties — Skill and judgment of sellers — Rescission of contract — Purchaser's right to lien for amount paid —Right to enforce lien by sale — Possession of goods — Costs. *Canadian Gas Power & Launches* v. *Orr Bros.*, 351.

SCHOOLS.

Township continuation school—Establishment of — Duty of school board — Requisition for funds — Mandamus. *West Nissouri Continuation School, Re*, 842.

SOLICITOR.

Lien for costs — Judgment—Settlement or compromise without providing for costs — Absence of collusion or Improper conduct — Jurisdiction — Costs of petition. *Grocers Wholesale Co. Ltd.* v. *Bostock*, 786.

"**Retainer**"—Law Reform Act, 9 Edw. VII. c. 28, ss. 22 et seq. — Obligation of solicitor to account — Bill of costs to be delivered and taxed. *Solicitor, Re*, 156.

SURROGATE COURTS.

Jurisdiction — Payment of infant's money into Surrogate Court by administrator — No power to receive — Trustee Act, 1 Geo. V. c. 26, s. 37. *Mercer Estate, Re*, 217.

Removal of cause into High Court — Difficulty and importance of questions arising — Value of estate — R. S. O. (1897), c. 59, s. 34 (2). *Pattison* v. *Elliott*, 232.

TIMBER.

Contract — Guaranty for payment for timber — Bank Act — Securities under — Correspondence. *Quebec Bank* v. *Sovereign Bank*, 966.

Contract for sale of timber limits and assets of company — Option or offer — Construction — Reformation— "Not completed" — Right of vendor to forfeit of deposit paid by purchaser — Parties — Form of action—Declaration — Costs. *Munn* v. *Vigeon*, 736.

Contract of sale — Representation or guaranty — Oral testimony — Admissibility — Fraud and misrepresentation — Contemporaneous or prior oral agreement — Discount on price — Demurrage — Evidence. *Hilty Lumber Co.* v. *Thessalon Lumber Co. and Traders Bank of Canada*, 770.

Crown license to remove — Contract for sale of timber — Authority of agent to contract for principal — Ratification by acquiescence — Statute of Frauds — Part performance. *Thompson* v. *Playfair*, 866.

Lease from Crown — Rights of lessee — Action for trespass — Damages — Conversion of timber — R. S. O. (1897), c. 36, s. 40. *Phillips* v. *Conger*, 436.

TRESPASS TO LANDS.

Action for damages — Injunction — Possession sufficient in absence of proof of title — Fouling stream — Nuisance. *Fisher & Son* v. *Doolittle & Wilcox Ltd. and Grand Trunk Rw. Co.*, 445.

Boundary — Interim injunction. *Douglas* v. *Bullen*, 837.

Injunction — Title to land — Grant from Crown — Question if it covered

island adjoining main land — Title by possession — Damages for Trespass — Failure to establish title. *Fox* v. *Ross*, 244.

TRIAL.

Action to recover money paid on shares of company — Winding-up of company — Leave to bring action — Alleged assignment of shares — Points not raised in pleadings — New trial ordered. *Daniel* v. *Birkbeck Loan Co.*, 147.

Jury notice — Motion to strike out — Con. Rule 1322 — Change in practice. *Bissett* v. *Knights of Maccabees, etc.*, 89.

Motion to expedite — Plaintiff not in default. *Campbell* v. *Sovereign Bank*, 105.

New — Slander Action — "Held town up" — Not actionable per se. *Holland* v. *Hall*, 209.

Order to expedite — Plaintiff not in default — Con. Rule 243 — Costs. *McIntosh* v. *Grimshaw*, 256.

VENDOR AND PURCHASER.

Contract for sale of land — Absence of authority from owner — Contract with husband — Correspondence—Establishment of contract. *Boland* v. *Philp*, 849.

Contract for sale of lands—Specific performance — Action for — Alternative for damages for breach of contract — Agency — Order for specific performance granted — Order for possession against person who took possession and performed certain work on lands when action was commenced — Costs to plaintiff. *Morgan* v. *Johnson*, 868.

Contract for sale of land — Specific performance — Statute of Frauds — Parol evidence to vary. *Maloughney* v. *Crowe*, 635.

Contract for sale of land — Objections to title — Right of way — Admission by vendor of validity of objections —Termination of contract — Registration — Discharge. *Jewer* v. *Thompson*, 610.

Contract for sale of land — Time for completion — Extension — Evidence — Notice to complete — Reasonableness —Right of vendor to determine contract — Specific performance — Refusal — Discretion — Return of part of purchase-money paid — Costs. *Fuller* v. *Maynard*, 809.

Contract for sale of land — Time of essence — Note given in part payment. *O'Hearn* v. *Richardson*, 609.

Objections to title — Will — Construction — Devise of lands — Power to dispose of — Title valid. *Smith & Patterson*, 224.

Repudiation of contract for sale of land. *Danbrook* v. *Parmer*, 430.

Statute of frauds — Receipt sufficient memorandum. *Maybury* v. *O'Brien*, 677.

Title — Will — Wrong description of lands — Valid title passed under will. *Coutts & LeBoeuf, Re*, 294.

VENUE.

Hamilton to Toronto — County Court action — Issues for trial — Evidence — Witnesses — Convenience — Expense. *Conkle* v. *Flanagan*, 104.

Grey Co. C. to Nipissing Dist. C. — Witnesses — Convenience. *Keenan Woodware Co.* v. *Foster*, 545.

Motion for — County Court action — Witnesses — Convenience. *Lloyd* v. *Stronach*, 619.

WATER AND WATERCOURSES.

Crown grant of land bounded by highway running near bank of lake — Encroachment of water upon highway and lands beyond — Right of grantee to lands encroached upon by water — Crown assuming to make lease of same lands — Trespass by lessee — Action — Parties — Attorney-General—Injunction — Damages. *Volcanic Oil & Gas Co.* v. *Chaplin*, 800.

Floatable river — Unlawful erection of boom in river—Ashburton Treaty — Ultra vires state legislation. *Rainy River Boom Corporation* v. *Rainy Lake Lumber Co.*, 952.

Mill privileges—Dam across stream — Raising height of — Easement — Flooding neighbour's lands — Statute of Limitations — Laches — Injunction —

Reference — Log Driving — R. S. O. (1897), c. 142, s. 1 — Costs. *Cain* v. *Pearce*, 174.

Pollution of stream—Mill owners — Prescriptive right — Nuisance — R. S. O. (1897), c. 133, s. 35. *Hunter* v. *Richards*, 408.

Riparian rights — Marsh lands — Rights of one owner against adjoining owner — Obstruction of access to shore —Mandamus to compel removal. *Merritt* v. *Toronto*, 710.

WAYS.

Bridges — Duty of county council to build, maintain, and repair — Municipal Act, 1903, s. 616 — Width of stream — Measurement at high water. *Caledonia & Count of Haldimand, Re*, 961.

WILLS.

Construction — Advancement of child — Deduction in share. *Boehmer, Boehmer* v. *Boehmer, Re*, 287.

Construction — Annuity — Residue —Remainder — Maintenace of infants— Powers of trustees. *McKay, Re*, 666.

Construction — Application for advice by executor — Under Trustee Act and Con. Rule 1269 (938) — Determination of validity of lease made by life tenant. *Gordon, Re*, 577.

Construction — Charity bequest — Fee of "legacy duty" — Succesion Duty — 9 Edw. VII. c. 12, s. 6 (2). *Gwynne, Eliza Anne, Estate, Re*, 405.

Construction — Devise — General residuary gift—Description of land owned by testator — Sale of that land and acquisition of other land — After-acquired land passing under residuary devise. *Thornton, Re*, 619.

Construction — Devise of real estate — Land subject to contract of sale. *Suetsinger, Re*, 738.

Construction — Equalization of values of shares — Personal powers of executors — Executors dead — Duty carried out by Court. *Drummond Estate, Re*, 554.

Construction — Part of estate not disposed of — Distribution of such part as in case of intestacy—Residuary clause — Intention of testator — Evidence of conveyance rejected — Payment of debts — Resort to undisposed of personalty. *Piper Estate, Re*, 620.

Construction — Revocation of clause in will by codicil — Division of residue among infant grandchildren. *Richardson, Re*, 605.

Construction — "Survivor" — Period of ascertainment — Death of testator. *Johnson, Re*, 741.

Testamentary capacity — Absence of undue influence — Proof of due execution — Evidence. *Toal* v. *Ryan*, 127.

Testamentary capacity — Absence of undue influence — Proof of will in solemn form in Surrogate Court—Action in High Court. *Mosier* v. *Rigney*, 857.

Testamentary capacity — Claim by daughter to moneys deposited in bank— Trust — Evidence — Joint account — Survivorship — Conduct of bankers. *Everly* v. *Dunkley*, 820.

Testamentary capacity — Delusions — Appeal from findings of Surrogate Judge. *Thamer* v. *Jundt*, 206.