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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 26TH, 1921.

*WALLACE v. GRAND TRUNK R. W. CO.

Railway—Level Highway Crossing—Person Driving over Tracks Struck by Engine—Evidence as to Responsibility of Defendants for Engine—Leave to Adduce on Appeal—Death—Action under Fatal Accidents Act—Negligence—Cause of Accident—Contributory Negligence—Findings of Jury—Evidence—Inferences from Undisputed Facts — Damages — Assessment of Excessive Amount—New Assessment Directed—Costs.

An appeal by the defendants from the judgment of LOGIE, J., in favour of the plaintiff, after trial of the action with a jury at Belleville.

The action was brought, under the Fatal Accidents Act, by the mother and administratrix of the estate of George Clifford Wallace, deceased, to recover damages for his death.

On the 20th December, 1919, the deceased was, with his brother Arthur, driving to the city of Belleville, along a highway in the township of Thurlow. A railway, alleged to be operated by the defendants, intersects by a level crossing the gravel highway, and at the point of intersection, a level highway crossing, a railway engine, also alleged to be operated by the defendant company, struck the buggy in which George and his brother were driving, and he was killed.

The plaintiff alleged a breach of statutory duty on the part of the defendants, and that that was the cause of the collision and death.

The defendants denied negligence and alleged contributory negligence on the part of the deceased.

* This case and all others so marked to be reported in the Ontario Law Reports.

In answer to questions, the jury found: (1) that the death was caused by the negligence of the defendants; (2) that such negligence consisted in "not ringing the bell on the engine or blowing the whistle;" (3) that the deceased could not, by the exercise of reasonable care, have avoided the accident; and they assessed the plaintiff's damages at $2,500.

On these answers the trial Judge pronounced judgment for the plaintiff for $2,500 and costs.

The appeal was heard by MULOCK, C.J. Ex., MAGEE and HODGINS, JJ.A., and MASTEN, J.

D. L. McCarthy, K.C., for the appellants.

E. G. Porter, K.C., and W. Carnew, for the plaintiff, respondent.

MASTEN, J., reading the judgment of the Court, said, after stating the facts, that one of the contentions of the appellants was, that there was no evidence to connect the locomotive engine alleged to have caused the death with the defendants or their servants or agents. The learned Judge said that the lack of formal evidence upon this point was due to a slip, and that, unless the defendants would now admit that the engine was being operated by them, the plaintiff should have leave to adduce evidence before the Court to establish the fact.

It was also contended that the trial Judge should have withdrawn the case from the jury. If counsel for the appellants meant to suggest that the cases upon which he relied established in this Province a doctrine different from that applied in England since Bridges v. North London R.W. Co. (1874), L.R. 7 H.L. 213, Dublin Wicklow and Wexford R.W. Co. v. Slattery (1878), 3 App. Cas. 1155, and Metropolitan R.W. Co. v. Wright (1886), 11 App. Cas. 152, the learned Judge did not agree with the suggestion. The contrary was established by such cases as Morrow v. Canadian Pacific R.W. Co. (1894), 21 A.R. 149; Scriver v. Lowe (1900), 32 O.R. 290; Makins v. Piggott (1898), 29 Can. S.C.R. 188; Toronto R.W. Co. v. King, [1908] A.C. 260; Champaigne v. Grand Trunk R.W Co (1905), 9 O.L.R. 589, 599; Peart v. Grand Trunk R.W. Co. (1886), 10 O.L.R. 753.

The learned Judge distinguished the three cases chiefly relied on for the appellants: Johnston v. Northern R.W. Co. (1873), 34 U.C.R. 432; Wabash R.R. Co. v. Misener (1906), 38 Can. S.C.R. 94; Grand Trunk R.W. Co. v. McAlpine, [1913] A.C. 838.

Reference also to Grand Trunk R.W. Co. v. Haines (1905), 36 Can. S.C.R. 180; Ramsay v. Toronto R.W. Co. (1913), 30 O.L.R. 127; Beven on Negligence, 3rd ed., p. 135; Halsbury's Laws of England, vol. 21, pp. 443, 444; Coyle v. Great Northern R.W. Co. of Ireland (1887), 20 L.R. Ir. 409.

The facts were not in dispute, as the defendants adduced no evidence; but questions arose as to the proper inferences from the facts. It was the province of the jury to draw the inferences of fact properly arising from the uncontroverted evidence; and it was the duty of the Judge to leave the case to them for that purpose.

The inferences which the jury had drawn were not so unreasonable that they should be set aside and a new trial granted.

The inference that the failure of the defendants to whistle and ring the bell was connected with and contributed to the accident was plainly warranted.

The inference that the deceased took ordinary and reasonable care before attempting to cross the railway tracks was one that the jury might properly draw.

The inference drawn by the jury that the accident was to be ascribed to the defendants' fault, and not to that of the deceased, was also warranted.

Reference to a recent and unreported decision of the Supreme Court of Canada in Ottawa Electric R.W. Co. v. Booth.

The case was properly left to the jury, and their findings in regard to liability could not be disturbed.

The pecuniary interest of the parents in the life of the son who was killed—he was a youth of 20, who had been overseas, and had since worked upon his father's farm—was not such as to warrant an assessment of damages at $2,500, and, as the Court could not force the plaintiff to accept a sum named by the Court, there must be a new assessment of damages, unless the parties could agree upon a sum: London and Western Trusts Co. v. Grand Trunk R.W. Co. (1910), 22 O.L.R. 262, 264, 268.

The costs of the former trial should be costs in the cause, and the costs of this appeal should be costs to the defendants in any event.

Order accordingly.

SECOND DIVISIONAL COURT. JANUARY 26TH, 1921.

ROBINSON v. TORONTO GENERAL TRUSTS CORPORATION.

Injunction—Interim Order Restraining Defendants from Holding Meeting of Shareholders of Company—Reversal on Appeal—Costs.

Appeal by the defendants Arena Gardens Limited from an order of MASTEN, J., in the Weekly Court, ante 471, restraining the

defendants, until the trial of the action, from holding a special general meeting of the shareholders of the appellant company for the purpose of approving and confirming certain acts of the directors.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

A. C. McMaster, for the appellants.

W. R. Smyth, K.C., and J. F. Boland, for the plaintiffs, respondents.

MEREDITH, C.J.C.P., at the conclusion of the argument, said that he was in favour of allowing the appeal and discharging the interlocutory injunction order, on the preliminary ground that no such order was necessary for the protection of the plaintiffs' rights, if any they had.

Injunctions are not to be granted or upheld merely because they may do no harm; and, if they were, this case could hardly be called one of that character.

Interlocutory injunction orders should be made only when preservation of property or other rights during the litigation requires it. Nothing had been said that could bring this case within that class.

On other and farther-reaching grounds the attempt to uphold the order might also fail; but, as all parties did not agree to this appeal being treated as a motion for judgment in the action, it was better to abstain from saying anything as to other grounds more than this: that the creditor-plaintiff has no writ of execution and so no control over his debtor's property; and that, if he had execution, the control should be such as could be exercised under it. And as to the shareholder-plaintiff, no case had been cited, and the learned Chief Justice knew of none, in which an injunction had been granted preventing a lawful meeting of the shareholders of a company; nor could the Chief Justice perceive why any such injunction as that in question could be needful or even useful. If that which is to be done at the meeting is lawful, what justification can there be for preventing it? Whilst, if anything unlawful is done, the plaintiffs can have then as effectual remedies—if they should be entitled to any—as any they could have now. And why assume that anything unlawful shall be done? It would be going altogether too far to interdict the intended meeting on account of anything disclosed in the material before the Court, or indeed upon anything said upon the argument.

The costs of the motion and of this appeal should be costs in the action to the defendants in any event; and the appeal should be allowed, and the injunction order set aside.

RIDDELL, LATCHFORD, and MIDDLETON, JJ., concurred.

LENNOX, J., dissented, upon the ground that the Judge who granted the order had a discretion which should not be interfered with.

Appeal allowed (LENNOX, J., *dissenting*).

SECOND DIVISIONAL COURT. JANUARY 28TH, 1921.

*MARKS v. ROCSAND CO. LIMITED.

Company—Shareholder and Director—Payment for Services as Manager—Authority for—Resolution of Shareholders at Special Meeting—Notice of Meeting—Failure to Specify Matters to Come before Meeting—Right of Plaintiff to Recover Remuneration for Services—Absence of Express Contract—By-law of Company—Implied Contract—Services Rendered while Director—Services Rendered before Appointment.

Appeal by the defendant company from the judgment of ORDE, J., 48 O.L.R. 224, ante 61.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

W. K. Fraser, for the appellant company.

H. J. Martin, for the plaintiff, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that the judgment in the plaintiff's favour was based upon an implied contract by the defendant company to pay to him, for his personal services, the amount of the judgment. No such claim was made; the claim was for "6 months' salary" at $200 a month, based on an expressed contract; and payment was not sought: what was sought was only a judgment "declaring" that the plaintiff was entitled to a salary as alleged in his claim.

The trial Judge evidently considered that the claim on an expressed contract could not be supported, but that the plaintiff could recover on an implied contract; and, if that were so, the judgment for payment of the money due and payable was right. A declaratory judgment is out of the question in such a case.

The judgment upon an implied contract could not be sustained.

When one accepts and has the benefit of the services of another, and there is no reason why those services should be given gratuitously, ordinarily no other conclusion can be reached than that there was a tacit agreement between the parties that the services should be paid for.

But in this case no such obligation should be implied. And ordinarily there would be great difficulty in finding any contract —tacit or expressed—in any case in which no contract was asserted by either party and of which each party was ignorant. This does not, of course, refer to obligations imposed by law.

The plaintiff was and is a large shareholder of the defendants; he is said to have owned and yet to own about one-fourth of its whole capital stock; and he is, and was during half of the time for which he claims remuneration, one of the defendants' directors. The services rendered were not of an onerous character; they were not more than it might reasonably be expected a large shareholder might do in the interests of his company, and so indirectly for his own benefit, without salary or other remuneration.

Then there are statutory provisions against payment to directors of companies unless such payment is expressly provided for as required by the statute; and in this case the defendants were bound by their own by-law 18, giving power to the directors to grant and fix the amounts of salaries of the president, directors, officers, etc., of the company, including the salaries and remuneration of such officers as may be directors, whether such salary or remuneration be paid to them as directors or otherwise.

The trial Judge was right in finding that the plaintiff could not recover on the ground that an expressed contract was proved.

It was not contended that anything done under by-law 18 helped the plaintiff; but a resolution passed at a general meeting of the shareholders of the company was relied on, and it plainly gave the plaintiff a salary of $200 per month, but payable only "when the finances of the company will warrant so doing." As this was all that the plaintiff could rely upon in support of his claim, and as there was no evidence that, when the action was begun, the finances of the company warranted payment, the action failed and should have been dismissed.

For the reasons stated by the trial Judge, there was no power in the shareholders, at that meeting, to pass such a resolution so as to bind the company.

The appeal should be allowed and the action should be dismissed.

LATCHFORD, MIDDLETON, and LENNOX, JJ., agreed with MEREDITH, C.J.C.P.

RIDDELL, J., read a judgment in which he gave reasons for agreeing in the main with the Chief Justice; he was of opinion, however, that the plaintiff should have compensation for his services as manager up to the time that he became a director. The judgment should be reduced to an amount proportional and limited to the time during which the plaintiff was not a director.

Appeal allowed and action dismissed (RIDDELL, J., *dissenting in part*).

SECOND DIVISIONAL COURT. JANUARY 28TH, 1921.

KNIGHT v. GARVIN AND MANNING.

Contract—Re-purchase of Company-shares—Evidence—Consideration—Findings of Trial Judge—Appeal.

Appeals by the defendants Garvin and Manning from a judgment of ROSE, J., of the 20th October, 1920.

The action was for specific performance or in the alternative for damages for breach of an agreement to re-purchase or take off the plaintiff's hands certain company-shares which he had bought from the defendants. The judgment of the trial Judge was in favour of the plaintiff for the recovery of $2,077.36, upon payment of which sum the plaintiff was to transfer the shares to the defendants.

The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

S. H. Bradford, K.C., for the appellant Garvin.

J. A. Macintosh, for the appellant Manning.

C. P. Smith, for the plaintiff, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that there were three questions involved in the appeal: (1) whether there was any contract with the plaintiff; (2) if so, by whom; and (3) whether there was any sufficient consideration for it. These were all questions of fact; and each was, after full consideration by the trial Judge, found in the plaintiff's favour; and as to all such findings the learned Chief Justice was quite in accord with the trial Judge.

The learned Chief Justice reviewed the evidence at some length, and said that he was in favour of dismissing the appeals.

RIDDELL, J., agreed with the Chief Justice.

LATCHFORD, MIDDLETON, and LENNOX, JJ., agreed in the result, for reasons given by each of them in writing.

Appeals dismissed with costs.

SECOND DIVISIONAL COURT. JANUARY 28TH, 1921.

*SANDLOS v. TOWNSHIP OF BRANT.

Highway—Nonrepair—Accident—Injury to Motor Vehicle and Driver—Liability of Township Corporation—Municipal Act, sec. 460—Evidence—Presumption—Onus—Defect in Culvert—Want of Inspection—Notice—Negligence.

An appeal by the defendants, the Municipal Corporation of the Township of Brant, from the judgment of ROSE, J., at the trial, in favour of the plaintiff with $500 damages and with costs, in an action for personal injury sustained by the plaintiff and injury to his motor vehicle by reason, as he alleged, of the negligence of the defendants in the nonrepair of a road in the township.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

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

O. E. Klein, for the plaintiff, respondent.

RIDDELL, J., in a written judgment, said that the plaintiff, travelling in his automobile from Hanover to Chesley, driving it himself, passed along the 12th side-road of the township of Brant, a fairly well travelled road. At one of the culverts, made of cement-tile, on the road, he met with an accident—his wheel ran into a hole in the culvert, with disastrous results. The culvert consisted of 6 cement tiles, each 2 ft. 6 in. length and 2½ in. thick. The tile at the extreme west (the plaintiff's left) was cracked through and had a piece broken out at its eastern end; the second was apparently a new tile, the eastern end of which came to the left wheel track; it was not close to the third tile, the western end of which was under the left wheel track, and which ran to the middle of the via trita; this was broken in 8 or 10 pieces; the fourth tile was also cracked. It was quite clear that the highway was out of repair; and the learned trial Judge had negatived contributory negligence. He also found that "the manifestation on the surface of the road that there was a break in the pipe came only a very few hours before the accident;" but that it had not been shewn that the break in the tile came at the same time as the appearance upon the surface.

The findings of fact were wholly warranted by the evidence; and the result was that it was established that the accident was due to want of repair not manifest until a few hours before the accident—the want of repair was caused by a break in a hidden tile which may or may not have occurred at the time of the outward

manifestation of nonrepair. Such a break could have been discovered on inspection of a certain character, but there was no finding of negligence in the system of inspection actually in use.

From almost the beginning of municipal control of and responsibility for highways, it has in this Province been considered that an action of this kind is based upon negligence: there must be proved some original defect or some negligence in inspection or want of inspection or some knowledge of the defect or the lapse of such a length of time that knowledge will be implied. The authorities in this Province, at least until the decision of Rose, J., in Richardson v. Township of Warwick (1920), 18 O.W.N. 106, were uniform. That learned Judge, however, interprets the decisions of the Supreme Court of Canada (City of Vancouver v. Cummings (1912), 46 Can. S.C.R. 457, and Jamieson v. City of Edmonton (1916), 54 Can. S.C.R. 443) as laying upon the municipality an onus not recognised by the Ontario cases; and, finding that that onus has not in this case been met, he gives judgment for the plaintiff.

The result of the decisions in the two cases mentioned is, that "in all cases where the accident has arisen from the . . . apparent wearing out or imperfect repair of the road, there arises upon evidence of accident caused thereby a presumption, without evidence of notice, that the duty relative to repair has been neglected."

The present is such a case; and a presumption has arisen that the duty of the defendants has been neglected. The presumption is not juris et de jure, but is rebuttable. The defendants did not meet the presumption by evidence shewing that they did all that could reasonably be done to prevent the want of repair occasioning the accident.

The appeal should be dismissed with costs.

Meredith, C.J.C.P., read a judgment in which he reviewed the facts and evidence at some length. He did not base his view of the case upon any question of onus, and did not express any opinion as to the effect of the decisions in the Supreme Court of Canada. His finding was that the plaintiff's injury was caused by the negligence of the defendants extending over a period of more than 7 years; and he was in favour of dismissing the appeal.

Latchford, J., in a written judgment, said that the judgment should be supported on the ground stated by Anglin, J., in the Edmonton case, 54 Can. S.C.R. at p. 459, viz., that the obligation of keeping the highway in repair involves the duty of preventing, as far as reasonably possible, the continuance of known conditions which will bring about a state of disrepair.

In the present case the continuance of the conditions resulting in the highway being in a state of disrepair was known to the officers of the municipality, and they took no precautions in the way of special inspection. Had such inspection taken place, the condition of the culvert would have been disclosed.

The appeal should be dismissed.

Middleton, J., also read a judgment. He said that the question which had arisen upon the Municipal Acts of other Provinces did not arise upon the Ontario statute. In cases of non-repair, liability is established prima facie as soon as the defect is proved; and the onus is cast upon the municipality to shew such circumstances as will exonerate it from the prima facie liability. The liability of the defendants was well established without reference to any question of onus. There is no justification for the idea that municipal corporations are entitled to allow their roads to fall into disrepair and then escape liability on the ground that they had no notice or knowledge of the situation. Notice is of importance only when what is complained of arises out of the clear wrongdoing of some one who has no official relation with the municipality or colour of right to do what he has done. Notice in other cases may be relied on to emphasise the breach of duty by the municipality.

The appeal should be dismissed.

Lennox, J., agreed in the result.

Appeal dismissed with costs.

Second Divisional Court. January 28th, 1921.

*RICHER v. BORDEN FARM PRODUCTS CO. LIMITED.

Judgment—Summary Judgment—Motion under Rule 57—Defence Set up by Affidavit—Defendants Prevented from Paying by Reason of Garnishment Proceedings in Quebec Court—Important and Difficult Question—Jurisdiction of Quebec Court—Question not Proper for Determination upon Summary Application—Action to Proceed to Trial in Ordinary Way—Appeal—Costs.

Appeals by the defendants in two actions from orders of the Judge of the County Court of the United Counties of Stormont Dundas and Glengarry awarding summary judgment under Rule 57, in one case for $313.39 and in the other for $250.90, with costs.

The actions were brought respectively by Louis and Fabien Richer to recover moneys alleged to be due to the plaintiffs, but which, the defendants said, they were prevented from paying by reason of garnishee proceedings taken by one Lauzon in a Quebec Court.

The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

H. W. Shapley, for the appellants.

J. A. Macintosh, for the plaintiffs, respondents.

MIDDLETON, J., in a written judgment, said that Lauzon, on the 6th February and 4th March, 1919, recovered a judgment in the Superior Court of the Province of Quebec against Louis Richer and Fabien Richer for $1,797 with interest and costs. On the 4th October, 1920, a process called "tiers-saisie" issued from the Quebec Court attaching all moneys due by the present defendants to the present plaintiffs, the defendants in the Quebec action. The tiers-saisie process is practically the same as a garnishee order nisi. Upon the return of the summons in the Quebec Court, the defendants in these actions contested the jurisdiction of the Quebec Court to attach the moneys due in Ontario; but on the 29th November, 1920, the order was made absolute and the defendants in these actions were ordered to pay to Lauzon the amount of their indebtedness to the plaintiffs in satisfaction pro tanto of the judgment creditor's (Lauzon's) claim. It did not appear from the papers filed whether the defendants had paid the money over to the Quebec judgment creditor, but it did appear that the defendants had assets in Quebec, and could readily be made to pay.

The present plaintiffs, Louis and Fabien Richer, dissatisfied with this situation and denying the jurisdiction of the Quebec Court to make an effective order in the premises, sued the defendants in a County Court, and, upon appearance being entered, accompanied by an affidavit setting out the facts, moved for and obtained summary judgments.

It was plain that this was not a case in which a summary judgment should have been granted. The Rule was not intended to provide a summary method of adjudicating upon disputed rights, but a simple method of enforcing admitted rights or rights concerning which there is no real dispute.

The question which would have to be determined in these actions was a difficult one. There was a difficulty at the threshold, because the circumstances relied on as conferring jurisdiction upon the Quebec Courts were not disclosed.

As to the principles upon which the question of the jurisdiction of the Quebec Court would have to be determined in these actions, the learned Judge referred to Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A.C. 670; Deacon v. Chadwick (1901), 1 O.L.R. 346; and Western National Bank of City of New York v. Perez Triana & Co., [1891] 1 Q.B. 304.

Where a Court other than the Court of domicile asserts jurisdiction, the defendant is called upon to consider the situation with care; for, while the Court (other than the Court of domicile) cannot pronounce a judgment entitled to extra-territorial recognition, it has the power of pronouncing a judgment which can be enforced by the machinery which the local law provides. Hence, even if the Court in Quebec had no jurisdiction over the Richers which our Court would be bound, on the principle of comity, to recognise, it undoubtedly had jurisdiction to pronounce a judgment which would be effective in Quebec and could be enforced by any mode of execution against any assets available in that Province; and in this case unquestionably that particular method of enforcement was admissible.

Whether the Quebec Court should allow its machinery to be used for the purpose of reaching a debt due in Ontario with respect to a transaction in Ontario by a debtor resident in Ontario, merely because there is power to reach such debtor, by reason of his having assets within Quebec, is a question for the Quebec Courts. But the English Courts have thought it not proper to exercise such a jurisdiction: Martin v. Nadel, [1906] 2 K.B. 26. That case, however, recognises the wide principle that "the law will never compel a person to pay a sum of money a second time which he has paid once under the sanction of a Court having competent jurisdiction."

When judgment passed against the Richers in Quebec, either by their consent or default, the risk of seizure of their property by the Courts of that Province was theirs, and the burden must be borne by them—it is not permissible to shift it to the defendants in these actions.

It has been held in many cases that a garnishee order nisi does not take away the right of the judgment debtor himself to sue. The garnishee order nisi affords no defence—it is only an actual payment that can be set up. The learned Judge thought that this should not defeat the defendants' right; and, if the case were ripe for hearing, he would be inclined to direct that the actions be stayed until the defendants could pay under the order of the Quebec Court.

The appeals should be allowed and the actions should proceed to trial in the ordinary way. The plaintiffs should pay the costs

of the motions for judgment and of these appeals forthwith after taxation; for the motions were to be regarded as an abuse of the practice.

RIDDELL, LATCHFORD, and LENNOX, JJ., agreed with MIDDLETON, J.

MEREDITH, C.J.C.P., agreed in the result, for reasons stated in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. JANUARY 28TH, 1921.

DISHER v. LEVITT.

Trusts and Trustees—Chattel Mortgage—Sale of Goods Covered by, under Distress for Rent—Exercise of Landlord's Remedy by Chattel Mortgagee—Trustee for Plaintiff and Others—Nothing to Shew Breach of Trust.

An appeal by the defendant from the judgment of SUTHERLAND, J., 18 O.W.N. 433.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

George Lynch-Staunton, K.C., and W. V. M. Shaver, for the appellant.

W. S. MacBrayne, for the plaintiff, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that, by agreement between the several persons concerned, a chattel mortgage was given by the common debtor to the defendant, out of which certain portions of the amount secured were to go to the plaintiff and two others.

The mortgaged goods were in a building owned by the defendant; and *after the mortgage was given rent accrued and became payable to the defendant,* who seized and sold the goods under a warrant of distress for such rent; and the sole question involved in this action was, whether he could lawfully so deprive the plaintiff of his right under the chattel mortgage.

The trial Judge held that the defendant could not: but why not? It was not suggested that anything could lawfully have prevented

such a distress if the chattel mortgage had been in the plaintiff's own name; and how could he have any higher right because of its being in the defendant's name for him.

There was no agreement on the defendant's part to pay the plaintiff the sum which he was to get out of the chattel mortgage otherwise than when realised from or under the mortgage; and, there being no personal obligation to pay, the plaintiff could succeed in this action only if failure to realise upon the mortgage and pay the plaintiff was caused by some breach of trust by the defendant.

But there was no suggestion of any failure on the defendant's part to do anything that he should have done to realise upon the mortgage; the whole claim was rested upon some supposed injustice in the defendant's enforcement of his rights as landlord, to the detriment of his own and the plaintiff's and third persons' interests under the mortgage. There was, however, nothing unlawful or inequitable or unjust in that, in the absence of any obligation to abstain from enforcing the landlord's rights, or of any act or omission as chattel mortgagee or trustee which enabled the landlord to exercise such rights, or the taking advantage in any manner of the position of trustee to better the position of landlord.

The appeal should be allowed and the action should be dismissed.

Appeal allowed.

SECOND DIVISIONAL COURT. JANUARY 28TH, 1921.

GOSLING v. FAUVER.

Vendor and Purchaser—Agreement for Sale of Land—Possession not Given on Date Agreed upon—Time of Essence of Agreement—Default of Vendors—Right of Purchaser to Recover Amount of Sale-deposit.

Appeal by the defendants from the judgment of the County Court of the County of York in favour of the plaintiff in an action to recover the sum of $200, a deposit made by the plaintiff on account of the purchase of a house and land from the defendants under an agreement which, as the plaintiff alleged, the defendants had not carried out.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., MIDDLETON and LENNOX, JJ.

Joseph Montgomery, for the appellants.

Grayson Smith for the plaintiff, respondent.

Lennox, J., reading the judgment of the Court, said that, by the agreement, time was expressly made of the essence, and, apart from that, punctual performance of the agreement by the defendants was essential, owing to circumstances inducing the plaintiff to contract. Possession was to be given on the 26th June, 1920. The defendants were not in a position to carry out their agreement until about the 7th or 8th July, if indeed they were ready then. The learned Judge was satisfied, after reading the evidence, that the plaintiff had never acceded to any proposed variation from the original stipulations, and never recognised the agreement as binding after the defendants' default.

Appeal dismissed with costs.

HIGH COURT DIVISION.

Orde, J., in Chambers. January 25th, 1921.

*REX v. BONDY.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Unlawful Sale or Disposal of Intoxicating Liquor—Evidence—Admission of Defendant that he Had Liquor on Premises—Absence of Proof of Sale—Sec. 88 of Act—"Possession of Liquor"—No Liquor Found on Premises when Searched—Onus—Inference—Finding of Magistrate—Effect of—Motion to Quash Conviction.

Motion to quash the conviction of the defendant, by the Police Magistrate for the Town of Essex, for that the defendant had, at the Town of Amherstburg, on the 12th September, 1920, unlawfully sold or otherwise disposed of 18 cases of liquor, contrary to the provisions of sec. 40 of the Ontario Temperance Act.

H. J. Scott, K.C., for the defendant.
F. P. Brennan, for the magistrate.

Orde, J., in a written judgment, said that the evidence upon which the conviction was based was that on the 12th September the defendant called upon the Chief of Police of Amherstburg and said he had lost 18 cases of liquor. This was assumed to be a complaint that the liquor had been stolen. The Chief of Police with the License Inspector searched the premises of the defendant, but found no liquor there. They did find certain things and signs

about the rear of the premises to indicate that persons had been there with a motor car, and that some heavy articles had been taken across the fence, but there was nothing to shew that anything had been removed from the house. The marks found were equally consistent with the theory that something had been brought into the house, and there was nothing upon which to base a finding that liquor had been removed except the statement of the defendant that he had had 18 cases of liquor in his possession, and that they were gone. There was no direct evidence of any sale.

But there was evidence that the accused had had in his possession 18 cases of liquor; he admitted it at the trial. And this liquor was the liquor in respect of which he was being prosecuted. Under sec. 88 of the Act, proof of such possession is prima facie evidence of guilt, unless the accused proves that he did not commit the offence.

It was argued that the "possession" to which sec. 88 refers is possession at the time when search is made—that is, that there must be evidence that liquor is *found* in the possession of the accused; that evidence that the accused has previously had liquor in his possession is not sufficient.

There is much force in this argument, but the question is settled, until a higher Court holds otherwise, by the decision in Rex v. Moore (1917), 41 O.L.R. 372.

Section 88 really makes no reference to the "finding" of liquor in the possession of the accused; it refers merely to proof of possession.

It could not, therefore, be held that the magistrate had no evidence upon which to convict.

Motion dismissed with costs.

ORDE, J., IN CHAMBERS. JANUARY 27TH, 1921.

*DE CAMPS v. SAINSBURY.

Practice—Writ of Summons—Ex Parte Order Authorising Substituted Service—Service on Solicitor—Application by Solicitor to Set aside Order and Service—Locus Standi—Rules 16, 217—Abuse of Process of Court Brought to Notice of Court by Officer—Costs.

An appeal by the plaintiff from an order of the Master in Chambers of the 8th January, 1921, setting aside an earlier order made by him upon the ex parte application of the plaintiff, authorising substituted service upon the defendant Laduke of the writ of summons.

J. S. Duggan, for the plaintiff.

H. J. Martin, a barrister and solicitor upon whom the writ was served, under the Master's first order, appeared on behalf of defendant Laduke, but without instructions from him, to support the order of the Master.

Orde, J., in a written judgment, said that the writ was served personally on the defendant Sainsbury; that the defendant Laduke was described in the writ as of Moose Factory, in the district of Temiskaming; and that the order for substituted service was made upon an affidavit of the plaintiff to the effect that it was impossible to make prompt personal service upon Laduke because he was "at present somewhere in the locality of Moose Factory," which is a Hudson Bay post on the southern shore of James Bay. The order was for service upon a Mr. Gilmour and upon Mr. Martin, the barrister and solicitor who appeared, and by sending a registered letter to Laduke at Moose Factory. Upon being served with the writ, Mr. Martin moved to rescind the first order, and the Master made the rescinding order of the 8th January, upon affidavits of Mr. Gilmour, Mr. Martin, and the defendant Sainsbury, shewing that Laduke was engaged in trading with the Indians in the Hudson Bay region, and was beyond the reach of postal communications, but was expected in Toronto in May or June next. Mr. Martin said that he was not Laduke's solicitor, had no instructions from him, and had never discussed the matters in question in this action with him. Mr. Gilmour said that he knew nothing of the matters in question in the action, and was not acting in any way for Laduke.

As to the status of Mr. Martin, reference was made to Japhet v. Luerman (1904), Annual Practice for 1921, p. 78; Taylor v. Taylor (1903), 6 O.L.R. 356, 545; Meldrum v. Allison (1916), 10 O.W.N. 148; Rules 16, 217.

Rule 16, allowing substituted service to be made in proper cases, was not intended to save the plaintiff the trouble and expense of effecting personal service, if personal service could be made, but primarily to prevent the defendant from evading service by going to parts unknown. In such a case, if some person is in communication with him, in circumstances which will bring the service of the writ upon such person to the defendant's notice, substituted service is ordered. This does not indicate the exact scope of the Rule—it has doubtless been extended to other cases. But where a man is said to be in some distant part of the Province or outside the jurisdiction, the mere fact that it may be difficult to reach him does not of itself relieve the plaintiff of the obligation of serving the defendant personally. It was not suggested that Laduke was trying to evade service. The plaintiff must either find him and serve him or wait until he returns.

The Master was right in rescinding the ex parte order, although on technical grounds it was not proper to treat the application as having been made on behalf of Laduke. For the purpose of this appeal, it should be treated as having been made by Mr. Martin as a solicitor and as such an officer of the Court.

Exercising the inherent power of the Court to rectify what was in substance an abuse of the process of the Court, the learned Judge directed that the order for substituted service and the service upon Mr. Martin and Mr. Gilmour and by registered letter be set aside, and that the Master's order of the 8th January be confirmed, with this variation, that it be so worded as to shew that the application came before the Court by way of advice received from one of its own officers, and not on behalf of Laduke.

The learned Judge questioned whether Japhet v. Luerman could be regarded as authority for the theory that a solicitor served with a writ for another person had no locus standi to move to set aside the service, in view of the decision in The Pommerania (1879), 4 P.D. 195; and suggested that the practice should be settled by a Rule of the Supreme Court.

The Master should not have awarded any costs to the defendant Laduke, and that part of his order should be struck out. There should be no costs to either party either before the Master or upon this appeal.

ORDE, J., IN CHAMBERS. JANUARY 27TH, 1921.

DICKENSON v. GEGG.

Pleading—Statement of Claim—Motion to Dismiss Action as Frivolous and Vexatious and because no Cause of Action Disclosed—Mortgage of Interest in Land—Sale of Interest under Receiving Order—Claim to Set aside Sale—Registration of Mortgage—Execution against Mortgagor—Priority—Costs.

Motion by the defendant Gegg to dismiss the action upon the ground that it was frivolous and vexatious and that the statement of claim, read with the plaintiff's examination for discovery, disclosed no cause of action against the defendant Gegg.

J. M. Ferguson, for the applicant.
A. T. Hunter, for the defendant Hobberlin.
N. S. Macdonnell, for the plaintiff.

Orde, J., in a written judgment, said that the plaintiff claimed to hold a mortgage made in 1912 by J. K. Leslie, now deceased, upon his interest in certain lands belonging to the estate of Blanche E. Leslie. Subsequently a writ of execution was issued by a judgment creditor of J. K. Leslie, and the defendant Gegg was, by an order of a County Court Judge, appointed receiver by way of equitable execution of the interest of J. K. Leslie in the estate of Blanche E. Leslie. By a subsequent order, Gegg was empowered to sell the interest of J. K. Leslie; and, in pursuance thereof, he sold the same to the defendant Hobberlin for $753.81. There were several large incumbrances against Leslie's interest; and, although the deed from Gegg to Hobberlin did not expressly make the assignment subject to the incumbrances, that must have been understood.

If the plaintiff's mortgage was registered before the delivery of the writ of execution to the sheriff, the plaintiff is protected thereby. If it was not so registered, the plaintiff's right to enforce his security may depend upon notice. It did not appear when the mortgage was registered. The statement of claim did not set out very clearly what the plaintiff considered his rights to be as against the defendants. It might be that failure to register the plaintiff's mortgage would not avail to enable the execution creditor to dispose of more than the execution debtor's interest, but lack of notice of the existence of the plaintiff's mortgage might enlarge the purchaser's rights. By the statement of claim the plaintiff asked that the order of the County Court Judge authorising the receiver to sell should be set aside. There might be no power in the Court to do this, and it was difficult to see what status the plaintiff had in that regard. But it was alleged by the statement of claim that the existence of the plaintiff's security was known to the defendants, and (para. 7) that the sale by Gegg to Hobberlin was improvident, collusive, and fraudulent, and part of the prayer for relief was that the sale be set aside.

It might be that the plaintiff had no cause of action; but the learned Judge was unable to say, either from the statement of claim or from the plaintiff's examination for discovery, that, when all the facts were disclosed, the plaintiff might not be entitled to some relief, even upon the statement of claim as at present framed. In these circumstances, while the action might be embarrassing and vexatious to the defendants, and might in the result prove to be frivolous, it ought not to be disposed of at the present stage. The plaintiff must proceed at his own risk as to costs, but he ought, if he sees fit, to be allowed to go down to trial.

The motion should be dismissed, with costs in the cause to the plaintiff.

HOLMESTED, REGISTRAR IN BANKRUPTCY. JANUARY 29TH, 1921.

RE RICHARDSON.

Bankruptcy and Insolvency—Composition and Extension Agreement—Approval of Court—Proposal—Acceptance by Majority of Creditors—Report of Trustee as to Conduct of Debtor—Statement of Affairs—Necessity for Filing—Bankruptcy Act, 1919, secs. 13 (2), (3), (7), (9)—Rules 97, 98, et seq.

Motion by a trustee in bankruptcy for the approval of a composition and extension agreement.

Vera Alexandra Robinson, for the trustee.

THE REGISTRAR, in a written judgment, said that it was not shewn that the required majority of creditors had accepted the proposal: see sec. 13 (3) of the Bankruptcy Act, 1919. The proposal of the debtor was varied by the creditors, and the consent of the debtor to the variation was not shewn to have been given. The report of the trustee as to the conduct of the debtor was not full enough: see secs. 13 (7), (9), and 59. The statement of affairs also should be, but was not, filed. It was argued that Rule 97 of the Bankruptcy Rules does not apply to proceedings under Rules 98 et seq., relating to "composition, extension, or scheme of arrangement;" but it appeared to the learned Registrar to apply to all statements of affairs. Under sec. 13 (2), the debtor, when seeking a composition and extension, must lodge a statement of his affairs; and, whenever the Act requires a statement of affairs to be made by the debtor, it seems clear that Rule 97 applies, and it must be prepared and filed as therein mentioned. This statement, filed in Court, remains of record and exhibits the state of the debtor's affairs at the time of the agreement, for the information of all whom it may hereafter concern.

This application must, therefore, stand for the production of further evidence.

ORDE, J. JANUARY 29TH, 1921.

*McIVER v. TAMMI.

Negligence—Injury to Workman in Building by Carelessness of another Workman—Dropping Heavy Article from Height—Duty Owed by Workman to Others—Action for Damages for Injury—Absence of Contributory Negligence—Absence of Knowledge of Risk—Election of Injured Workman to Claim Compensation from Workmen's Compensation Board—Workmen's Compensation Act, sec. 9—Right of Board to Benefit of Judgment in Action—Assessment of Damages—Notice to Board—Application of Amount Payable under Judgment.

Action by a carpenter for damages for personal injuries sustained by reason of the alleged negligence of the defendant, a labourer.

The action was tried without a jury at Sault Ste. Marie.
U. McFadden, for the plaintiff.
J. L. O'Flynn, for the defendant.

ORDE, J., in a written judgment, said that the defendant denied that he was negligent, alleged contributory negligence on the part of the defendant, and also set up that the plaintiff was barred from bringing this action because he had filed a claim with the Workmen's Compensation Board and had received full compensation from the Board.

The plaintiff was employed by a construction company in building work. On the 19th July, 1918, the day on which the plaintiff was injured, the building in which he was working was in skeleton form and almost wholly open at the sides and ends and to the sky. The defendant, a Finlander, was engaged that day, with some other men, upon the upper portion of the structure, in bolting certain parts of the iron work together. The defendant, following a practice in vogue in the building, when any portion of the work was finished, threw a heavy wrench to the ground from above, first calling out "Watch out below!" At that moment the plaintiff, being on the ground within the walls of the building, stepped out from behind a beam and was struck on the head by the wrench and badly injured. He said that he heard no warning shout, and there was no reason to doubt his word in this respect.

Whatever the practice or the orders of a superior might be, it must be negligence to throw a heavy tool from a height of 40 feet when there is the slightest risk of hitting some one. Merely shouting "Watch out below" in a perfunctory way, and then

throwing down the tool, without first being sure that every man to whom the warning is being given has heard the warning and is in a position of safety, cannot be sufficient. There was a duty upon the defendant to take care to avoid the very thing which happened here. There was no evidence to support the defence of contributory negligence, nor was it suggested that the plaintiff knew anything about the risk, so that it could not be said that he was volens.

The defendant relied upon sec. 9 of the Workmen's Compensation Act, 4 Geo. V. ch. 25, as in effect barring an injured person from setting up any further claim if he elects to claim compensation from the Board or from his employer. So far as this defendant was concerned, the question was settled by Hutton v. Toronto R.W. Co. (1919), 45 O.L.R. 550; S.C. in the Supreme Court of Canada, sub nom. Toronto R.W. Co. v. Hutton (1919), 59 Can. S.C.R. 413. The making of a claim for compensation is in itself an election to claim compensation, so far as the Board is concerned. Counsel for the plaintiff conceded that the Board was entitled to the benefit of any judgment which the plaintiff might recover against the defendant, and that any moneys payable thereunder should be payable to the Board, in accordance with sec. 9 (3) of the Act. Before the judgment in this action is entered, notice should be given to the Board so that it may either adopt the judgment or take such other course as it may be advised.

Upon consideration of the evidence, the learned Judge assessed the plaintiff's damages at $1,000, and directed judgment to be entered for him for that amount and the costs of the action; with a declaration that the judgment shall enure to the benefit of the Workmen's Compensation Board, and that the moneys shall be payable to the Board, to be dealt with under the provisions of sec. 9 of the Act, that is, first in recouping the Board the sums of $256.47 and $72.50 already paid for compensation and medical services; and, secondly, by applying the surplus as the Act directs.

The entry of the judgment will, however, be stayed in order that notice thereof may be given to the Board. If, after such notice, the Board, within 14 days, either states that it is willing to adopt the judgment, or does not take steps to intervene for the purpose of asserting its position, then the judgment will be entered as directed.

REX v. SLEW—ROSE, J., IN CHAMBERS—JAN. 26.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Intoxicating Liquor in Place other than Private Dwelling House—Total Absence of Evidence of "Having"—Order Quashing Conviction.]—Motion by the defendant to quash a conviction, by a magistrate, for having intoxicating liquor in a place other than his (the defendant's) private dwelling house, contrary to the provisions of the Ontario Temperance Act. ROSE, J., in a written judgment, said that there might be a suspicion—but it was no more than mere suspicion—that the defendant had some interest in the dealings of other persons with the liquor in respect of which he was prosecuted; but there was no evidence that he ever had any liquor in any place whatsoever. The conviction should be quashed, with the usual order for the protection of the magistrate and officers concerned. J. M. Bullen, for the defendant. F. P. Brennan, for the magistrate and informant.

SIXTH DIVISION COURT OF THE COUNTY OF PERTH.

BARRON, Co. C.J. JANUARY 15TH, 1921.

AITCHISON v. TOWNSHIP OF ELMA.

Assessment and Taxes—Increase in Amount of Assessment without Notice to Person Assessed—Taxes Paid under Protest—Action to Recover Payment Made—Mistake in Assessment Roll—No Mistake as to Notice—Assessment Act, secs. 49 (1), 69 (19), 72 (1)—Curative Provision, sec. 70—Application of—"Voluntary Payment."

An action to recover $10 paid under protest by the plaintiff to the collector of taxes of the Municipal Corporation of the Township of Elma, the defendants, and accepted by the collector under protest.

H. B. Morphy, K.C., for the plaintiff.
J. C. Makins, K.C., for the defendants.

BARRON, Co. C.J., in a written judgment, said that the plaintiff's property was assessed for $7,300, and notice of the assessment, under the Assessment Act, R.S.O. 1914 ch. 195, sec. 49 (1), was duly served upon him by the assessor. Some time afterwards, and too late to appeal, the plaintiff discovered that his assessment had been increased by $700, without notice to him and without his

knowledge, and without regard being had to sec. 69 (19) of the Act. The $10 paid by the plaintiff, which he now sought to get back, was the proportion of the total taxes attributable to the $700.

An informal mention to the plaintiff by the assessor, at a chance meeting, that the plaintiff's assessment had been changed, did not dispense the municipality or the assessor from the statutory duty to give notice. The notice is the one channel by which a ratepayer acquires any knowledge of his assessment; and a complete system of machinery is then provided by the statute to work out to a finality each assessment—a system open as well to an elector (sec. 69 (3)) and to the assessor (secs. 69 (19) and 72 (1)) as to the ratepayer who may feel himself aggrieved by his assessment: Canadian Land and Emigration Co. v. Municipality of Dysart (1885), 12 A.R. 80.

There was no defect, error, or misstatement in the notice that was served upon the plaintiff; and so the curative provision of the statute, sec. 70, could not be applied as regards the notice.

But it was said that a mistake or error occurred in the assessment roll. Assuming that to be the fact, the plaintiff's assessment was never "within the cognizance of the Court of Revision" (Town of Macleod v. Campbell (1918), 57 Can. S.C.R. 517, per Anglin, J., at p. 522), because formal proceedings under sec. 69 to give the Court of Revision jurisdiction were never taken by any one—all that was done was to alter the plaintiff's assessment behind his back, without notice to him and without his knowledge. The defendants cannot set up the curative section when they are at fault in preventing the necessary proceedings from being taken.

In any event, the non-compliance with sec. 69 (19) could not be cured by sec. 70.

Reference to Noble v. Township of Esquesing (1920), 47 O.L.R. 255, 257, 520, 521.

The payment of the $10 to the assessor was not a "voluntary" payment: it was a payment made to the collector and accepted by him under protest—made, it was fair to assume, to prevent the summary proceedings which a collector must take when proceeding to collect the taxes: see O'Grady v. City of Toronto (1916), 37 O.L.R. 139, and cases there cited.

A payment is not "voluntary" when it is illegally demanded by one who is in a position to dictate terms under colour of a statute or of an office. There may be a practical compulsion as well as an actual legal compulsion.

Reference to Halsbury's Laws of England, vol. 7, p. 478; Waterhouse v. Keen (1825), 4 B. & C. 200; Dew v. Parsons (1819), 2 B. & Ald. 562.

There should be judgment for the plaintiff for $10 and costs.