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HODGINS, MASTER IN ORDINARY. MAY 17TH, 1906.

MASTER'S OFFICE.

RE OSHAWA HEAT, LIGHT, AND POWER CO.

EX PARTE SHERIFF OF ONTARIO.

Company — Winding-up — Writ of Execution — Seizure by Sheriff of Goods of Company — Fees and Possession Money.

Motion by the liquidator for an order directing the sheriff of Ontario to deliver to him the goods and chattels seized by the sheriff under a writ of execution issued by the Port Credit Brick Company against the company in liquidation.

A. H. Beaton, for liquidator.

R. C. H. Cassels, for sheriff of Ontario.

Shirley Denison, for execution creditor.

F. Ford, for another creditor.

THE MASTER:—The writ of execution was placed in the sheriff's hands on 28th February, 1906, for the levy of $650 debt and $127.44 costs, and under it on 23rd March the sheriff seized a quantity of the goods and chattels of the company which were then in the hands of the bailiff of the 1st Division Court in the county of Ontario, which the bailiff had seized under an execution dated 19th March, issued out of that Division Court.

The winding-up order was made on 23rd March, 1906.

The 66th section of the Winding-up Act, R. S. C. ch. 129, provides that "no lien or privilege upon either the real or personal property of the company shall be created for the amount of any judgment debt or of the interest thereon by the issue or delivery to the sheriff of any writ of execution or by levying upon or seizing under such writ the effects or estate of the company . . . if before payment over to the plaintiff of the moneys actually levied, paid, or received under such writ . . . the winding-up of the business of the company has commenced; but this section shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the province in which such writ was issued." This section first appeared in sec. 13 of the Insolvent Act of 1865, and was re-enacted as sec. 83 of the Canada Insolvent Act of 1875; and the decisions under that Act are therefore material.

The section of the Insolvent Act of 1865 was construed in Re Hayden, 29 U. C. R. 262, where it was held that a judgment creditor who had an execution in the sheriff's hands at the making of an assignment by the judgment debtor was entitled to rank for his costs of the judgment as a privileged creditor against the insolvent. In giving judgment Morrison, J., said: "Before the Insolvent Acts an execution creditor when he placed his writ in the sheriff's hands had a peculiar lien on his debtor's property to the extent of his debt and costs. The Insolvent Act, by the 13th section above cited, deprived him of that lien for his judgment debt . . . but the section further provided that it should not apply to nor affect any lien or privilege for costs which the plaintiff possessed under the law of that part of the then province in which such issued." "As a lien for such costs did exist in Upper Canada before the passing of the Act for the amount of those costs on the debtor's goods when the execution was placed in the sheriff's hands, it is only reasonable to assume and hold that such lien and the right to recover those costs in full should not be affected by the provisions of the 13th section, but that the same should be secured to the judgment debtor as a privileged claim on the assets of the estate."

A similar result was arrived at by the Judge of the County of Wentworth in Re Fair and Burst, 2 U. C. L. J. N. S. 216 (1866), and his decision was confirmed on appeal.

These decisions were followed by me in Re Erie Glass Company, decided 27th March, 1894 (not reported), where after argument I allowed the execution creditors the costs of their judgment and the sheriff's fees up to a fixed date.

In Smith v. Antipitzky, 10 C. L. T. Occ. N. 368 (1890), McDougall, Co.J., in disposing of a somewhat similar question between an assignee for the benefit of creditors and a sheriff, said: "Under the provisions of this Act (R. S. O. 1887 ch. 124, sec. 9), a debtor may assign to any one; and although it is true any such assignee becomes subject to the general control of the Court, and may be removed by the Court for cause, still he is not an officer of the Court in the sense that the sheriff is, or as were the official assignees under the repealed Insolvent Act." And he held that it would therefore be unreasonable that "the execution creditor who was in possession should be compelled to withdraw and look to a stranger to realize and pay his lien." But in the case before me the liquidator is an officer of, and appointed by, the Court, as is the sheriff; and on his appointment he is directed by the 30th section of the Winding-up Act to "take into his custody or under his control all the property, effects, and choses in action to which the company is or appears to be entitled," which when read with the statutory injunction contained in sec. 17 of the Winding-up Act, "that . . . execution put in force against the estate or effects of the company after the making of the winding-up order shall be void," practically operates as ousting the sheriff's possession of the insolvent company's goods seized by him, and under a writ of execution issued out of a provincial Court, but subject to the lien protected by the latter part of sec. 66.

From the affidavit filed by the sheriff it appears that on 29th March he was advised by the solicitors for the execution creditors that a winding-up order had been made, and on 2nd April he wrote to the provisional liquidator requesting a copy of the winding-up order and intimating that, upon payment of fees, etc., and instructions from the plaintiffs' solicitors, he would be glad to hand over the goods to the representative of the liquidator. On 7th April the provisional liquidator replied that he would on 11th April "ask the direction of the Court as to what action is to be taken in regard to the same."

As there appears to have been no demand from the liquidator for the delivery over by the sheriff of the goods

and chattels he had seized until the 5th May, and as he therefore had to continue to hold and protect them until the order was made for their delivery over to the liquidator, I think the sheriff is entitled to his fees and to possession money up to the date of such order. Costs of all parties to be added to their claims.

OCTOBER 12TH, 1906.

DIVISIONAL COURT.

LEBU v. GRAND TRUNK R. W. CO.

Railway—Animal Killed on Track—Escape to Highway from Enclosure—Open Gate from Highway to Track—Negligence—Liability.

Appeal by plaintiff from judgment of County Court of Kent.

Plaintiff, a livery stable keeper at Bothwell, owned a field adjoining defendants' railway, in which he had a horse at pasture. The animal escaped from the field and got upon the highway, went a short distance, and passed through a gateway into defendants' freight yards, and on to the track, where it was killed by a train. Plaintiff claimed $150 damages. The action was tried by the Judge of the County Court without a jury, and dismissed with costs.

O. L. Lewis, Chatham, for plaintiff.

W. Nesbitt, K.C., and Frank McCarthy, for defendants.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—Section 237, sub-sec. 4, of the Dominion Railway Act, 1903, provides that if an animal at large upon the highway . . . gets upon the property of the railway company and is killed . . . the owner may recover the amount of his loss from the company—unless it be proved that the animal got at large through the negligence, &c., of the owner. The earlier sub-sections are restricted to cases where an animal at large upon the highway is killed or injured at the point of intersection of the highway with a level railway crossing—where recovery cannot be had if the animal is at large contrary to the provisions of the section. But

in the last and new sub-section, there may be recovery for an animal at large killed upon the property of the railway company by a train, though the animal was not in charge of a competent person. This large and liberal meaning has been given to this new sub-section in various cases—some being in the Divisional Court, such as Bacon v. Grand Trunk R. W. Co., 7 O. W. R. 753, and Arthur v. Central Ontario R. W. Co., ib. 527, and also 11 O. L. R. 537, and we see no reason to disagree with such a reading.

This plaintiff's case was made out upon the evidence. His horse escaped from the enclosure by jumping a gate without the owner's knowledge. The animal thus got on a public street, and going down the street came to an opening which led down to the track. This opening was furnished with a gate, but the gate was left open by the company, and through this open gate the horse got on to the track where it was killed by the train.

There was a case of negligence made as against the company by the failure to have the place fenced or properly protected through which the horse reached the company's track, under the Act, sec. 199, which could not have been withdrawn from the jury.

Upon the submission before us that no further evidence could be given, and that we were to dispose of the controversy as it now stands, we think plaintiff should have judgment for the amount agreed upon as the value of the horse—with costs of action and appeal.

TEETZEL, J. OCTOBER 15TH, 1906.

ELECTION COURT—CHAMBERS.

RE PORT ARTHUR AND RAINY RIVER PROVINCIAL ELECTION.

PRESTON v. KENNEDY.

Parliamentary Elections — Controverted Election Petition — Particulars — Scrutiny — Supplemental Particulars after Scrutiny Begun and Adjourned—New Charges—Controverted Election Rules 20, 24—Costs.

Motion by respondent for leave to add further particulars of votes which he intended to object to on the scrutiny.

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

I. F. Hellmuth, K.C., and W. J. Elliott, for petitioner.

TEETZEL, J.:—The trial of the petition, other than the scrutiny, took place in September, 1905, and after an appeal from rulings of the trial Judges in regard to certain votes which the petitioner objected to, the matter of the scrutiny came before me in July last at Port Arthur, and several votes given for the respondent were struck off, and in the result so far the petitioner appeared to be in a majority. The parties not being ready to proceed to complete the scrutiny, the further trial of it has been adjourned from time to time until 7th January next.

The respeondent has already filed and served particulars of votes objected to by him.

The petitioner contends that I have no discretion, under Rule 24 of the General Rules respecting the trial of election petitions, to allow the respondent to add new particulars of other votes objected to, but that the Rule aims simply at giving further details of particulars already served.

The Rule reads as follows: "The Court or a Judge may at any time order such further particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial, in the same manner as in ordinary proceedings in the High Court of Justice, and as prescribed by the said Act, and upon such terms as may be ordered."

Rule 20 provides for the particulars being served 14 days before the trial.

In the absence of precedent, I am of opinion that the Rule has not the limited meaning urged by the petitioner, but that, for the purposes of ensuring a fair and effectual trial, the Court or a Judge may allow either party to serve further particulars in respect of other votes objected to than those mentioned in the original particulars. I think the word "particulars" in Rule 24 must mean particulars "of votes intended to be objected to," this being the language of Rule 20, and is not confined to further details of particulars already given.

It was also urged by the petitioner that certain votes objected to in the proposed particulars were not invalid votes, assuming the facts to be true as stated in the particulars; that is to say, those that are alleged to have voted on trans-

fer certificates obtained from the returning officer, without any personal or written request.

I am inclined to think that while this class of votes was not actually under consideration by the Court of Appeal, there are sufficient dicta in the judgments of the Court (ante 46) to strongly support a contention that such votes are invalid.

Without deciding that question until the evidence is in, I am of opinion that it is not unreasonable for the purpose of securing a fair and effectual trial of the petition, that the respondent should be allowed to serve the additional particulars, but I think, in view of the lateness of his motion, and that it is an indulgence that he is asking, that the costs of the motion should be costs in the matter to the petitioner in any event.

I stated upon the argument that should I come to the conclusion that the respondent's motion should be granted, a similar privilege should be granted to the petitioner if he desires to supplement his particulars.

This order is not to prejudice any application the petitioner may make at the trial to have the costs of the petition paid by the respondent, should it appear that but for the added particulars the respondent would have lost his seat.

MABEE, J. OCTOBER 16TH, 1906.

CHAMBERS.

HAMILTON v. HODGE.

Venue—Change—Convenience—Action to Set aside Tax Sale.

Appeal by plaintiff from order of Master in Chambers, ante 351, changing the venue from Toronto to Port Arthur.

J. W. Bain, for plaintiff.

T. D. Delamere, K.C., for defendants.

MABEE, J., dismissed the appeal with costs to defendant in any event.

MABEE, J. OCTOBER 17TH, 1906.

CHAMBERS.

GYORGY v. DAWSON.

(TWO ACTIONS.)

Security for Costs — Plaintiff Leaving Jurisdiction pendente Lite — Application for Security after Trial — New Trial Ordered—Delay in Applying.

Appeal by plaintiff from orders of local Judge at Welland requiring plaintiff to give security for costs of these actions.

R. McKay, for plaintiff.

W. M. Douglas, K.C., for defendants.

MABEE, J.:—The actions were commenced on 12th November, 1903, tried on 15th May, 1905, and dismissed. Upon plaintiff's appeal, a Divisional Court in November, 1905, set aside the trial judgments, and granted new trials, and the Court of Appeal in February, 1906, refused to disturb the disposition made of the actions by the Divisional Court. An order was made by Teetzel, J., on 24th April, 1906, upon appeal by plaintiff from an order made by the local Judge at Welland, under which defendants were given leave to examine plaintiff for discovery "in case the plaintiff shall return to the province of Ontario on or before 15th June, 1906," and an affidavit of plaintiff's solicitor filed upon that motion stated that plaintiff had for some time prior to that date been out of the jurisdiction of the Court, being at Sarkosbylok, in Hungary. Plaintiff did not return. The order of 24th April gave defendants leave to issue a commission to Hungary for his examination in the event of his not returning by 15th June; they did not avail themselves of that term of the order, but on 1st October instant they served notice of motion for the orders now in appeal. It was not suggested that plaintiff was not still in Hungary. It is said the delay in applying for these orders deprives defendants of their right to security. I think defendants could not have reasonably made an application for security before 15th June, and the cases shew that the delay from that date to 1st

October is not such laches as prevents defendants from asserting their right to the orders now in appeal. No costs were incurred by either party during this interval. It is said that these orders will prevent a trial at Welland in November. This may be so; I cannot say. Even if so, I do not think it an answer to defendants' application. Defendants are not to blame because plaintiff left the jurisdiction; they cannot compel his return; they ask what it seems to be the practice of the Court to grant as against absent plaintiffs.

I think the orders were properly made, and the appeals fail. Costs to defendants in any event. If plaintiff desires, the time for giving security may be extended.

The following cases were cited: Bertudato v. Fauquier, 22 Occ. N. 34, 38 C. L. J. 79; Sharp v. Grand Trunk R. W. Co., 1 O. L. R. 200; Small v. Henderson, 18 P. R. 314; Hately v. Merchants Despatch Co., 11 P. R. 9; S. C., 10 P. R. 253; Hollingsworth v. Hollingsworth, 10 P. R. 58; Codd v. Delap, 15 P.R. 374; Tanner v. Weiland, 19 P.R. 149.

OCTOBER 17TH, 1906.

DIVISIONAL COURT.

CUDAHEE v. TOWNSHIP OF MARA.

Ditches and Watercourses Act — Award — Reconsideration— Construction of Ditch—Charge for Engineer's Services— Letting Work—Breach of Contract—Reletting.

Appeal by defendants from judgment of senior Judge of County Court of Ontario restraining defendants from taking proceedings for recovery of the amount charged against plaintiff's lands by reason of the construction of a ditch under the provisions of the Ditches and Watercourses Act.

D. Inglis Grant, Orillia, for defendants.

R. D. Gunn, K.C., for plaintiff.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

MULOCK, C.J.:—One James Corrigan, the owner of the south half of lot 15 in the 8th concession of the township of Mara, required the construction of a ditch for the drainage of his land, and to that end served the owners of the other lands to be affected, with the notice required by sec. 8 of the Act, but, the owners having failed to arrive at an agreement in respect of the work, Corrigan filed with the clerk of the municipality a requisition in accordance with the provisions of sec. 13, and, thereupon, having taken the necessary steps, Mr. Kelly, the engineer, made his award, whereby he found that the ditch was required, and specified its location, description, and course, and apportioned the cost.

This ditch was accordingly constructed from the northern boundary of Corrigan's land for a certain distance upon that of plaintiff, and was there connected with an existing ditch, which it was supposed would carry off the water. It did not, however, accomplish this purpose, but discharged it upon plaintiff's lands.

After an expiry of two years from the completion of the ditch, plaintiff, being one of the owners affected, took the proceedings contemplated by sec. 36 of the Act for a reconsideration of the award. Thereupon Mr. Fitton, who had succeeded Mr. Kelly as engineer of the township, proceeded under the Act to reconsider the award, and made his amended award, whereby he required the ditch to be extended into the lands of one Kelly which adjoined on the east those of plaintiff.

After various delays the ditch was constructed as required by Mr. Fitton's award, and the cost, including the engineer's charges, was apportioned amongst the owners of the lands affected. Plaintiff refused to pay the portion adjudged against her, and the council, under the authority of sec. 30, caused the amount to be placed upon the collector's roll and a warrant to be issued for its recovery by distress, as in the case of taxes. Plaintiff thereupon instituted this action, alleging the illegality of the amended award and praying for an injunction restraining defendants from proceeding to collect the amount so charged against her on the collector's roll.

One objection taken by plaintiff to the validity of the amended award is that Kelly having by his award specified the location, description, and course of the ditch, its com-

mencement and termination, it was not competent for Fitton to amend these specifications. We are unable to accede to this contention.

Section 36 enacts "that any owner party to the award whose lands are affected by a ditch, whether constructed under this Act or any other Act respecting ditches and watercourses, may, at any time after the expiration of two years from the completion of the construction thereof . . . take proceedings for the reconsideration of the . . . award under which it was constructed, and in every such case he shall take the same proceedings, and in the same form and manner, as are hereinbefore provided in the case of the construction of a ditch."

We are of opinion that by virtue of this section the engineer, on the reconsideration of an award, may make whatever award might have been made in the first instance. Under the notice given by Corrigan it would have been competent for the engineer Kelly to have specified such a ditch as that described in Fitton's award, but not having done so, the powers created by the notice and requisition remained not exhausted but merely in abeyance and capable of being exercised whenever "any owner party to the award" took proceedings necessary for its reconsideration. This plaintiff did, and she was a person having the necessary status as such "owner party," etc., entitling her to such reconsideration.

Another objection is that an illegal amount for engineer's services is included in the claim against plaintiff. It is admitted that in accordance with the provisions of sub-sec. 2 of sec. 4, the council, by by-law, fixed the charges to be made by the engineer for his services under the Act at the rate of $5 a day, and, under sec. 29, the engineer certified to the clerk of the municipality that he was entitled to $45 for fees and charges for his services. It does not follow, we think, from this detailed account of his services, that he has charged more than $5 a day for his services. Prima facie his certificate established the validity of his claim for $45, and the onus was on plaintiff to shew its incorrectness. This was not done, and we cannot assume it, and must therefore overrule the objection.

Another objection is that the work was let to the lowest bidder, and security taken for its due performance; that the contractor failed to perform the work; and that the munici-

pality should have proceeded to recover damages for breach of contract, and not have re-let the work. This objection appears to be met by sub-sec. 4 of sec. 28, which enacts that "the engineer may let the work and supply of material or any part thereof, by the award directed, a second time or oftener, if it becomes necessary in order to secure its performance and completion."

We think the appeal should be allowed and plaintiff's action dismissed. As to costs, the engineer's certificate, as to the amount owing to him for his charges, was sufficiently vague to have misled plaintiff into believing that an illegal amount was being levied against her land, and it thus afforded some excuse for her having instituted the present action. We therefore think she should not be charged with costs. This appeal is allowed without costs and plaintiff's action dismissed without costs.

CARTWRIGHT, MASTER. OCTOBER 19TH, 1906.

CHAMBERS.

WAGAR v. CARSCALLEN.

Pleading—Statement of Claim—Striking out — Embarrassment — Fraud — Setting out Facts and Circumstances—Anticipating Defence—Leave to Amend.

Motion by defendants to strike out paragraphs 4, 7, and 9 and part of paragraph 8 of the statement of claim.

Plaintiff, who was over 66 years of age, sought to recover from her daughter and her son-in-law $10,000. Plaintiff alleges that she was induced by fraud and intimidation to make a deed of the land in question, which was afterwards sold for $10,000.

C. A. Moss, for defendants.

J. H. Spence, for plaintiff.

THE MASTER:—Paragraphs 4, 7, and 8 are objected to as being embarrassing and irrelevant and at most being a pleading of evidence.

There is no doubt that they contain allegation of matters of fact and of things done by defendants to induce plaintiff by threats of having her declared insane, and by cruelty after they had induced her to go and reside with them, to give her daughter the conveyance of the land.

These, however, are to be considered in view of the basis of the action, which is fraud. As to this Lord Watson said in Salomon v. Salomon, [1897] A. C. at p. 35: "A relevant charge of fraud ought to disclose facts necessitating the inference that a fraud was perpetrated upon some person specified." The paragraphs in question seem only to be a compliance with this rule. They contain some of the material facts at least on which plaintiff will rely to prove her case. Merely to allege a fraud would not be enough. Such a statement of claim must be amended. Otherwise the defendant in such an action would be left in ignorance of what was meant.

Paragraph 9 is in a somewhat different position. The deed complained of was made on 8th March last. Paragraph 9 alleges that on the previous day the daughter, by way of colourable consideration for the deed, covenanted with plaintiff to keep her during her life, and if she wished to live elsewhere to pay her $3.50 a week and furnish her with all necessaries in sickness as in health. It concludes as follows: "The said defendant in said agreement further covenanted that she would not sell or convey said lands during the lifetime of the plaintiff." No doubt, in one aspect, this is anticipating a possible defence, and so is premature. But another is that the agreement of 7th March required defendants to do certain things as a term of the deed which plaintiff was to give and did give the next day; that this was part of the whole scheme to get the deed from plaintiff, in which it would be a very important factor (if true) that the undertaking not to alienate the lands during plaintiff's life was in the agreement, but was left out of the deed, whereby plaintiff was deprived of a most important protection which was to have been reserved to her.

This 9th paragraph might, no doubt, have been made fuller and more explicit if the agreement is as I supposed it to be. The fact of the land being two lots in the city of Oakland, in California, has probably had a good deal to do with the action and the complications that have arisen. Had land of any such value in the county of Leeds and Addington

been dealt with in this way, no doubt the solicitors would have required that plaintiff should have independent advice and would have declined to act for both parties, and pointed out to defendants that this was a wise, if not a necessary precaution, in case the transaction should be afterwards impeached. It was stated on the argument that when these lots were conveyed they were of comparatively little value. It was due to the great earthquake in the following month at San Francisco that these small lots, containing only less than a tenth of an acre and being 50 feet x 100, appreciated to such an extent as $10,000.

The order will therefore be a dismissal of the motion as to paragraphs 4, 7, and 8. As to paragraph 9, plaintiff may have leave to amend her statement of claim (and otherwise) if so advised within a week. Time for delivery of statement of defence to be extended for one week thereafter.

It is much to be wished that some satisfactory arrangement may be reached, and prevent such painful litigation becoming a matter of public notoriety.

It may not be out of place to remark that the language of Lord Selborne and Brett, L.J., in Millington v. Loring, 6 Q. B. D. 190, at p. 194, seems to give ample authority for the allegations complained of, in an action of this character. Being on the equity side of the Court the pleadings are properly fuller than where a plaintiff is bringing a common law action.

CARTWRIGHT, MASTER. OCTOBER 19TH, 1906.

CHAMBERS.

HOLDSWORTH v. GAUNT.

Dismissal of Action—Want of Prosecution—End of Cause of Action—Dispute as to—Summary Jurisdiction to Dispose of Costs in Chambers.

This action for alleged infringement of a patent was commenced on 11th December, 1903. The statement of claim was delivered in due course, and the statement of defence on 2nd February, 1904. A motion for particulars of the defence was served on the 24th of that month.

Shortly after this defendants went out of business, and nothing more was done by either side until November, 1904, when defendants' solicitor wrote to plaintiff's solicitor that he must discontinue, or else that defendants would be obliged to move to dismiss.

No result seems to have been attained, and on 11th May, 1905, defendants' solicitor wrote again to same effect. Four days later he gave the usual notice of motion to dismiss, and on 31st May that motion was dismissed, on "plaintiff by his solicitor undertaking to go down to trial at the next non-jury sittings at Toronto."

Notwithstanding this the action still lay dormant until 19th June last, when defendants' solicitor again wrote to same effect as his letter of 11th May, 1905. To this apparently no reply was sent, and on 26th June another motion to dismiss was launched.

This was adjourned until after vacation and was argued on 25th September.

J. R. Roaf, for defendants.

G. H. Kilmer, for plaintiff.

THE MASTER:—Plaintiff was willing to have the action dismissed without costs. It was argued on his behalf that he was entitled to have his costs up to the time when defendants ceased to do business, though he was prepared to forego his strict rights. He relied on Knickerbocker v. Ratz, 16 P. R. 193, and on Eastwood v. Henderson, 17 P. R. 578, a case which was followed by the Exchequer Division in O'Sullivan v. Donovan, 8 O. W. R. 319. If this was always the view of plaintiff's solicitor, it must have been by an oversight that he gave the undertaking to proceed as a term of the dismissal of the motion in May, 1905. This seems otherwise inconsistent with the contention that plaintiff should now be allowed to discontinue without costs, on the ground that he has gained his object and that the action is at an end. The principle on which such an order can properly be made is exemplified in Armstrong v. Armstrong, 9 O. L. R. 14, 4 O. W. R. 223, 301. If it was thought that plaintiff was entitled to such an order, a motion should have been made to that effect when the order of 31st May, 1905, was made. I have no recollection now of what took place

then, or whether anything was said as to plaintiff's right to costs, or his being willing to forego them to have the action set at rest.

As the case now stands, before plaintiff can have the action dismissed without costs, it must be clear that plaintiff was justified in bringing the action; and that defendants acknowledged this by going out of business.

It was on grounds of this character that the cases relied on by plaintiff were decided.

Here, on the contrary, defendants by their affidavits positively deny the validity of plaintiff's patent. They say that they gave up business for reasons of their own and not on account of this action. They assert their right and intention to resume the use of the machinery in question whenever they see fit to do so.

This seems to bring the case within the decision in Hunter v. Town of Strathroy, 18 P. R. 127. There the Divisional Court held that there was no jurisdiction in Chambers to dispose summarily of the costs where the object of the action has not been substantially attained. Here the defendants deny that this has been done; and unless the parties can settle the matter otherwise, the plaintiff must now undertake peremptorily and without hope of any further indulgence to go to trial at the next non-jury sittings, and in default that the action be dismissed with costs.

The costs of this motion will be to defendants in any event.

CARTWRIGHT, MASTER. OCTOBER 19TH, 1906.

CHAMBERS.

MONTGOMERY v. RYAN.

Summary Judgment—Rule 603—Suggested Defence—Bank—Account—Reference.

Motion by plaintiff for summary judgment under Rule 603 in an action on a promissory note given to the Bank of Montreal and assigned to plaintiff subject to its equities.

W. N. Ferguson, for plaintiff.

W. M. Hall, for defendant.

THE MASTER:—The note is admitted. The defences alleged are two. The first is that defendant gave collaterals which have not been fully and truly accounted for.

This would not entitle him to any greater relief than a judgment of reference to ascertain what exactly is due on the note in question.

The other defence is as follows, if I rightly understand the argument of defendant's counsel.

The bank, it is said, have no authority to do a savings bank business. This, it is argued, has the effect of locking up the circulation and preventing debtors from getting money to pay their liabilities. Even if such business is ultra vires, it does not appear how this can be any defence, unless a defendant could shew that he had funds in the savings bank which he was prevented by the rules from applying on the debt due by him to the bank. Nothing of the sort is even suggested here. It will be time enough to consider the question when any bank takes such a very unlikely position.

It must be left to a higher authority to give effect to such a defence if it is right to do so.

Something of this nature was set up in the recent case of Canada Permanent Mortgage Corporation v. Briggs, 7 O. W. R. 443. It did not however receive any consideration either at the trial or by the Divisional Court.

If defendant desires, he can have a judgment of reference. If not, the usual order will be made.

OCTOBER 19TH, 1906.

DIVISIONAL COURT.

TORONTO R. W. CO. v. CITY OF TORONTO.

Municipal Corporations — Expropriation of Land—Property of Street Railway Company Designed for Car Barn—Action to Restrain Council from Passing By-law—Declaratory Judgment—Refusal to Pronounce—Discretion—Appeal.

Appeal by plaintiffs from judgment of MEREDITH, C.J., ante 78.

W. Laidlaw, K.C., for plaintiffs.

H. L. Drayton and W. Johnston, for defendants

BOYD, C.:—The relief sought in this action is to restrain defendants from proceeding to expropriate property belonging to plaintiffs. . . . It is alleged . . that the proceedings to expropriate are ultra vires because the land in question has been purchased or acquired under the terms of an agreement made with the defendants and incorporated in the statutory charter, 55 Vict. ch. 90 (O.)

The ground relied on is that the property is now held by plaintiffs for public or quasi-public use, and is necessary for the use and accommodation of the plaintiffs as a site for car-barns; and that expropriatory powers cannot be legally employed to divert this land from this necessary use as contemplated by the plaintiffs.

The question has resolved itself into a merely academic one, as the proposal to expropriate the land has not been prosecuted, and it may be enough for the purposes of the argument to say that there appears to be no incompatability in the legitimate expropriation by defendants of land owned by plaintiffs, when that land is not essential to the purposes of the undertaking. That the land may be convenient for plaintiffs' purposes would not be, I conceive, an answer to the bona fide action of the defendants in employing their expropriatory powers.

Re Brown, 1 O. R. 415, relied on by defendants, does not support their contention in its absolute form; many expressions in it go to shew that quasi-public property may be the subject of expropriatory and paramount powers exercised by municipal corporations, in pursuance of a policy for bettering or improving the city or other municipality.

If plaintiffs obtained their property by the exercise of a power of expropriation, a graver question would arise if defendants sought afterwards to further expropriate for their uses property already expropriated by plaintiffs for their uses. There might arise in such case a conflict of paramount powers not contemplated by the Courts or the legislature; but no such difficulty exists when the contest is between a corporate body not possessed of compulsory

power of acquisition and a municipal body which does possess such powers in the way of expropriation.

The rule is recognized in American cases that land owned by a company whose business constitutes a public use, not in actual occupation or not essential to the undertaking, stands on the same footing as that of a private owner, and may be expropriated: see Railroad Co. v. Belle River, 48 Ohio St. R. 273, and Y. v. P., 201 Pa. St. 457. Other cases are referred to and the matter is discussed in 15 Cyc. Law and Practice, pp. 612 et seq.

I agree with the ground of decision below, that this is not a case for a declaratory judgment.

Appeal dismissed with costs.

MAGEE, J.:—. . . The claim for an injunction was practically abandoned, and merely a declaratory judgment asked for. In the absence of danger involving the actual relief sought by the writ, I do not see that the company are any better entitled to an abstract declaration, which may never be required, that the city could not expropriate, than the city would be to ask one that it could do so if it so desired: Stewart v. Guibord, 6 O. L. R. 262, 2 O. W. R. 168, 554; Bunnell v. Gordon, 20 O. R. 281; Barraclough v. Brown, [1897] A. C. 615; North-East Marine Co. v. Leeds Forge Co., [1906] 1 Ch. 324; Offin v. Rochford Council, ib. 342. . . .

Appeal dismissed with costs.

MABEE, J.:—The Court has undoubted authority to grant a declaratory judgment without incidental relief. The cases, however, shew that this is a discretionary power: Bunnell v. Gordon, 20 O. R. 281; Thomson v. Cushing, 30 O. R. 123. The Chief Justice, in the judgment in appeal, deals very fully with the facts and exercises the discretion of the Court in refusing the declaration asked for. I cannot say that he was in error in the exercise of such discretion, and the appeal, in my opinion, fails upon that ground alone. I say nothing as to the powers of defendants to expropriate the lands in question.

OCTOBER 19TH, 1906.

DIVISIONAL COURT.

HAMMILL v. GRAND TRUNK R. W. CO. AND CITY OF HAMILTON.

Negligence — Municipal Corporation—Coal Yard—Railway Siding — Injury to Yardsman — Construction of Wall—Evidence—Findings of Jury—Nonsuit.

Appeal by defendants the corporation of the city of Hamilton from the judgment of MABEE, J., in favour of plaintiff, the widow and administratrix of the estate of John Hammill, deceased, for the recovery of $1,000 damages for the death of her husband by the alleged negligence of defendants.

Wallace Nesbitt, K.C., for appellants.

S. F. Washington, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., MAGEE, J., CLUTE, J.), was delivered by

CLUTE, J.:—The action is brought under Lord Campbell's Act, by the widow and administratrix, claiming damages for the death of John Hamill, who was killed by being crushed between a car of the Grand Trunk Railway and a stone wall erected by the city of Hamilton.

On application of plaintiff the action was dismissed as against the Grand Trunk Railway Company.

The corporation of the city of Hamilton have a city yard into which there runs a switch from the Grand Trunk Railway, passing the coal shed on the curve. On the opposite and concave side of the track the city erected a stone wall some 8 days before the accident. Plaintiff alleges that this wall was negligently built, and that it was placed "so close to the track that it was a trap for brakesmen or others who required to place cars in the city's said yard."

On 4th July, 1905, the deceased had been ordered by the yardmaster of the Grand Trunk Railway (who had been requested by the city to do so) to place a car in the city's

yard. The statement of claim then states that the deceased was at the westerly side of the track and was walking in a southerly direction as the cars were slowly backing in, and while so walking back in the yard he was caught between the side of the car and the said fence, which was a space of about ten inches, and received injuries from which he died a few days later.

The city engineer states that the wall in question was made under his instructions. It is 72 feet long. The distance between the stone wall and the gauge of the rail is 3 feet 5½ inches at the northerly end and 3 feet 3½ inches at the southerly end. On the other side it is 5 feet. The width between the rails is 5 feet 2 inches. The width of the car is 9 feet 11½ inches, leaving a space of 10 inches between the car and the stone wall. It is stated by . . . one of plaintiff's witnesses that the space between the track and the stone wall is wider at the gate than it is further up the siding, but he did not measure it. Some emphasis was laid upon this point by plaintiff's counsel, but the difference in width, as appears from the plan and from the evidence of the city engineer, is only 2 inches. The evidence is not very clear as to how the accident really occurred. The deceased was "placing" the car, that is, putting the car opposite to the coal-shed where it was wanted, so that coal could be taken out of the car into the shed. It is said that he would walk along until the car door was opposite wherever it was wanted, giving the signal to the engine-driver; and that is what he was doing at the time of the accident. It is further stated that it was necessary for him to walk upon the side where the wall is, as the shed upon the opposite side is built so near the track that there was not room for him to walk on that side, and also because the shed side being the convex side of the track, he could not signal to the engine-driver, who was on the engine at the rear pushing the cars to the place desired. What must have occurred would seem to be this: that as the car was being pushed in, the deceased was in front of it, and when the car had reached about the spot where it was desired to have it placed, he stepped to the side of the track to signal, without apparently noticing the wall, and, the car being in motion, he was immediately caught between the wall and the car, and received the injuries of which he died. It is said that he was a very careful yardsman; had

been in the employ of the Grand Trunk Railway Company for some 18 years; that he had frequently placed cars in this shed before the wall was built, but that he had not had occasion to place a car where this was required since the wall was built. The accident happened about 11 o'clock in the morning. The space occupied by the wall previous to its erection had been open ground, and upon this ground just back of where the wall stood the deceased had been in the habit of signalling the engine-driver when placing cars.

Plaintiff's witness McConnell, who was the engine-driver at the time the accident occurred, says: "We pushed cars ahead of us. We had to push cars in to place them. We pushed in every car that was placed in that siding. Hammill (the deceased), who was in front, was giving the signal as he went along at the side of the car to place it. I could not see Hammill, but he was walking on the ground alongside of the car as the car was going in." . . .

The engine-driver then received a signal from Wadsworth to stop and back, and it was then found that the deceased had been crushed between the car and the wall. Wadsworth, who had left Canada, was not called. . . .

For the defence it was shewn that there was nothing unusual about the construction of the wall; that the distance between the rail and the wall is about the average of loading platforms; that these switches and loading platforms are constructed so that persons handling material could get it unloaded quickly, and if cramped for space the platform is closely crowded, leaving sufficient clearance for the width of the car that will go through it; that this wall or platform was used for unloading bricks and lumber on the one side and coal on the other. It is described as a stone retaining wall (to retain the earth of the dock) 2 feet wide and 70 feet long and about 3 feet 6 inches above the top of the rail. The earth is filled in behind this wall, forming a dock for unloading materials of all kinds of freight, principally brick.

The witness Laflin, an engineer on the Toronto, Hamilton, and Buffalo Railway, stated that these receiving platforms are not constructed with any idea that a brakesman or anybody else should ever get between these platforms and the rails; that the primary reason for putting the plat-

form so close to the rails was for facilitating the unloading of material.

A number of witnesses swore that it was unnecessary to stand where the deceased was when he was injured in order to place the car; that this might have been done either from the wall or the top of the car. One witness states that after the wall was built there were some 13 or 14 cars put in, and Hammill (the deceased) came ahead of the cars and stood in the open space and signalled to his brakesman. Another witness, Morgan, in the employ of the city, who had charge of receiving the coal deliveries, and who asked Hammill on this occasion to put these cars in the switch, said that he had had a great many cars put in, probably 150; that there were from 15 to 20 cars put in after the wall was built; and that Hammill's custom was to go ahead of the cars, that he never saw him at the side of the car.

On the evidence the following are undisputed facts: that the wall in question was built upon the city's land for the purpose of a receiving platform; that it was properly placed, constructed, and used for that purpose; that the deceased had full knowledge of its position, and had on previous occasions placed cars in the yard, after the wall was built; that on the occasion in question he proceeded in front of the car, and, the car having reached the place where he desired to have it placed, stepped aside, and was caught by the moving car between it and the wall.

I have searched the evidence in vain to find some duty which the city owed to the deceased which should have restrained them from placing the wall where it was placed. It was intended to be used as a receiving platform; and for conveniently handling goods it was properly placed. For the city to have assumed that by so placing it some employee of the Grand Trunk Railway Company in placing cars would stand between the car and the platform, seems to me wholly unreasonable. But, supposing the defendants could so have anticipated the accident, it could only be upon the ground of assuming that an employee would recklessly and carelessly place himself in a position where he was sure to be injured. Even supposing that the wall were not placed as a receiving wall, but to be used as a fence, had not the city a right to use that land as they pleased? Suppos-

ing the land had been owned by a stranger, could it be pretended for a moment that he would not have had the right to build up to the line, and does it make any difference that the city happened to own the lands upon both sides of the track? I think not. There was no duty to leave a way for the yardsmen upon the opposite side of the track from which to signal the engine-driver where to stop, and it seems to me wholly gratuitous to say that there was any such necessity. There was then, I think, no negligence whatever on the part of the city in erecting the platform in the manner they did.

But, assuming that the city, having knowledge of the usual practice of the yardsmen in placing cars and in so doing of occupying the land where the wall stands for the purpose of signalling the engine-driver, negligently placed the wall where it is so as to endanger the yardsmen when placing cars, deceased might have taken another method of signalling the engine-driver. He chose to place himself in a position of danger, with a knowledge of the facts, where injury was inevitable. He was the cause of his own injury. He stepped in the way of danger needlessly and thoughtlessly, and that was the immediate cause of the injuries which he received.

I think the judgment entered for plaintiff should be set aside with costs and the action dismissed with costs.