THE

ONTARIO WEEKLY REPORTER

(To and Including March 31st, 1906.)

VOL. VII. TORONTO, APRIL 5, 1906. No. 12

TEETZEL, J. MARCH 26TH, 1906.

TRIAL.

OTTAWA ELECTRIC CO. v. CITY OF OTTAWA.

Assessment and Taxes—Street Railway—Exemptions—Land Leased from Crown — Agreement with Municipality—Construction—Storage Battery — Real or Personal Property—Ejusdem Generis Rule—Fixture.

Action to recover $5,000 paid by plaintiffs to defendants for taxes in 1904, in respect of an assessment made in 1903, and for a declaration that the assessment was illegal and void.

F. H. Chrysler, K.C., for plaintiffs.

T. McVeity, Ottawa, for defendants.

TEETZEL, J.:—Plaintiffs are lessees from the Crown of 3 hydraulic lots, upon one of which is erected a building containing a storage battery, which consists of 288 cells, being wooden boxes lined with lead, each containing a number of leaden and glass plates. The cells are all connected by soldering or lead burning, and the total weight is several tons. The battery rests by its own weight on insulators, and is in no way fastened to the floor. The building was specially put up for it, and the items for its construction were put together in the building. It is connected with plaintiffs' railway

by two cables, the one joining the trolley wire, and the other joining the tracks. It is an important part of plaintiffs' electric railway system. Its functions are not only to regulate the current supplied by the generators, but to act as a reservoir for surplus electric energy, and it contributes greatly to the efficient and economical operation of the railway.

Plaintiffs were assessed for $100,000 in respect of the 3 lots, and of that sum $40,000 was the value placed upon the battery.

Plaintiffs take 2 objections to the assessment: first, to the whole sum, on the ground that the lots are the property of the Crown, and therefore defendants have no jurisdiction to assess or impose taxes upon it; and second, to the $40,000, on the ground that the storage battery is personal property, and therefore exempt from taxation under an agreement between plaintiffs and defendants, dated 28th June, 1893, confirmed by ch. 76 of the statutes of Ontario, 1894.

The lease from the Crown to plaintiffs is for 21 years, at a yearly rental, and is renewable in perpetuity, and there is no restraint upon assignment.

I think the first objection must be disallowed, on the authority of Niagara Falls Park R. W. Co. v. Town of Niagara Falls, 31 O. R. 29, and the cases therein referred to.

The assessment in question is under sub-sec. 2 of sec. 7 of R. S. O. 1897 ch. 224, which reads: "Where any property mentioned in the preceding clause"—property vested in the Crown—"is occupied by any person otherwise than in an official capacity, the occupant shall be assessed in respect thereof, but the property itself shall not be liable."

Now, while the fee in the land in question is vested in the Crown, plaintiffs own the leasehold estate therein, and are in actual continuous and exclusive possession thereof, for the purposes of their business, and not in any official capacity. I am, therefore, of the opinion that, while the land itself is not liable for the taxes, plaintiffs were properly assessed in respect of the same.

See also Mersey v. Cameron, 11 H. L. Cas. 443; Totten v. Truax, 16 O. R. 490; Ruddell v. Georgeson, 5 Western Law Times 2, per Killam, J.; California v. Moore, 12 Cal. 56; Ex p. Gaines, 56 Ark. 227.

As to the second objection, the agreement referred to provides as follows: "18. The corporation shall grant to the said companies exemption from taxation and all other

municipal rates on their franchises, tracks, and rolling stock, and other personal property used in and about the working of the railway, also on the income of the companies earned from the working of the said railway, for a period of 30 years from the said 13th day of August, A.D. 1893. But this shall not apply to the real estate of the companies." "52. In this agreement, unless the context otherwise requires, the expression 'track' shall mean the rails, ties, wires, and other works of the company used in connection therewith."

The question, therefore, is, whether the storage battery is personal property, or, if not, whether it is included within the expression "other works," in clause 52.

I think, having regard to the purpose of the storage battery, its constituent importance as a part of plaintiffs' railway and power plant, and the manner of its attachment to the premises, plaintiffs must be held to have intended that it should remain permanently connected with their railway system as an important integral part thereof. Under such conditions it becomes part of the real estate as between vendor and purchaser, mortgagor and mortgagee, and the owner and a rating municipality. . . .

[Reference to Holland v. Hodgson, L. R. 7 C. P. 328; Hobson v. Gorringe, L. R. 1 Ch. 182; Haggert v. Town of Brampton, 28 S. C. R. 174; Stack v. Eaton, 4 O. L. R. 335, 1 O. W. R. 511; Reynolds v. Ashby, [1903] 1 K. B. 87, [1904] A. C. 466; Kirby v. Guardian, 21 Times L. R. 618.]

The storage battery was real estate within the meaning of sub-sec. 9 of sec. 2 of ch. 224, R. S. O., and assessable as such, and is not embraced in the expression "other personal property used in and about the working of the railway" in clause 18 of the agreement. Nor do I think it is covered by the words "other works of the company," etc., in clause 52 of the agreement.

The purpose of these clauses being to provide an exemption from taxation, the strict construction applicable to statutes providing for exemptions should be applied in construing this agreement, and it should be construed so as not to extend the exemption to property not clearly specified.

. . .

At the date of the agreement tracks of street railways were not assessable as real estate under the decision in Toronto Street R. W. Co. v. Fleming, 37 U. C. R. 116, but this

case was overruled in Consumers Gas Co. of Toronto v. City of Toronto, 27 S. C. R. 453, and, on the authority of this case and Re Toronto Railway Co. Assessment, 25 A. R. 135, the rails, poles, and wires of a street railway company are now assessable as real estate.

Mr. Chrysler urged that the agreement should be construed in the light of . . . the Fleming case, but I do not see that, even if this were so, it would assist in the least in determining whether the storage battery is assessable as real or personal estate. . . . The parties may not at the time have had in mind the subject of storage battery, but they have chosen to specify "tracks and rolling stock," and I cannot say that a storage battery is ejusdem generis with either of these in clause 18, or with "rails, ties, wires" in clause 52. I think the general words following these 3 in the latter clause would have reference to such similar items as poles, fish-plates, spikes, etc.

Such words as "plant and machinery" have been omitted from the agreement presumably with intention, and I should say that the storage battery might be properly included as within the meaning of these descriptive words, but not within the meaning of any of the classes of property particularly mentioned in the agreement.

Action dismissed with costs.

FALCONBRIDGE, C.J. MARCH 26TH, 1906.

TRIAL.

NORTHERN ELEVATOR CO. v. LAKE HURON AND MANITOBA MILLING CO.

Contract — Correspondence — Sale of Wheat—Dispute as to Price—Terms of Contract—Evidence of Custom or Usage in Trade—Appreciation of Evidence.

Action for conversion of wheat.

J. H. Moss and Featherston Aylesworth, for plaintiffs.

W. Proudfoot, K.C., for defendants.

FALCONBRIDGE, C.J.:— . . . Plaintiffs carry on business in the city of Winnipeg. Defendants are described in the statement of defence as carrying on the business of grain merchants and warehousemen in the town of Goderich. Defendants, however, claim, so far as this action is concerned, to be treated as millers, and not as grain merchants or speculators.

The action, according to the statement of claim, is based upon the alleged conversion by defendants to their own use of 10,000 bushels of wheat, part of a cargo of 95,000 bushels shipped by plaintiffs to defendants.

But the real dispute between the parties is as to the price of the wheat; and, a dispute having arisen between the parties, plaintiffs withheld the bill of lading for the last 10,000 bushels, and defendants, notwithstanding the absence of this document, contending that the wheat was all paid for, took the 10,000 bushels covered by the bill of lading referred to, which is the alleged conversion.

The real issue . . . is whether defendants have or have not paid in full for the 95,000 bushels.

Defendants first approached plaintiffs by letter dated 28th April, 1903, stating the company (defendants) would require wheat, and asking in about what shape and at about what price plaintiffs could furnish it. Plaintiffs replied by letter, dated 2nd May, 1903, stating that they were "selling wheat every day for export on the basis of 3 over New York July for one hard, and 1¾ cents over for one northern, cif. Georgian Bay or Buffalo:" and adding, "We are open to sell to you at the same price."

Plaintiffs contend that, in stating their willingness to deal on the basis of 3 over New York July, they were suggesting the adoption in selling to defendants of a well established and clearly defined method of dealing. Plaintiffs ask me to find that there exists in the grain trade on this continent a clearly defined and well understood usage, by which what is known as cash wheat is sold on the basis of future wheat of a stated month on one of the established produce exchanges, and that when a vendor of cash wheat agrees to sell the same to a purchaser on the basis of 3 over New York July, the transaction involves a sale by the vendor of the cash wheat, and a counter-sale by the purchaser of the New York July wheat to the vendor of the cash wheat,

and that the purchaser of the cash wheat shall pay the vendor 3 cents a bushel more than the vendor pays him for the New York July wheat.

Plaintiffs further ask me to find that in a contract of this character it is the duty of the purchaser of the cash wheat to deliver the New York July wheat to the vendor, either through the purchaser's own broker or by giving the vendor an order to buy in the New York market on the purchaser's account; that the delivery of the New York July wheat in one or other of these ways is essential in order to fix the price of the cash wheat; and that there is no other recognized method of fixing the price of cash wheat but by delivery of the New York July wheat.

Further correspondence passed between the parties, and on 21st May defendants sent a telegram to plaintiffs as follows: "Can you give us Rosedale next week 3 over New York July one hard half under two northern say half each, $25,000 cash, balance 3 weekly payments?" To which plaintiffs replied by telegram on 22nd May: "Referring to your telegram of 21st Rosedale loads for Midland cargo sold trying get her next trip about first of next month or Algonquin about 29th of this month. Price one hard all right but No. two northern ½ too low, can give about two-thirds hard. I will telegraph when hear from boats. R. H. Crowe."

And on the same day plaintiffs telegraphed as follows: "Referring to telegram, we do offer, subject to your immediate reply by telegram, one cargo about 80,000 part No. one hard wheat 3 over part No. two Manitoba northern wheat a quarter under New York July, cif. Goderich, shipment in 10 days, terms $25,000 sight draft and balance weekly payments as suggested, interest and insurance Goderich paid by you as before. If you wish will fix price to-day, one hard 82, northern 78¾. Telegraph immediately whether you accept or not. Can give you more two northern than one hard. G. R. Crowe."

And also wrote as follows: "Had your telegram this morning (dated yesterday) asking if we could give you some one hard on the steamer "Rosedale" at 3 over New York July next week, and some two northern at ½ under, and I have responded by two telegrams to-day. At the time of writing we have offered you a cargo of about 80,000 bushels, the one hard at 3 cents over New York July, and the two northern at ¼ cent under New York July, cif. Goderich, and have said

to you it would be satisfactory to draw when shipment was made, for about $25,000 value of the grain, and the balance to be stored in your elevator subject to our order, payments to be made at your convenience, you to pay us interest at the rate of 6 per cent. and the actual cost of insurance. I further stated that you could if you wished fix the price of the wheat on the basis of to-day's close, which would be 82 cents for the one hard and 78¾ for the two northern. Ellis sold one hard wheat for me to-day that nets us 82 cents cif. Goderich. G. R. Crowe."

Defendants replied by telegram 23rd May: "We accept half No. one hard half No. two northern price fixed date shipment or sooner. Lake Huron and Manitoba Milling Co."

Plaintiffs wrote 23rd May as follows: "Since writing you yesterday, we have your telegram accepting our offer of a cargo of wheat about half one hard and half two northern, the quantities of each to be made to conform with the ship's compartments, and the price is 3 cents over New York July for the one hard and ¼ cent under New York July for the two northern, cif. Goderich. Since writing you yesterday I have engaged the steamer 'Rosedale' to take this cargo. Of course, if any mishap to the Rosedale should occur, I would have to get another boat. The Northern Elevator Co., Ltd., G. R. Crowe, general manager."

Defendants wrote on the same day to Mr. Crowe: "We received your wire yesterday, and regret that we were not able to answer promptly, having had considerable difficulty getting the manager over the 'phone at Toronto. However, we wired this morning accepting your offer of a cargo of about 80,000 bushels half one hard, half two northern, cif. Goderich, prices to be fixed date of shipment or sooner, at 3 cents over New York July for one hard and ¼ under for two northern. We will write you further regarding payments, but in the meantime they stand as per our telegram. We will probably be able to arrange to accept sight draft for between 30,000 to 40,000. Yours very truly, Lake Huron and Manitoba Milling Co., Limited, C. A. McGaw, secretary."

These letters and telegrams constitute the contract.

On 28th May plaintiffs telegraphed: "Probably send Algonquin to-morrow;" and offering a surplus 15,000 bushels

of her cargo; and on 29th May plaintiffs telegraphed to defendants: "Algonquin loading to-day due Goderich Monday morning."

Plaintiffs contend that defendants' manager McGaw thoroughly understood the method of trading as above outlined, and that the contract was made with reference to such custom or usage. Defendants rely on the phrase which is used in their telegram of 23rd May, "Price fixed date of shipment or sooner." Plaintiffs' manager says that he observed both of these statements, but paid no attention to them, as he did not consider that they added anything to the well understood meaning of the contract; and that in fact the contract was, according to his ideas, complete without them, and therefore he saw fit to ignore them. I think that he had no right to do so. I am of opinion that he ought to have at least inquired what defendants meant by annexing a new term in the alleged well understood method of dealing. It ought to have been clear to him that defendants intended the words to have some meaning, and I think that they had a meaning. If plaintiffs had refused to deliver wheat in accordance with the telegrams and letters, could defendants have successfully maintained an action? I think not. The answer would be, "You imposed a new term to which I never agreed."

In order that plaintiffs shall succeed, it becomes necessary to read into this contract the alleged custom that in a sale such as this there is an implied term that defendants in settlement for the cash wheat must supply the July option. A custom to be binding must be universal, and the evidence of the custom must be clear, cogent, and irresistible: Kirchner v. Venus, 12 Moo. P. C. 381; Burke v. Blake, 6 P. R. 250. If evidence of a custom inconsistent with the agreement entered into is tendered, it cannot be received: Hayes v. Nesbitt, 25 C. P. 101; Marshall v. Jamieson, 42 U. C. R. 115; Hayton v. Irwin, 5 C. P. D. 130; Syers v. Jonas, 2 Ex. 111. The evidence of usage must be distinct in order to affect the meaning of the terms of the contract, and the evidence must be clear and consistent, otherwise the plaintiff fails: Bowes v. Shand, 2 App. Cas. 455.

The alleged custom here was stated to be universal, but that expression was qualified by the statement that Mr. Crowe meant New York, Winnipeg, Chicago, and Minneapolis. It was not contended that it included Toronto, and

in fact Mr. Crowe declined defendants' proposition to arbitrate at Toronto, on the ground (see telegram 10th June) that Toronto people were not familiar with that class of trade.

It is to be borne in mind also that in this case defendants appear as millers and not as warehousemen or speculators. It is quite true that Mr. McGaw, defendants' manager, has had a good deal of experience. He had been in the grain trade at Winnipeg, where it is said this method of dealing is used, and he had on behalf of defendants in 1901 carried through a deal in Manitoba wheat on the basis of Chicago May wheat, on terms somewhat similar but by no means identical with this. I mention this circumstance principally to shew that I think I have not overlooked any possible element in dealing with the case, and I do not think this circumstance sufficient to overbalance the circumstances which preponderate in favour of defendants.

Action dismissed with costs.

CARTWRIGHT, MASTER. MARCH 27TH, 1906.

CHAMBERS.

TIERNEY v. SLATTERY.

Pleading—Action by Creditor in Name of Assignee—Claim for Payment of Debt to Creditor—Venue.

This action was commenced by one Marceau on behalf of himself and the other creditors of defendant Daze to set aside two chattel mortgages made by Daze to his co-defendant Slattery, and to restrain any sale thereunder.

Before any injunction was obtained, the goods were sold by Slattery, and Daze made an assignment to Tierney.

By an order of 8th February, 1906, Marceau was given leave to continue the proceedings in the name of the assignee, Tierney; Marceau to bear the expense and risk and have the exclusive benefit of the action.

On 14th March, 1906, the statement of claim was delivered. The 1st paragraph alleged a sale of goods by Marceau to Daze, and the 3rd paragraph stated that on 22nd September,

1905, Daze was indebted to Marceau in the sum of $79.13 for such goods, which debt had neither been paid nor secured. The 1st clause of the prayer for relief asked judgment for the $79.13; and the 3rd clause asked that Slattery account for the moneys received.

The defendants moved to strike out these paragraphs and clauses as embarrassing and irrelevant.

Grayson Smith, for defendants.

C. A. Moss, for plaintiff.

THE MASTER:—It was decided in Oliver v. McLaughlin, 24 O. R. 41, that the relief asked for in the first clause could not be given in the present action.

This was very recently affirmed and followed in Urquhart v. Aird, 6 O. W. R. 155, 506.

It follows that paragraphs 1 and 3 of the statement of claim are irrelevant, as they have no relation to the action as at present constituted, and clause 1 of the prayer for relief must be expunged, as no such judgment can be given in this suit. The claim for an account from Slattery may then remain. It was also noticed on the argument that no place of trial is mentioned in the statement of claim, though Pembroke was named in the writ.

The plaintiff should amend within 4 days.

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

Defendants will have 8 days after the amendment to deliver their defence.

ANGLIN, J. MARCH 28TH, 1906.

CHAMBERS.

BLACK v. ELLIS.

Pleading—Statement of Claim—Frivolous or Vexatious Action—Prolixity—Municipal Corporation—Contract for Purchase of Electric Plant—Allegations against Mayor—Alterations in Contract—Ratification by Council—Injunction—Parties—Rule 261—Stay of Action—Amendment—Costs.

Three motions by the several defendants to strike out the statement of claim, on the ground that it disclosed no reasonable cause of action, and that the action was frivolous and

vexatious, and to stay the action or to dismiss it; and supplemental motion by one of the defendants, the liquidator of the Consumers' Electric Company of Ottawa, to strike out paragraph 15 of the statement of claim for prolixity.

A. E. Fripp, Ottawa, for defendants the corporation of the city of Ottawa.

Glyn Osler, Ottawa, for defendant liquidator.

R. G. Code, Ottawa, for defendant Ellis.

F. R. Latchford, K.C., for plaintiff.

ANGLIN, J.:—Plaintiff sues as a ratepayer of the city of Ottawa, and on behalf of himself and all other ratepayers. Defendant Ellis is mayor of the city of Ottawa. The Consumers' Electric Company were the owners of an electric lighting plant which the city of Ottawa sought to acquire.

Plaintiff alleges that, at a meeting of the council of the corporation of the city of Ottawa, held on 17th July, 1905, a definite agreement was reached with the Consumers' Company, by which the corporation were to acquire, for . . . $200,000, the plant of the company as it then stood in the city, and, in addition, supplies not converted into plant then in the possession of the company, to the value of $3,000; that a by-law authorizing the making of such agreement, which had been previously twice read, was then read a third time and passed, and the mayor was authorized to execute such agreement, which was set out as a schedule to the by-law. Plaintiff further alleges that the mayor, on the following day, executed a materially different agreement, which, he charges, has, if binding, the effect of depriving the city of Ottawa of their right to the $3,000 worth of supplies and may also render the city liable to pay the company a further sum of $3,771.79. The alleged alteration consisted in the insertion, after the word "whatsoever," in the phrase "supplies of every kind and description whatsoever up to the value of $3,000," of the words "on hand on the 30th April, 1905." The company had, between 30th April and 17th July, converted into "plant" a large quantity of what were "supplies" at the former date. The value of these the liquidator alleges amounted to $6,771.79. It was stated at bar, upon evidence contained in examinations had upon the present motions, that, after executing the agreement in its altered form, defendant Ellis caused the cheque of the municipal

corporation for the entire sum of $200,000 to be handed over to the Consumers' Company, without receiving any supplies whatever other than what had been so converted into plant. This allegation is not made in the statement of claim. It is further alleged that the company refuse to recognize any right in the city to demand or obtain any "supplies" from them, and make a claim upon the city for the sum of $3,771.79, being the value of supplies, over $3,000 worth, converted into plant between 30th April and 17th July, and this claim, the plaintiff alleges, is, upon the true construction of the agreement as executed by the mayor, well founded.

Plaintiff claims a declaration that the document executed by the mayor is not the agreement of the municipal corporation, and that the alteration by the mayor was material and wrongful and a breach of duty, for which the mayor is answerable in damages to the ratepayers; a judgment declaring the nullity of such document and ordering its cancellation, and requiring the mayor to execute an agreement in the form authorized by council; and an injunction against payment of the sum of $3,771.79, or any other sum by the municipal corporation to the liquidator of the Consumers' Company; a personal judgment against defendant Ellis for $3,000 to be paid to the corporation of the city of Ottawa; and a declaration that plaintiff, as a ratepayer, has been injured and damnified by the mayor's alleged breach of duty, and that plaintiff, on behalf of himself and all other ratepayers, is entitled to recover $3,000 as damages for such breach of duty and wrongful acts of defendant Ellis.

At the conclusion of the argument I expressed the opinion that, if plaintiff had any status to maintain this action, it should not be stayed or dismissed as frivolous or vexatious, and that the alleged prolixity of the 15th paragraph of the statement of claim could be more conveniently, and in this case quite adequately, dealt with in the taxing office. To that opinion I adhere.

Without at all determining what, upon the true construction of the document actually executed, is the effect of the insertion of the alleged unwarranted words, "on hand on the 30th April, 1905," it seems to me reasonably clear that, if these words give to that document the effect asserted by the Consumers' Electric Company, and affirmed by plaintiff,

and, if the agreement actually made by council be what plaintiff alleges, the alteration effected is most material, and entails a loss to the municipality of at least $3,000, or, if the estimate of the Consumers' Company as to the value of supplies put into plant after 30th April be correct, of $6,771.79. If plaintiff has, as a ratepayer suing on behalf of himself and other ratepayers, a right to maintain an action to protect the municipality against such a loss, his proceedings certainly should not be burked on the ground of frivolity or vexatiousness.

Defendants contend that, in so far as it is sought to control the action of an officer of the municipal corporation and to compel payment of moneys by him to which the municipal corporation are entitled (if there be any liability on the part of its officer), plaintiff, suing as he does, cannot maintain this action; that, at all events, he cannot do so without alleging and proving that the municipal corporation have refused to bring such an action, or otherwise to protect the interests of the municipality in the premises; that, the acts of the mayor being capable of ratification by the municipal corporation through their council, no action lies by a ratepayer qua corporator in respect of it; and that the acts complained of have in fact been acquiesced in and ratified by the council, and must therefore now be treated as if originally authorized.

For the purpose of the present applications plaintiff's allegations of fact must be taken to be true, just as they would have been upon a demurrer.

Excepting that plaintiff does not here charge that the mayor acted fraudulently and for his own personal profit, the analogy between the present case and Paterson v. Bowes, 4 Gr. 170, is in many respects very close. An allegation of such fraud does not seem to me to be essential to plaintiff's cause of action. In substance, he alleges an illegal and unauthorized application of funds of the municipality by the mayor—an expenditure for which the municipality has received no consideration. No doubt, the municipal corporation would . . . be entitled to maintain the present action in respect of most of the relief which plaintiff seeks; and, unless they should be unwilling and refuse to sue, no ratepayer can bring such action. Plaintiff has not in his statement of claim alleged such unwillingness or refusal, as he no doubt should have done, and, under the strict practice

of olden days, his pleading would be held demurrable. (See, however, Blaikie v. Staples, 13 Gr. 67, 69.) But he comes into Court shewing knowledge by the corporation for at least 6 months of the alleged illegalities, and no action taken. He is met upon these motions by the contention of counsel for defendants that the city council has ratified and acquiesced in the mayor's acts and stands by them, and, in support of this contention, the counsel produces a resolution of the council instructing him to defend the action upon these grounds. Nothing, therefore, is lacking except a formal allegation of the unwillingness and refusal of the council to sue, and this plaintiff should be and will be allowed to supply by amendment of his statement of claim. Upon this amendment being made, on the authority of Paterson v. Bowes the objection that this action would only lie in the name of the municipal corporation must be overruled. See, too, Crampton v. Zabriskie, 101 U. S. 601, 609; Dillon on Municipal Corporations, 4th ed., pp. 1103-1119; Baxter v. Kerr, 23 Gr. 367; Kirby v. Bowbier, there cited; and Township of West Gwillimbury v. Hamilton and North-Western R. W. Co., 23 Gr. 383.

If plaintiff's allegations are true—as they must on these motions be assumed to be—the payment of $3,000, part of the $200,000, was without consideration. It would be a distinct breach of trust on the part of the municipal council to attempt to ratify such a payment. It is illegal and incapable of ratification. If, as plaintiff alleges, there was a valid and enforceable bargain sanctioned by by-law for the acquisition of the Consumers' Co.'s plant, as it existed on 17th July, for . . . $197,000, the municipal council could not, by ratification, or in any other way, validate a transaction, purporting to have been carried out under that by-law, involving the payment for that same plant of $200,000, or, perhaps, of $203,771.79, out of the municipal funds. As to all in excess of the $197,000, the payment would be without consideration and in breach of trust. Neither, therefore, in the contention that the execution by the mayor of the impeached document and the payment of the $200,000 were susceptible of ratification, nor in their alleged ratification, do I find anything which would justify me in giving effect to defendants' motions.

As to the claim for an injunction to prevent payment to the Consumers' Co. of the further sum of $3,771.79, or of any further sum—assuming that plaintiff will at the trial

make out a case entitling him to such relief—I see no reason why he may not maintain this action against . . . the municipal corporation.

Finally, it should be pointed out that these motions are made under Con. Rule 261. In many cases it has been held that to stay an action as not maintainable, or to strike out a statement of claim on the ground that it discloses no reasonable cause of action, is only justifiable in the clearest cases. When mature and careful consideration is required to determine whether a reasonable cause of action is presented, the pleading is certainly not so obviously bad that it should be thus summarily stricken out: Brophy v. Royal Victoria Insurance Co., 2 O. L. R. 655; Christy v. Ion Specialty Co., 18 C. L. T. Occ. N. 85.

The motions will, therefore, be dismissed. In amending his statement of claim plaintiff should consider whether he should not amend his style of cause so as to confine plaintiffs to ratepayers other than defendant Ellis: see Morrow v. Connor, 11 P. R. 425. He may do so, if so advised, and may also add any allegations which he deems warranted by the evidence obtained upon the present motions. Time for defences will be extended until 8 days have elapsed after such amendments shall have been made.

The costs of these motions will be costs in the cause to plaintiff as of one motion.

MARCH 28TH, 1906.

DIVISIONAL COURT.

COBEAN v. ELLIOTT.

Limitation of Actions—Real Property Limitation Act—Tenant at Will—Devise for Life to Tenant upon Condition—Presumption of Acceptance—Violation of Condition.

Appeal by plaintiffs from judgment of FALCONBRIDGE, C. J., ante 13, dismissing action.

W. T. J. Lee, for plaintiffs.

T. J. Blain, Brampton, for defendants.

The Court (BOYD, C., MAGEE, J., MABEE, J.), dismissed the appeal with costs.

MARCH 28TH, 1906.

C.A.

BANK OF MONTREAL v. SCOTT.

Evidence—Examination for Discovery of Ex-officer of Plaintiff Banking Company — Non-admissibility — Proof of Admissions by Stenographer as Witness—Rule 439 (a)—Promissory Note—Wife Indorsing for Benefit of Husband —Improper Admission of Evidence—New Trial.

Appeal by plaintiffs from judgment of BRITTON, J., 6 O. W. R. 411, dismissing action as against defendant Margaret Scott.

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

M. Wilson, K.C., for defendant Margaret Scott.

The judgment of the Court (MOSS, C.J.O., OSLER and GARROW, JJ.A.), was delivered by

OSLER, J.A.:—The action is upon a promissory note for $5,000, indorsed by defendant Margaret Scott . . . to plaintiffs. . . . Defendant (a married woman) denied the indorsement of the note, and pleaded certain facts which, it was contended, relieved her from all liability thereon under the recent decision of the Supreme Court of Canada in Adams v. Cox, 35 S. C. R. 393. . . . Britton, J., held that the case was governed by that decision, and dismissed the action.

On the opening of the defence the shorthand writer who had taken the examination for discovery of one Glass, who had been the manager of plaintiffs' branch at Chatham when the note was taken, was called, and she (the shorthand writer) was asked, against objection, what Glass had stated on such examination. The evidence was admitted subject to the objection, and the witness verified what Glass had then said as to the circumstances under which the note was acquired by the bank.

During the discussion which arose as to the admissibility of the evidence it was stated by plaintiffs' counsel, without contradiction, that when Glass was examined he was an ex-officer of the bank. Glass was not himself called as a witness, nor was defendant's husband nor defendant herself.

In reply, the depositions of defendant taken upon her examination for discovery were put in and read.

Upon the whole of this evidence the trial Judge held that the defence was proved.

If Glass was an ex-officer of the bank when his examination was taken, he was not a person examinable for discovery under Con. Rule 439 (a). The right to examine such persons ceased when the original of that Rule was passed in June, 1903. But, even if he was then plaintiffs' local manager, his examination could not have been given in evidence at the trial, under the express terms of that Rule. And if such examination could not be proved by putting in a copy certified by the examiner as an examination regularly taken, neither could it be proved in the roundabout method adopted at the trial, by calling the examiner or stenographer to prove what the examinee had said. Nor were Glass's statements admissible as admissions or statements made by an agent of the plaintiffs, for (first) they were not statements or admissions made at the time of the transaction, and (second) he was no longer agent of the plaintiffs when he made them.

So far, therefore, as defendant has to rely on anything said by Glass, her defence fails.

It may be that . . . Adams v. Cox in the Supreme Court will be found to support the defence, but the evidence is not entirely satisfactory as regards the circumstances under which the bank acquired the note, and the knowledge of the agent of the facts necessary to be found to establish the defence.

We are of opinion that . . . the case calls for a new trial, at which the evidence of Glass and defendant's husband may be given, and the whole transaction more thoroughly sifted than at present appears to have been done.

The costs of the last trial and of the appeal must be costs in any event of the cause to plaintiffs.

MARCH 28TH, 1906.

C.A.

RE INTERNATIONAL BRIDGE CO. AND VILLAGE OF BRIDGEBURG.

Assessment and Taxes—Assessment Act, 4 Edw. VII. ch. 23—Appeal from Decision of Court of Revision—Powers of Appellate Tribunals—International Bridge—Application of sec. 43 of Statute—Exemption—Excessive Valuation—Business Assessment—Income Assessment.

Appeal by the company under sec. 76 (6) of the Assessment Act, 4 Edw. VII. ch. 23, from a decision of a board of

County Court Judges varying (but not to the extent contended for by the company), upon appeal of the company the decision of the Court of Revision of the village in respect of an assessment for a bridge, the property of the company; and cross-appeal by the village corporation from the decision of the board, upon the ground that the board ought to have held that the company were liable to a business assessment in respect of the bridge, and further because, if not liable to a business assessment, the company were liable to assessment for income, and that the board should have allowed all necessary amendments in order to assess the bridge company in these respects.

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

G. Lynch-Staunton, K.C., and L. C. Raymond, Welland, for the village corporation.

The judgment of the Court (Moss, C.J.O., Osler, Garrow, Maclaren, JJ.A.), was delivered by

Moss, C.J.O.:—The subject of the appeal is a bridge known as the "International Bridge," which crosses the Niagara river between Bridgeburg, in this province, and the city of Buffalo, in the State of New York.

The purpose of its construction was for the passage over it of trains of railway companies having connecting lines on each side of the river, and that is the use to which it has been and is now devoted.

In 1905 the assessor of the village assessed the company in respect of the bridge, and the entry in the assessment roll is as follows: "The International Bridge Canada side of the river $650,000;" no other particulars being given. The notice of assessment given pursuant to sec. 46 of the Assessment Act contains the same words, and none of the particulars set forth in the schedule F. are supplied. From these entries it is apparent that the assessor dealt with the bridge as coming within sec. 43 of the Assessment Act, and as liable to assessment as a bridge crossing a river forming a boundary between the province and another country. On appeal to the Court of Revision the assessment was confirmed. The company thereupon appealed to a board of County Court Judges, and contended that the bridge was not a bridge assessable under sec. 43, but a railway bridge forming part of the property of the Grand Trunk Railway Company, and

therefore exempt under sec. 44 of the Assessment Act. It was further contended that in any case the amount of the assessment was excessive.

The majority of the board held that it was a bridge falling within the terms of sec. 43 of the Assessment Act, and assessable as such. They agreed in holding that the valuation made by the assessor was excessive and should be reduced. No evidence bearing on the value was given, but counsel for the respective parties having agreed for the purposes of the appeal that the Canadian end of the bridge could be replaced for . . . $300,000, the board held that the assessment should be reduced to that sum.

One member of the board expressed the opinion that, in ascertaining the assessable value, income should be taken into account, but all appeared to agree that a business assessment could not be imposed.

On the argument in this Court, Mr. Cowan, for the company, conceded that, in the face of the decision of the Judicial Committee of the Privy Council in Toronto R. W. Co. v. City of Toronto, [1905] A. C. 809, it was not open to him to argue the question of the assessable or non-assessable nature of the property. . . . [Quotation from case cited at p. 815.] This unmistakable language leaves open no conclusion other than that the intent and meaning of the legislation in regard to appeals in matters of assessment was to provide that in making assessments the assessor is the sole judge of what property is by law assessable, and that, no matter how grievously he may err in law, the appellate tribunals created by the Assessment Act have no jurisdiction to pronounce him wrong or to set him right. Their only province is to say whether his judgment as to the value of that which he assesses is right or wrong. . . . If that was not the intention of the legislature—and the general impression seems to be that it was not—it rests with that body to supply the appropriate remedy.

For the purposes of this appeal, however, it must be assumed that the bridge in question is properly assessable under sec. 43 of the Assessment Act. But because this is said, it is not to be assumed that doubt as to the propriety of so dealing with it is entertained or intended to be expressed. Nothing is to be implied except that the question is not and cannot be entered upon.

Upon the company's appeal, then, the question is, whether the sum fixed by the board as the assessable value is excessive.

The rule of valuation to be applied in assessing this bridge is explicitly stated in sec. 43. The part of the structure within Ontario is to be valued as an integral part of the whole, and at its actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights, and franchises, and subject to similar conditions and burdens (and incorporating the provisions and basis of assessment set forth in sub-sec. 2 of sec. 42), regard being had to all the circumstances adversely affecting the value of such property, including the non-user, if any, of the same. The differences between these provisions and those of the former Assessment Acts, under or by reference to which In re Bell Telephone Co. and City of Hamilton, 25 A. R. 351, In re London Street R. W. Co. and City of London, 27 A. R. 83, In re Queenston Heights Bridge Assessment, 1 O. L. R. 114, and In re Toronto Electric Light Co. Assessment, 3 O. L. R. 620, 1 O. W. R. 261, were decided are quite apparent. The present provisions are directed first to describing a certain kind of property and then prescribing a rule and measure of valuation to be adopted by the assessor when dealing with property coming within that description.

There is no uncertainty in the directions to the assessor. To begin with, he must regard and value the part within his municipality as an integral part of the whole and on the basis of valuation of the whole—that is to say, it is not to be regarded as a distinct and separate part without relation to the other parts constituting with it the whole structure, not as a mere mass of materials without completeness or effectiveness, but as an essential and important portion of the complete structure. And in fixing the value of the portion the valuation of the whole must be considered. The assessment of the value of the part must proceed on the basis of the valuation of the whole. The value is the actual cash value which a competent person appointed to appraise between the owning company and a company having the same powers, rights, and franchises, and therefore able to use the property in precisely the same way, would fix, upon a contract of sale by the one to the other.

The difficulty, pointed out in the decisions under the former law, of valuing on this basis, owing to the inability of the purchaser to apply to the property purchased the vital elements of power to operate and use for the purposes for which it was designed, has been removed. And there no longer exists any reason preventing the assessor from putting himself in the place of an appraiser and placing such actual cash value upon the designated portion of the structure as would be reasonable and proper in a dealing between two companies on equal terms with one another as regards all powers, privileges, and franchises, enabling them to make a beneficial use of the whole. Whether a purchasing company answering the description is or can be found is not material.

For the assessor's purposes it can be assumed that such is the case, and, taking the directions of the section as his guide, his duty is clear. He could not, without disregarding them, treat the portion of the bridge in question—as it was argued for the company he should do—as a quantity of materials to be taken apart and removed by the purchaser, to be set up in another erection or sold for that purpose or some other purpose for which they might be available or rendered available. To do so would be to ignore the direction that he is to consider the value as upon a sale to a company which could use and operate it in the same manner and for the same purposes as the owning company were doing. In other words, he is not now to accept the conclusions of the decisions upon the former law as his guide. . . . This disposes of the bridge company's appeal. . . .

The cross-appeal is in the alternative. It is first contended that a business assessment should have been imposed, and next that there should have been an assessment in respect of income. If the company are liable to a business assessment under sec. 10, they appear to be exempt from assessment in respect of income under sec. 11 (1), clause (a).

Whether the company were properly subject to a business assessment or not, is a question that cannot be dealt with by this Court under its restricted jurisdiction. Nor can it say that the company should, in case they are not subject to a business assessment, be subject to be taxed for income. The assessment roll and the notice of assessment define the assessor's view of the law of assessment as applicable to this special piece of property, and with that we cannot interfere.

Read in the light of the decision of the Judicial Committee, the power of the Court under sec. 78 is confined to reopening the assessment in order to the correction of omissions or errors in the amount of the assessment stated by the assessor, and perhaps to the placing on the roll of the names of persons who should be assessed for the amount so fixed. It does not extend to imposing assessments of a different character. That would be to determine whether property was or was not by law assessable.

The appeal and cross-appeal should be dismissed, each with costs.

MARCH 28TH, 1906.

C.A.

LANCASTER v. SHAW.

Penalty—Disqualified Person Voting at Election—Ontario Election Act—Postmaster in City—Sub-postmaster—Post Office Act.

Appeal by defendant from judgment of MEREDITH, J., in favour of plaintiff, 6 O. W. R. 316, 10 O. L. R. 604.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.

G. C. Gibbons, K.C., for defendant.

I. F. Hellmuth, K.C., for plaintiff.

GARROW, J.A.:—The action was brought to recover a penalty of $2,000 by reason of defendant having voted at an election of a member of the Legislative Assembly held on 25th January, 1905, while disqualified by reason of then being a postmaster in the city of London, contrary to the provisions of the Ontario Election Act, R. S. O. 1897 ch. 9, sec. 4, sub-secs. 1 and 2.

Prior to 8th January, 1902, defendant was the postmaster at London South, now within the limits of the city of London. But on that day he was notified by the Postmaster-General that on and from that date his office had been reduced to the rank of a sub-post office, and that in

future his duties would be those of a sub-postmaster, and two days later defendant replied accepting the new position of sub-postmaster, and he remained in that position at the time of the election.

Accompanying the letter of 8th January, 1902, was a "printed memorandum of conditions on which sub-offices will be established and maintained, to take effect from 1st January, 1902," which specifically defined the official title and also the duties of the sub-postmaster, and fixed the salary at $60 per annum, to include rent of premises.

Mr. John Cameron was at the time the city postmaster, at the head or central office, and of course within the prohibition in question.

There was no evidence, and indeed no suggestion, of any order in council appointing the defendant.

The judgment of the Judge at the trial proceeded apparently upon this: defendant at one time was a postmaster; there is no mention of the office of sub-postmaster in the Post Office Act; defendant continued after the alleged change to discharge many of the duties of a postmaster; therefore he was still to be regarded as a postmaster, and therefore within the penal clause in question.

By sec. 49 of the Post Office Act, R. S. C. ch. 35, postmasters in cities having permanent salaries can only be appointed by the Governor-General in council, while all other postmasters may be appointed by the Postmaster-General.

And, although the Postmaster-General has no power to appoint a city postmaster with permanent salary, he has, under sec. 9, a general power to remove all postmasters, including those appointed under sec. 49, and also power to appoint all other officers except those provided for by that section.

Under these provisions the Postmaster-General had, in my opinion, power to remove defendant from his original office, especially with his own consent, and to appoint him to the subordinate office, which might, for anything I can see to the contrary, be called that of sub-postmaster. And I think the result of what was done was, that defendant thereupon ceased to be a city postmaster (if he ever was one), and became, as he was designated in the memorandum, and as he was thereafter known by the department, a sub-postmaster. And, with deference, it appears to me that defendant's true position can, if there is contradiction, be

more safely gathered from the memorandum defining his powers and his duties than from a consideration of his official action, which it must be conceded fell considerably short of those usually performed by the ordinary postmaster. For instance, the only outgoing mail matter he received was the registered matter, and this he did not forward to its destination, but only to the central city office. His only duty with respect to other outgoing mail matter was, if requested, to weigh it with a view to the payment of the proper postage, upon which it was deposited in a box outside the office, and taken thence by the ordinary city collectors. And he received no incoming mail whatever for distribution.

And there were other differences, but these serve to shew by how much the duties of defendant fell short of those of the ordinary postmaster; with the result that, in my opinion, the defendant's limited official actions agree with rather than contradict the written evidence of his appointment to the subordinate office.

The only question, therefore, it appears to me, is, does the prohibition include a sub-postmaster, and, in my opinion, it clearly does not.

The right to vote is a highly prized right, not to be interfered with or taken away by anything less than explicit language. And it is, I think, sufficient for defendant to say that the prohibitory section does not contain his official name. Penal offences are not to be established by construction. Defendant is either postmaster, or he is not. If he is, he has offended, and, if he is not, he is entitled to go free from this not too meritorious action.

But, even if we go deeper and look beyond the language for the intention of the legislature, we shall find that when it is intended to include subordinate officers they are specifically named, as in the case of deputy sheriffs, who are named, while deputy registrars are not.

I think the appeal should be allowed and the action dismissed with costs.

OSLER, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., and MACLAREN, J.A., also concurred.

MARCH 28TH, 1906.

C.A.

HIGGINS v. HAMILTON ELECTRIC LIGHT AND CATARACT POWER CO.

Master and Servant—Injury to Servant—Negligence—Superintendent of Works — Workmen's Compensation Act — Place of Danger—Warning—Findings of Jury.

Appeal by defendants from judgment of ANGLIN, J., at the second trial at St. Catharines, in favour of plaintiff for $1,500 damages in an action tried with a jury, brought under the Workmen's Compensation for Injuries Act and at common law, for damages for injuries sustained by plaintiff, John Higgins, a workman in the employment of defendants at their power station in the township of Grantham, while engaged in digging a trench in the concrete floor of the station. Plaintiff was injured by an electric shock, and alleged that the appliances were defective and that there was negligence on the part of defendants and their servants. The jury found, in answer to questions, among other things, that it was practicable to have had the place where plaintiff was working "dead," that is, without electric current; that it was negligent to have had the alley in which plaintiff was working "alive;" that it was the superintendent who was negligent; that there was a defect in the cable or appliances which caused the injury, viz., defective insulation. The action was first tried before MACMAHON, J., and a jury, who made different findings from those at the second trial, and assessed the damages at $1,200. This verdict was set aside, and a new trial ordered by the Court of Appeal (5 O. W. R. 136.)

W. R. Riddell, K.C., for defendants.

T. F. Battle, Niagara Falls, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.:—This case was before us on a former occasion, when we were compelled to grant a new trial in consequence of some defect or insufficiency in the findings of the

jury. The action has now been tried again, and the jury has again found a verdict in favour of plaintiff, after a charge which was not finally objected to. An action arising out of the accident which gave rise to the present action was brought by one Griffith against these defendants, in which the plaintiff ultimately recovered, on practically the same evidence as was laid before the jury in the present case. The judgment of the Court in setting aside the nonsuit at the first trial of that action is reported in 2 O. W. R. 594. A second appeal was dismissed on the argument.

On the second trial of the present action the trial Judge submitted to the jury, with full explanation and discussion of the evidence applicable to each, a number of questions with the view of ascertaining the precise ground of negligence, if any, on which defendants were sought to be made liable, and whether at common law or under the Workmen's Compensation Act, all of which, so far as was necessary to establish a cause of action under the latter, were answered. The jury assessed the damages at $2,000, but the trial Judge, being of opinion that a cause of action had been proved under the Workmen's Compensation Act only, directed judgment to be entered for the maximum recoverable under that Act, viz., $1,500, and that is not now really complained of. The jury exonerated plaintiff from contributory negligence, and also found that he had not, knowing and appreciating the danger of the position in which he was injured, voluntarily taken the risk of the accident. The contest at the trial mainly centred upon the question whether plaintiff had any business to be at the particular place where he met with his injury (a severe shock and burns from a heavily charged electric wire), in the room he was working in, and it was said that certain slats or bars had been put up by defendants' superintendent to keep plaintiff and his fellow sufferer away from such place, which they had disregarded and paid no attention to. We think, however, that it was quite open to the jury to find as they did that upon the general orders which the workmen had received from the superintendent they were not forbidden to go behind these slats, and that for the purpose of clearing up the floor of the room of the litter and rubbish caused by the special work they were engaged in (opening a trench for wires in the cement floor), they were authorized and required and it was reasonably necessary and proper that they should go there. The place

was one of great danger, and the jury found that the superintendent negligently omitted to warn plaintiff not to go there; that, if such warning had been given, the injury would have been prevented; that plaintiff was injured because of conforming to the order of a person, sc., the superintendent, to whose orders he was bound to conform; and that such person was negligent in not giving proper caution or warning. A further examination of the evidence appears to me, as it did at the argument of the appeal, to support all the essential findings, and I am, therefore, of opinion to dismiss the appeal.

MARCH 28TH, 1906.

C.A.

CRAIG v. McKAY.

Bankruptcy and Insolvency—Preference—Statutory Presumption—Rebuttal—Transaction before Revision of Statutes in 1897 — Circumstances Rebutting Intent to Prefer—Registry Laws.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., 6 O. W. R. 160, dismissing action.

F. Arnoldi, K.C., and P. McDonald, Woodstock, for plaintiff.

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

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

MOSS, C.J.O.:—Plaintiff in this action, suing as the assignee of one Miles O'Reilly Vandecar, seeks to have an instrument of mortgage dated 15th October, 1896, made by Vandecar in favour of defendants McKay and Bicknell, for securing payment to them of $250 on 15th October, 1897, with interest in the meantime, declared void and set aside as fraudulent against the creditors of the mortgagor Vandecar.

The assignment under which plaintiff claims was executed by the mortgagor on 21st October, 1896.

This action was commenced on 31st July, 1902. It was first tried by Britton, J., who dismissed it, on the ground

that under the circumstances appearing upon the evidence the plaintiff has no status to sue. Upon appeal to a Divisional Court, this ruling was reversed, Idington, J., dissenting: 8 O. L. R. 651, 4 O. W. R. 274.

Before the Divisional Court plaintiff sought judgment in his favour on the ground that, as the language of sub-sec. 2 (b) of sec. 2 of the Act respecting Assignments and Preferences, 1887, stood when the assignment was made, there was an irrebuttable presumption that the impeached mortgage was made with the intent to give an unjust preference. This contention was not given effect to, and a new trial was directed in order that the case should be fully tried on its merits.

The new trial took place before the Chief Justice of the King's Bench, who dismissed the action.

Plaintiff thereupon applied for and obtained leave to appeal direct to this Court. . . .

The principal question raised and discussed was the once much debated point whether, the mortgage having been executed within 60 days before the assignment, it was to be conclusively presumed to have been made with intent to give a preference, and that the presumption was not to be rebutted in any manner whatever, or whether the presumption was rebuttable and subject to be overcome by evidence.

The question was set at rest as to all transactions occurring after 31st December, 1897, by the action of the commissioners for the revision and consolidation of the statutes, in inserting after the word "presumed," where it occurs in sub-secs. 3 and 4 of sec. 2 of R. S. O. 1897 ch. 147, the words "prima facie." But the circumstances of this case permit the re-agitation of the question.

For plaintiff it was strongly contended that the point is still open and undetermined, and that the strength of reasoning and the weight of authority lead to the conclusion that the presumption was—prior to the amendment of 1897—irrebuttable.

But the result of the decisions in our Courts beginning with Newton v. Ontario Bank, 13 Gr. 652, and ending with Lawson v. McGeoch, 20 A. R. 464, is against this proposition. There is opposed to it a great body of judicial opinion to be found in the cases preceding Lawson v. McGeoch. In that case the Judges of the Divisional Court were manifestly of the opinion that the presumption was capable of being rebutted: 22 O. R. 474.

The decision was unanimously affirmed in this Court, and, with regard to the opinions expressed, Osler, J.A., must be considered as standing alone in favour of the absolutely irrebuttable nature of the presumption. So far, therefore, as this Court is concerned, the actual decision in Lawson v. McGeoch must be regarded as an affirmance of the principle that the presumption was capable of being rebutted. That this was the intention of the legislature is made plain by the action of the commissioners for the revision and consolidation of the statutes, already referred to.

The Act 60 Vict. ch. 3, making provision for the work of the commissioners, empowered them, amongst other things, to make such minor amendments as were necessary to bring out more clearly what they deemed to be the intention of the legislature (sec. 3 in part). And it may safely be assumed that the commissioners, among whom were a number of the Judges before whom the question had come in their judicial capacity, fully satisfied themselves that in making the amendment they were giving clear expression to the intention of the legislature.

Plaintiff further contended that, assuming the presumption not to be irrebuttable, defendants had failed to shew a bona fide transaction not invalid or void against plaintiff as assignee representing the creditors of the mortgagor, Vandecar.

Defendants testified on their own behalf, and the Chief Justice believed and accepted their testimony. He expressed himself as favourably impressed by their manner and demeanour, as well as by their evidence, and there is nothing on the face of their testimony, or in the circumstances to which our attention was forcibly drawn by counsel for plaintiff, to lead to a contrary view.

The existence of the indebtedness to defendants and their right to be paid at the time when the mortgage was given was beyond dispute. That the mortgagor was possessed of considerable means was equally certain. Indeed, the evidence seems to shew that valuing his farm, farm stock, implements, grain, and other personal property, not by the standard of a forced assignee's sale, but as on dealings in the ordinary course, his assets considerably exceeded his indebtedness. He was in good repute among his neighbours and those with whom he was dealing, and there was no reason for the defendants, McKay and Bicknell, or any one else, supposing

that he was unable to pay his debts in full or that he was contemplating making an assignment. He was asked for and gave security for a debt which he owed upon property of which he was the owner. It was urged that at the time he had just failed in an action at law and that the costs were being taxed against him. But there was no reason in that preventing him from securing a creditor. The amount of the taxed costs was not large, and, even if they were not paid and execution issued, that would not entitle the execution creditor to assail the mortgage to defendants. Defendants accepted the mortgage without knowledge of inability to pay or of any intention to go into insolvency or make an assignment. There appears to be an entire absence of intent to prefer. Defendants had before them a statement made by the mortgagor of his property, from which they might well conclude that he was well able to pay all claims against him. And if the evidence of value be gone into, it appears fully to support the correctness of the statement. It is true the farm of 150 acres over which the mortgage was given was finally knocked down to plaintiff at $4,200 or $1,300 less than the mortgagor valued it at, but plaintiff was both seller and purchaser. He had arranged beforehand with a neighbour or friend to bid for him, and it is not easy to bring to light all the subtle influences to prevent competition that can be put in practice in such a case. The prices at which the stock and hay were disposed of seem somewhat surprising, but there may have been satisfactory reasons why they did not realize more. But, without pursuing this further, it is sufficient to shew that there were very reasonable grounds for defendants believing that their mortgagor was a man of substance well able to pay his debts.

Stress was laid upon defendants' failure to mention their security when making proof of their claim, of their delay in registering the mortgage, of their borrowing money on an assignment of it, after the day for payment had arrived, and their delay in taking steps to enforce it. They gave their explanation of these matters in a manner that satisfied the Chief Justice. His opinion as to their credibility was not affected thereby, and there is no reason for differing from him in that respect.

Plaintiff also insisted that, inasmuch as the assignment was registered before the mortgage, he was entitled to the benefit of the registry law. But plaintiff is not a subsequent purchaser for valuable consideration within the meaning of

the Registry Act so as to avail himself of its provisions with regard to priority of registration. As transferee of the assignor's property he occupies no higher position than the assignor. The assignment passes the rights of the assignor as he possessed them, and, save in so far as the Assignments and Preferences Act confers special rights, the assignee represents the assignor. As said by Osler, J.A., in Kitching v. Hicks, 6 O. R. 739, at p. 749, "the assignee is merely the legal representative of the debtor, with such right as he would have if not bankrupt, and no other." See also Robinson v. Cook, 6 O. R. 594. And, as regards the effect of the registry law, Cullver v. Shaw, 19 Gr. 599, is exactly in point, and has not been questioned in any subsequent case.

Appeal dismissed with costs.

MARCH 28TH, 1906.

C.A.

LONDON AND WESTERN TRUSTS CO v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Railway—Injury to Person Employed in Yard—Negligence —Contributory Negligence — Shunting Cars—Failure to Look—Functions of Judge and Jury.

Appeal by plaintiffs from judgment of Meredith, J., 6 O. W. R. 321, sub nom. London and Western Trusts Co. v. Père Marquette R. W. Co., dismissing an action brought under the Fatal Accidents Act, by the administrators of the estate of Joseph Navin, deceased, for the benefit of his widow and children, against defendants, to recover damages for his death, by their negligence, as alleged.

G. C. Gibbons, K.C., and C. A. Moss, for plaintiffs.

W. Nesbitt, K.C., and D. L. McCarthy, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.:—The facts of which evidence was given at the trial shortly are as follows. Deceased was yardmaster of the Grand Trunk Railway Company in their London yards.

On 24th December, 1904, 4 cars had been placed and were standing by themselves on a side line or track running in an easterly and westerly direction in that company's yard, which connected with defendants' line. These cars were intended to be transferred to that line. In the ordinary course of his duty the deceased was passing behind the most westerly car, and about two feet or so from it, to inspect the other side of one of the 4 and satisfy some doubts he had whether it was ready to be transferred. While in the act of crossing the track two cars loaded with coal came from the east, violently collided with the standing cars, and the deceased was knocked down, run over, and killed by the car behind which he was passing. The force of the collision was such that the standing cars were driven about a car and a half or 2 car lengths along the track, the westerly one became separated from the others and ran half a car length farther. The yard foreman Hill, who was accompanying the deceased, was also struck, but, not having actually got upon the track, escaped without serious injury.

The coal cars had been propelled upon the line by a flying switch or shunt from an engine under the control of an engine-driver of defendants. They were not intended to be connected with the standing cars nor to have gone further than just to clear a switch on defendants' line a considerable distance (said to be the width of two city blocks, whatever that may be) east of them. In their erratic course they crossed Colborne street and ran down nearly to Waterloo street, not far from which the 4 cars were standing. There was only one man in charge of the cars. He was handling a brake at the rear end, but unable to stop them. He saw Navin and Hill, but gave them no warning, not supposing they intended to cross the track. The runaway cars, not being accompanied by an engine, made very little noise. Hill said he did not hear them and knew nothing of them until the collision took place. He had no reason to expect them there or to look out for them. There was evidence that it was against the rules of the defendant company to make a flying switch, and that, if the cars had been moved in the proper way, deceased must have heard the noise of the engine and bell, and further that, when an engine was not being used, it was the duty of a man to be at the head end of the car in order to give warning. Hill, plaintiffs' witness, said that if they had looked to the east before passing on to the track they must have seen the advancing cars. They

did not do so because they did not hear any one working there and had no suspicion that cars were coming down nor any reason to expect that there would be; that in all his experience he had never known a drop switch thrown against that siding. He did not think it was risky going so close round the end of the cars; it was done every day. Asked whether, apart from drop switches, there was any reason why a car or engine might not be coming from the east on that track, the witness said it was the rule that they always came with the engine to the head-end. Q. But there was no reason why an engine might not be coming there? A. No. Q. And if there was no engine, no reason why cars should not come except that they did not usually? A. No, it is never done. Q. If an engine had been coming down, would you have heard it? A. Certainly, I could not have helped it. Other evidence indicates that this would be not only because of the noise of the engine itself, but also because of the ringing of the engine's bell. A witness for the defendants said that the deceased was standing on the track, i.e., not moving across it, with his back to the car at the time he was struck. Hill denied this. Other evidence was given for the defence minimizing the force of the collision, and opposed to plaintiffs' evidence as to the method of shunting cars, or that warning was usual or necessary when moving cars in the yard.

At the close of plaintiffs' case a nonsuit was moved for, on the grounds that there was no evidence of defendants' negligence and that it appeared that the accident had been caused by the deceased's own negligence. The Judge refused to nonsuit, and, after defendants had given their evidence, left the whole case to the jury, with a charge not unfavourable to defendants. They found, in answer to questions, that the negligence of defendants was the proximate cause of the deceased's death; that such negligence consisted in running the cars without an engine, at too great velocity, and in giving no warning of their approach; and that the deceased could not by the exercise of ordinary care have avoided injury.

The motion for nonsuit was renewed on both grounds. The Judge reserved judgment, and afterwards dismissed the action, holding that, while there was evidence of negligence on defendants' part in bringing the cars together with too

great force, yet that plaintiffs had "by their own case established contributory negligence on Navin's part," and were therefore not entitled to recover.

On the appeal plaintiffs contended that defendants' negligence had been proved; that the question of the deceased's negligence was, under all the circumstances, a question for the jury, and not for the trial Judge, and that on their findings judgment should have been directed for plaintiffs. Defendants renewed and relied upon the objections they had urged at the trial.

I am of opinion, with great respect, that the appeal should be allowed. The finding of the jury as to the negligence of defendants in sending down the coal cars in the manner they did, that is to say, with too great force, is well supported by the evidence. It was not a question of running them at too great a rate of speed, although it was the excessive speed which carried them to the point of impact with the standing cars. The question was whether, instead of taking care not to send them beyond the point where they were intended to be and where they could have done no damage to any one, defendants had not so carelessly managed the switch by the application of improper and unnecessary force that the cars had been sent far beyond that point to a place where they had no business to be, and thereby caused the accident. As to this I agree with the learned trial Judge. The facts speak for themselves. There was evidence of gross negligence on the part of the engine-driver, and I should have been surprised if the jury had found otherwise on this question.

The case is not within the line of such decisions as Batcheler v. Fortescue, 11 Q. B. D. 474, and Hutchinson v. Canadian Pacific R. W. Co., 17 O. R. 347. There the persons injured were practically bare licensees and took the risks incident to the positions in which they had placed themselves, where the defendants had no reason to expect that they would be. In this case the deceased was engaged in the performance of his ordinary duty, and, apart from the question of his alleged contributory negligence, the servants of defendants, who sent the cars flying down the line, ought reasonably to have anticipated that other persons might be engaged in the performance of duties upon the line with respect to cars standing thereon, such as coupling or examination, who might be injured if the operation of switching the cars was negligently conducted.

The other point, namely, whether it so plainly appeared upon plaintiffs' own case that the accident was attributable, not to defendants, but to the deceased man's own negligence, that there was nothing left for the jury to deal with, was the point most insisted upon by defendants. As to this I am compelled to take a different view from that which found favour with the trial Judge.

It cannot be laid down by this Court, in following any authorities by which they are bound, that, as a matter of law, a person who, in the exercise of a right or the performance of a duty, attempts to cross a railway track without looking to see whether a train is approaching, is guilty of such negligence as ipso facto to deprive him of the right to recover if he is struck by a train or car and injured.

The surrounding facts and circumstances, as disclosed in plaintiffs' own case, may be such as to leave no other reasonable conclusion open than that his own negligence, whether it be described as contributory negligence or mere folly and recklessness, was the proximate cause of the accident.

In a case of that kind no issue of fact is presented for the jury, and the trial Judge may properly rule that the plaintiff has failed to prove his case, either because he has not proved that the defendants' negligence caused his injury, or because he has proved that his own negligence was the cause of it.

As Lord Hatherley said in Dublin, Wicklow, and Wexford R. W. Co. v. Slattery, 3 App. Cas. 1155, "If contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think that there is anything left for the jury to decide, there being no contest of fact;" and in Wakelin v. London and South Western R. W. Co., 12 App. Cas. 52, the rule which is now, I take it, in practice, the settled rule, was thus stated by Lord Fitz-Gerald: "The propositions of negligence and contributory negligence are" (in cases like the present) "so interwoven as that contributory negligence is generally brought out and established by the plaintiff's witnesses. In such a case, if there be no conflict on the facts in proof, the Judge may withdraw the question from the jury and direct a verdict for the defendant, or, if there is a conflict or doubt as to the proper inference to be deduced from the proof, then it is for the jury to decide."

The facts in this case before us are very different from those which appeared in the cases chiefly relied on for the defence. In Danger v. London Street R. W. Co., 30 O. R. 497, to quote from the judgment of the Chancellor, the plaintiff "went into danger heedlessly and needlessly. Knowing that the car was coming behind him, he suddenly turns his horse upon the track when there was no time or opportunity to arrest the forward motion of the car." Ordinary care, he adds, would have prevented the accident "unless the driver had been (i.e., if the driver had not been) so utterly reckless as to match his horse against the electric motor."

In Phillips v. Grand Trunk R. W. Co., 1 O. L. R. 28 (D. C.), the plaintiff proved that he met with his injuries while, for his own convenience, walking in a place of extreme danger, namely, between the rails instead of in the space between the tracks, which was open and known to him. It was held that the accident was caused, not by the defendants' negligence, but by his own reckless act. Street, J., said, that if he had been merely crossing the line of rails the case must have been left to the jury, as it was necessary for the purpose of his business that he should cross them, though not that he should walk up the line between the rails. A similar case in principle is Dominion Steel Co. v. Oliver, 35 S. C. R. 535.

O'Hearn v. Town of Port Arthur, 4 O. L. R. 409, 1 O. W. R. 373 (D. C.), is Talbot v. Toronto Street R. W. Co., 15 A. R. 346, over again, and is not unlike Danger's case except in the fact of the plaintiff's actual knowledge that the car was approaching. But the plaintiff was familiar with the working of the railway, the times of the trips, and the rate of speed of the cars. He had expected the car, looked for it, and, not seeing it, had driven "for some distance alongside the track," and then, without looking again, had attempted to cross just in front of it at a moment when it was impossible for the motorman to avoid a collision.

Much reliance was placed by Mr. Nesbitt upon Elliott v. Chicago, Milwaukee, and St. Paul R. R. Co., 150 U. S. 245, but there also the plaintiff's knowledge of the approach of the train, which was being broken up and shunted almost before his eyes, was a material element in determining the question of his negligence.

In our case the cars were standing by themselves, and were not, so far as appears, intended to be immediately removed. There was no reason to expect that other cars would then be backed down against them. The deceased was familiar with the conditions under which work was to be done in the yard, and unless, which was not proved, cars were liable to be sent down negligently or otherwise at any unexpected moment, I cannot see why a jury might not properly infer that there was no want of ordinary care in crossing without looking up and down the track. I cannot say that I feel any doubt that the question was one for the jury to decide, under all the circumstances of the case. I think that their findings on both points are in accordance with the evidence and that the plaintiffs are entitled to judgment for the damages assessed.

I have said nothing as to the finding that no warning was given of the approach of the coal cars, but upon the evidence I think that was also a fact that the jury might properly take into consideration in dealing with the question of the deceased's negligence.

The cases of Morrow v. Canadian Pacific R. W. Co., 21 A. R. 149, Champaigne v. Grand Trunk R. W. Co., 9 O. L. R. 589, 5 O. W. R. 218, Smith v. London and South Eastern R. W. Co., [1896] 1 Q. B.; White v. Barry R. W. Co., 15 Times L. R. 474, S. C., 17 Times L. R. 644 (H. L.), Vallée v. Grand Trunk R. W. Co., 1 O. L. R. 244 (C.A.), are in favour of the plaintiffs' right to recover.

Appeal allowed with costs. Judgment to be entered for the plaintiffs on the findings of the jury for the damages assessed.

CARTWRIGHT, MASTER. MARCH 29TH, 1906

CHAMBERS.

GLASS v. GRAND TRUNK R. W. CO.

Foreign Commission—Terms—Costs—Delay in Applying—Cross-interrogatories.

Motion by defendants for a commission to examine at

Memphis, Tenn., the railway official with whom plaintiff made the contract under which the action was brought.

D. L. McCarthy, for defendants.

T. N. Phelan, for plaintiff.

THE MASTER:—It was conceded that the order must go. It was, however, contended that the costs of such examination should be given to plaintiff in any event. It was said that plaintiff would not attend on this examination unless this was a term of the order. In support of this view Ferguson v. Millican, 11 O. L. R. 35, 6 O. W. R. 661, was relied on. There, however, the terms were imposed for the reasons given by Osler, J.A. Nothing of the kind is to be found in the present case. The result of the judgment in Ferguson v. Millican is to confirm the principle that on these applications "all the circumstances of each particular case must be taken into consideration."

Here the evidence to be taken is most material to the defence. The witness is a foreigner, not in defendants' employment, nor in any way under their control.

Something was said at the argument about undue delay in making the motion as being a ground for imposing such terms as plaintiff desires. There does not seem to have been any inexcusable delay, nor has the action been conducted by plaintiff with any particular celerity.

It would, no doubt, be more satisfactory to have the evidence in every case heard by the tribunal before which the trial takes place. Where (as here) the commission evidence is on a point vital to the case, it must be a distinct disadvantage to defendants to be deprived of the oral testimony, instead of having the evidence given personally in open court.

. . .

The order will issue as asked.

If plaintiff is unwilling to incur the expense of being represented on the commission, he might, if so advised, deliver cross-interrogatories, as was done in Centaur Cycle Co. v. Hill, 7 O. L. R. 110, 2 O. W. R. 1025.

MABEE, J. MARCH 29TH, 1906.

TRIAL.

McLEOD v. LAWSON.

McLEOD v. CRAWFORD.

Contract—Mining Location—Discovery—Agreement between Prospectors — Declaration of Interests of Co-owners—Trust — Lease Taken in Name of one — Agreement by Lessee with Stranger—Construction—Ratification by Co-owners — Notice of Interests of Co-owners — License to Mine—Taking out Ore—Share in Proceeds—Injunction —Costs.

Actions for declarations that plaintiffs had interests in a certain mining location and to set aside an agreement between defendant Lawson and defendant Thomas Crawford, and for injunctions and other relief.

G. H. Watson, K.C., and J. B. Holden, for plaintiffs Murdoch McLeod and Donald Crawford.

R. McKay, for plaintiff John McLeod.

S. H. Blake, K.C., W. M. Douglas, K.C., and A. C. Boyce, Sault Ste. Marie, for defendant Lawson.

I. F. Hellmuth, K.C., and W. H. Irving, for defendant Thomas Crawford.

A. D. Crooks, for defendant John McMartin.

MABEE, J.:— . . . I find the facts as follows. There was an arrangement made between Murdoch McLeod, Donald Crawford, and Thomas Crawford, on Saturday 10th September, 1904, that they should go prospecting for mineral properties and divide equally any locations they might discover, each contributing his time and sharing in the expense of the venture. Thomas Crawford being unable to go, it was then arranged that Murdoch McLeod and Donald Crawford should proceed upon the trip, Thomas Crawford making some small payment to them in lieu of his accompanying them, and he to retain his interest with them in any properties they might discover. While the two were on their journey to the locality they had in view, they met

John McLeod, and it was arranged among the three, without the knowledge of Thomas Crawford, that John McLeod should join them in the trip and be entitled to share in any properties that might be located. On 16th September Murdoch McLeod made a valuable discovery upon the lot in question in the township of Coleman. A discovery post was planted, with the date of the discovery, the names of Murdoch McLeod as discoverer, and John McLeod and Donald Crawford as witnesses, written thereon, some lines were run, and the parties returned to New Liskeard, where they all lived. Murdoch McLeod and Donald Crawford reported to Thomas Crawford and informed him that John McLeod had accompanied them and that they had arranged with him that he should share in the property. Thomas Crawford assented to the arrangement, and John McLeod was afterwards taken by the other two to the office of Thomas Crawford, and the bargain about the property repeated in his presence, and thereupon it was finally agreed that these 4 persons should each be entitled to one undivided quarter interest in the lands. Later on it was arranged that the lease should issue in the name of Thomas Crawford; the name of the discoverer on the post was changed from Murdoch McLeod to Thomas Crawford; and application was made to the department through Mr. McEwen, a solicitor acting for all the parties, for the lease which afterwards issued to Thomas Crawford. At McEwen's office when McEwen was instructed to apply for the lease, it was stated in the presence of Thomas Crawford that John McLeod was entitled to a quarter interest, and McEwen says he was making the application for the lease upon behalf of all of these 4 persons. The $40 that went to the government for the lease was paid by Thomas Crawford, but there were unadjusted accounts between the parties.

The position taken by Thomas Crawford in this litigation is, that John McLeod was never entitled to any interest in this land, at least not to any interest that would diminish the one-third share that he, Thomas Crawford, was entitled to under the first agreement, and that, if John McLeod was entitled at all, it must be only to an interest in the two-thirds that Murdoch McLeod and Donald Crawford would acquire; but I find the arrangement to have been that each of the 4 was entitled to a quarter interest, and that the issue of the lease to Thomas Crawford placed him in the position of a

trustee for the other 3, to the extent of their three-quarter interest. . . .

It was argued that John McLeod had no interest whatever in the property, and that the other 3 were partners. I think they were not partners but co-owners. There was no arrangement made about working or developing the property, and I think the arrangement did not constitute a partnership, but put these 4 men in the position of co-owners each of an undivided quarter interest.

It was then contended that, if there was no partnership, the Statute of Frauds stood in plaintiffs' way. I think the evidence that Thomas Crawford held these lands as trustee as aforesaid is clear and complete, and, as I understand the law, the Statute of Frauds does not prevent the establishment of a trust and a declaration to that effect, where the parol agreement is satisfactorily established: Rochefoucauld v. Bertram, [1897] 1 Ch. 207; Hull v. Allen, 1 O. W. R. 151, 782.

In coming to the conclusion that the parties were not co-partners, I am not overlooking the statements in the affidavits that the land was held in partnership, but I do not think that affects or changes the original arrangement, and the solicitor who drew the affidavits said that the word "co-partnership" was his word, and he used it without distinguishing between it and "co-ownership."

No work had been done upon the property, but some conversation had taken place from time to time about development by the parties interested, down to 8th June, 1905, when the agreement which gives rise to this litigation was entered into between Thomas Crawford and the defendant Lawson. I find that prior to that date there had been no discussion about selling the property, and no authority had been given to Thomas Crawford to sell or in any way deal with the three-quarter interest belonging to the other co-owners.

On 8th June, 1905, Thomas Crawford, without consultation with or notice to Murdoch or John McLeod, entered into an agreement with Lawson whereby, in consideration of $200 in cash and a one-fourth share of the ore or mineral taken from the property, Lawson was to have the privilege of entering upon the location and mining ore and mineral and removing the same, from the date of the agreement up to 31st August; and the agreement states that, in the event

of Lawson making "a discovery of valuable ore or mineral on said land during said period, he shall have the privilege of having a new agreement entered into from and after the said 31st day of August, 1905, for the purpose of working the said location on the terms and conditions therein contained, so long as . . . (Lawson) may desire to work said location, and . . . (Crawford) hereby agrees to enter into such agreement." A recital in the agreement also states that Lawson "is desirous of entering upon said location for the purpose of prospecting the same for mineral and for removing ore and mineral therefrom."

As a matter of fact, Lawson, who had been camping in the vicinity of the location, had on 7th June made a very valuable discovery of silver upon the lands, had put up a discovery post, had seen the old discovery post, with Thomas Crawford's name on it, with the two witnesses, and had made an oral agreement with 2 or 3 other persons to share with them in the mineral to be taken from the property. On the evening of 7th June Lawson learned from a map he had in his camp that his discovery was upon the Crawford lot, and that a lease had issued for it. On the morning of the 8th Lawson went to Haileybury to the land agent there to try and make an application in his own name for the location, he contending that the alleged discovery upon which the lease had issued to Crawford was not a "valuable discovery" within the meaning of the mining regulations then existing, and taking the position that he was in truth the discoverer and entitled to a lease for that lot. He was, however, told that, as a lease had issued, an application could not be received from him, and that he had better seek out the lessee and treat with him. He then proceeded to New Liskeard, saw the lessee Thomas Crawford, and obtained the above agreement from him. Lawson made no disclosure to Thomas Crawford that he had been upon the property or had any special knowledge of it, and it was very strongly contended that he committed a fraud upon Thomas Crawford in obtaining the agreement from him, and it was said that he was bound to disclose to Crawford that he had been trespassing upon his land. The agreement is pointed to as shewing that Lawson by it was representing that he was "desirous of entering upon" it, and Lawson candidly admits that he intentionally avoided giving Crawford the information he had about the property, as he knew that would defeat him in obtaining it. Lawson takes the position that he

was dealing at arm's length with Crawford, and that there was no duty or obligation upon him to tell Crawford anything about his land, and that he made no misrepresentation of any kind to him. . . . I am of opinion that there was no legal fraud in what Lawson did, or in what he did not do, and that this case is quite distinguishable from Aaron's Reefs Limited v. Twiss, [1896] A. C. 273, Phillipps v. Homfray, L. R. 6 Ch. 670, and other cases cited. . . . I do not think a man becomes a trespasser by simply walking over a rocky wilderness and looking for minerals as Lawson did; but, even if it were technically trespassing, I do not think any obligation or duty was cast upon Lawson to inform Thomas Crawford of those facts. The latter knew the property was valuable, or at least he had made an affidavit, upon which his lease issued, that a valuable discovery of mineral had been made. If purchases were upset simply because the purchaser knew the property was more valuable than the vendor supposed, an intolerable state of affairs would be brought about. . . . I think the attack plaintiffs made upon the agreement, upon the ground that Lawson overreached Thomas Crawford and committed a fraud upon him, fails.

Plaintiffs then allege that Lawson entered into this agreement with actual notice that Thomas Crawford held the lease as trustee for them, Lawson having registered the agreement, or rather filed a caution in the Land Titles office, and pleading that registration and that he was a bona fide purchaser without notice of any alleged equities of the plaintiffs.

The evidence upon this, as well as upon other branches of the case, is conflicting, and, after much consideration, I have arrived at the conclusion that nothing took place at the time of the negotiations or the making of the agreement that can be fairly said to have been notice to Lawson that Thomas Crawford, who had the paper title, had not authority to deal with the property. . . . For all that was said, I think Lawson was justified in continuing the transaction, and that he had no notice or constructive notice of the claims now advanced, or that there was any probability of any claim adverse to the holder of the paper title afterwards arising, nor did sufficient take place to put him upon inquiry.

Before completing the agreement with Lawson, Thomas Crawford went to see Donald Crawford about it, and I think a fair inference as to what took place is, that, if not adopting the agreement Thomas was making, he did not tell

Thomas not to make it, nor did he take any steps to notify Lawson that he was not assenting, although he knew Lawson was negotiating, and had been in Thomas Crawford's office in the morning when Lawson was there. . . . Neither Murdoch McLeod nor John McLeod knew of the agreement until the day following.

On the evening of 8th June Donald Crawford, Murdoch McLeod, and Thomas Crawford met at the office of the latter, and the following ageeement was drawn up by Murdoch McLeod and signed by the three: "Thomas Crawford and Donald Crawford and Murdoch McLeod, all of the town of New Liskeard, agree to divide all profits and to pay all expenses equally in connection with the south-west quarter of the north half of lot No. 3, con. 4, Coleman."

John McLeod had no notice of this meeting, and both Murdoch McLeod and Donald Crawford say they insisted upon his name being put in the agreement—that they were not intending to shut him out—but that Thomas Crawford was persisting that John McLeod had no interest in the property and was not entitled to share. At the time this agreement was signed, both Murdoch McLeod and Donald Crawford knew of the Lawson agreement and of its terms, and that Lawson had given Thomas Crawford a cheque for $200. They discussed the particulars of the Lawson agreement, Thomas Crawford saying he suspected Lawson had made a discovery before he came to him for the agreement; Donald Crawford saying it was not every day that Thomas sold a mine; and winding up the proceedings with sending for a couple of bottles of beer. I think this was an intention to ratify the agreement . . . and that, if it had been acted upon, or if Lawson or Thomas Crawford had in any way changed his position in consequence thereof, it would have been binding upon Murdoch McLeod and Donald Crawford; but, nothing having been done by any one under it, and the existence of it not even coming to Lawson's knowledge, I think they were at liberty to recede from it and repudiate the sale to Lawson, which they did on the evening of 9th June, or early in the morning of the 10th, when they learned from one Clendenning of the valuable discovery that had been made by Lawson and his associates on 7th June.

I find the fact to be that, as put by Armstrong, they learned on the evening of the 9th of the discovery . . . that the matter was put in Mr. McEwan's hands about sunrise on the morning of the 10th, and that he filed the cau-

tion for them; they then took or attempted to take possession of the property, and from that time have been contending that Thomas Crawford had no authority to dispose of their interests in the mine.

Lawson went on developing under his agreement, and having taken out a quantity of valuable ore, plaintiffs Murdoch McLeod and Donald Crawford applied for an injunction, which was granted upon terms. Some ore has been sold, and a very large sum of money is in Court under the terms of the injunction order. A quantity of valuable ore has been taken out and is ready for sale, and much more is said to be in sight. . . .

There are no issues raised in the pleadings as between defendants Thomas Crawford and Lawson, and I am not to be regarded as dealing with their rights as between themselves. . . .

The rights, if any, of Lawson in the mine are derived entirely from the agreement of 8th June and the filing of a caution under the Land Titles Act.

The lease from the Crown to Thomas Crawford is for 10 years from 1st January, 1903, and was registered under R. S. O. 1897 ch. 138, by sec. 21 of which there is vested in the lessee the possession of the land for all the leasehold estate described in the lease; but sub-sec. 4 of sec. 21 preserves the interests and equities of the plaintiffs as between them and the defendant the lessee. Section 51 makes provision for the transfer by the lessee of the whole of his leasehold interest.

As I read the agreement on 8th June, it is a mere license to Lawson to prospect upon the land; then, in the event of his finding ore, provision is made for its division; it is not an assignment of the lease, in any sense of the word, and, I think, did not convey to Lawson any estate in the land itself, but a right of property only, as against Thomas Crawford, in such ore as he took out or removed under the terms of the agreement. It does not give to Lawson any exclusive right to the possession of the lands, nor indeed any exclusive right to mine ore, and I think in no way can it be regarded as an assignment or transfer of the title held by Thomas Crawford in trust for plaintiffs to defendant Lawson; and that, subject to whatever rights as between Thomas Crawford and Lawson the latter may have acquired by the agreement,

the estate is still in Crawford as trustee for plaintiffs. Under the agreement (5th clause) Lawson may at any time discontinue work on the claim, and notify Thomas Crawford, and thereafter the agreement becomes "null and void." No reconveyance from Lawson to Crawford would be necessary, as no estate in or title to the lands was in Lawson by virtue of the agreement, which itself terminated on 31st August. The 9th paragraph gave Lawson the right should he make a discovery of valuable ore or mineral on the lands "during the said period," that is, between 8th June and 31st August, to have a new agreement entered into "for the purpose of working the said location," all of which, I think, clearly shews the agreement to be merely personal in its character between the immediate parties to it: see Doe dem. Hanley v. Wood, 2 B. & Ald. 724; Sutherland v. Heathcote, [1892] 1 Ch. 475; Lynch v. Seymour, 15 S. C. R. 341; Haven v. Hughes, 27 A. R. 1.

Again, if the agreement could in any way be regarded as a sub-lease, or assignment of the mining lease, it expired on 31st August, and Lawson's rights were then confined to Crawford's contract to give him an agreement to work the location. As against plaintiffs, this is a contract that, upon old and well established principles, could not be specifically enforced, and Walsh v. Lonsdale, 2 Ch. D. 9, relied upon by Mr. Blake, I do not think applies, in the view I have taken of the construction of the agreement.

I am, as far as possible, refraining from expressing any opinion upon the rights of Lawson and Thomas Crawford as between themselves. Litigation is pending between them.

. . . .

I have not dealt with many features of these cases presented at the trial, nor have I commented upon much of the evidence, nor referred to many of the able arguments advanced by counsel, as, in my view of the cases, the foregoing is sufficient to dispose of the matters presented by the pleadings.

In the result, therefore, plaintiff John McLeod is entitled to a declaration that he is the owner of an undivided one-fourth interest in the mining location in question, an injunction restraining defendant Lawson from mining under the agreement of 8th June, and (if plaintiff desires) an account of the ore removed from the property. If, however,

plaintiff John McLeod accepts the amount in Court in McLeod v. Crawford as the proper sum received from the sale of such ore, he may take, in lieu of an account, one-fourth of the money at the credit of that suit. Plaintiffs Murdoch McLeod and Donald Crawford are entitled to a declaration that they are each the owner of an undivided one-fourth interest in the location in question, an injunction restraining defendant Lawson from continuing to mine upon the property under the agreement of 8th June, and an account from Lawson and Thomas Crawford of the amount of ore removed from the mine and the sum or sums received or that should have been received for it, or, in the alternative, one-fourth each of the moneys in Court, as they may elect. Defendant Lawson may have a reference, if he desires to contend that more moneys have been paid into Court than should have been paid in by him, or that there are expenses of mining or otherwise that might be chargeable against plaintiffs, but at his (defendant Lawson's) risk as to costs of such reference, which will be reserved till after report.

As most, if not all, of the parties to both actions have sold or assigned or in some way dealt with their interests pendente lite, and some, at least, of the purchasers are carrying on the litigation, there will be no costs to or against any party to either action.

MORRISON, Co.C.J. JANUARY 31ST, 1906.

SEVENTH DIVISION COURT, PRINCE EDWARD.

ARTHUR v. CENTRAL ONTARIO R. W. CO.

Railway—Animals Killed or Injured on Track elsewhere than at Crossing—Animals Wrongfully at Large on Highway within Half-mile of Crossing before Getting on Track—Liability of Railway Company—Railway Act, 1903, sec. 237, sub-sec. 4—Change in Law.

Action to recover the value of a horse of plaintiff which was killed on defendants' railway track on 25th February, 1905.

T. A. O'Rourke, Trenton, for plaintiff.

E. G. Porter, Belleville, for defendants.

MORRISON, Co.C.J.:—The plaintiff had for some weeks previous to the happening of the accident been in the habit of watering his stock of animals at a hole cut in the ice on Lake Consecon, adjoining his property in the township of Hillier. On the day of the accident he proceeded as usual to do so again, riding on the back of one horse, leading by a halter another horse, and allowing two other horses, which were unhaltered, to follow, and driving his horned cattle, 8 or 9 in number, before him. Having reached the water-hole, he dismounted and watered the animals. In attempting to remount, the 4 horses broke away from him, reached the highway, and, at the intersection of such highway with the railway, less than one-half mile distant, strayed from the highway on to the railway track, where one of the two horses which were unhaltered was struck by a train of defendants and so seriously injured that he had to be shot.

The horses had been out of sight and out of the control of plaintiff, and on the highway within a half-mile of the railway crossing, for probably an hour, and certainly more than 20 minutes, before the happening of the accident.

The action was tried with a jury on 26th January instant, and under the Division Courts Act, sec. 175 (a) (62 Vict. ch. 11, sec. 9), I left to them questions to be answered. These questions and the answers returned by the jury thereto were as follows:

1. Were the plaintiff's horses permitted to be at large on the highway within a half-mile of the railway crossing contrary to the provisions of sub-sec. 1 of sec. 237? Yes.

2. At the time of the accident, were there cattle guards at the railway crossing where the horses got from the highway on to the property of the railway company? No.

3. At what point on the railway was injured the horse which was afterwards in consequence shot. Was it at the railway crossing or elsewhere? On the railway, 50 or 60 rods from the crossing.

4. Did the plaintiff's horses get at large through the negligence or wilful act or omission of the plaintiff? No.

5. If the plaintiff's horses did get at large through the negligence or wilful act or omission of the plaintiff, in what did such negligence or wilful act or omission consist? (No answer requisite.)

6. What was the value of the horse killed? $60.

Upon the evidence, the admissions of counsel at the trial, and the law, as I stated it to the jury, there was only one of these questions as to which the jury could have properly returned a different answer than that they did. That question is the 4th, which was left entirely in the hands of the jury upon the evidence, subject to the usual definition, which I gave the jury, of what constitutes legal negligence.

On these findings, I entered judgment for the plaintiff for $60 and costs.

At the commencement of the case, upon my suggestion, and indeed at my request, counsel signed a consent that whatever might be the judgment in the action, the unsuccessful party should have the right, under sec. 154 (2) of the Division Courts Act, to appeal to a Divisional Court of the High Court of Justice. Accordingly at the close of the case, counsel for the defendants, under Rule 283, applied viva voce for a new trial, which was refused.

In view of the findings of the jury, there remains (as I understand) just this one legal question for determination in appeal, whether sub-sec. 4 of sec. 237 of the Railway Act, 1903, which came into force on 1st February, 1904, changed the pre-existing law as to the liability of railway companies for animals wrongfully at large on a highway within a half-mile of a railway crossing, which are killed or injured, not at the railway crossing, in which case admittedly there would be no liability, but elsewhere than at the crossing, on the property of the company. The contention of the defendants is that the companies are not responsible for the loss of animals so wrongfully at large, whether killed or injured at the crossing or elsewhere, which apparently was the law before the late Act. The latest pronouncement to this effect is, I think, to be found in the judgment of Gwynne, J., in James v. Grand Trunk R. W. Co., 31 S. C. R. at pp. 425-6.

According to my judgment, the law has in this respect been changed by the Act of 1903. The sections affecting the question are 199 and 237, which may be epitomized thus. Section 199 imposes on the companies the duty to erect and maintain cattle guards "suitable and sufficient to prevent cattle and other animals from getting on the railway." Section 237 imposes on the owners of animals the duty not to permit them (except under certain conditions) to be at large upon the highway within a half-mile of a railway crossing

(sub-sec. 1), under the penalties of their being liable to be impounded (sub-sec. 2), and if killed or injured at the crossing that the owner shall have no redress (sub-sec. 3), but if killed or injured "upon the property of the company," which I take to mean elsewhere than at the crossing, the owner "shall be entitled to recover the amount of such loss or injury against the company," unless the company establishes, etc. (as in sub-sec. 4).

Sub-section 4 of sec. 237 is a new enactment, substituted for 53 Vict. ch. 28, sec. 2, which was a substitution for sec. 194 (3) of the Railway Act of 1888, which again was a substitution for sec. 13 (2) of the Railway Act, R. S. C. ch. 109, under which, according to Rose, J., in Nixon v. Grand Trunk R. W. Co., 23 O. R. at p. 127, "the liability of a railway company for damages to animals on the railway where fences or cattle guards were not constructed or maintained was absolute and unconditional."

Its origin then, seems to indicate that sub-sec. 4 comprises whatever provision it was intended the present Act should contain as to the liability of railway companies for neglect in the construction or maintenance of fences and cattle guards.

The several provisions of sub-sec. 4 and the other three sub-sections of sec. 237 are interdependent and to be read and construed together. The whole section is a consolidation and amendment of prior enactments.

Sub-section (61) of sec. 7 of the Interpretation Act, R. S. C. ch. 1, as amended by 53 Vict. ch. 7, provides: "Parliament shall not, by . . consolidating or amending (an Act) be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act or upon similar language."

And in Bank of England v. Vagliano, [1891] A. C. 107, Lord Herschell, at pp. 144-5, thus expresses the rule: "I think the proper construction is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it probably was intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

Read and construed according to these rules, that is to say, without regard to the pre-existing law and simply to ascertain the meaning and effect of the words used, what was the intention of the framer of these several sub-sections? Surely this, that the place or point on the railway at which the injury was done should fix the rights and liabilities of the parties.

The contention of the defendants virtually is, that sub-sec. 4 does not relate to or include cases within sub-sec. 1. The words of sub-sec. 4 are "at large upon the highway or otherwise." These are wide enough to include the whole highway, and do not warrant the exclusion of that portion of the highway which is within a half-mile of a railway crossing.

Then the words at the end of the sub-section, those after the semi-colon, as to animals not in charge of some competent person, must relate back to sub-sec. 1, where the same words are used.

It seems to me very clear, then, that sub-sec. 4 must be construed as including animals wrongfully at large on a highway, within a half-mile of a railway crossing, which are killed or injured, not at the crossing, in which case there can be no recovery because of sub-sec. 3, but killed or injured elsewhere on the property of the company than at the crossing.

And the reason for the distinction is obviously this. In the case of animals so wrongfully at large and killed or injured at the crossing, there can be no recovery (sub-sec. 3), because the owner himself was at fault in permitting them to be so at large; but if killed or injured on the property of the company elsewhere than at the crossing, there may be recovery unless, etc. (sub-sec. 4), because the company was at fault in not erecting and maintaining cattle guards "suitable and sufficient to prevent animals from getting on the railway:" sec. 199 (a) (2).

In such latter case, the animals, although wrongfully at large, might and probably would have escaped but for the neglect of the company.

[An appeal by the defendants from this judgment was heard by a Divisional Court composed of MULOCK, C.J., ANGLIN, J., CLUTE, J., on the 20th March, 1906, and was dismissed with costs.]

CARTWRIGHT, MASTER. MARCH 31ST, 1906.

CHAMBERS.

WILLIAMSON v. PARRY SOUND LUMBER CO.

Trial—Postponement—Grounds for Motion—View of Locus in quo Necessary for Defence—Impossibility of View at Date of Proposed Trial.

Motion by defendants to postpone the second trial of the action, which was brought to recover damages for injuries received by plaintiff while working in defendants' saw mill in August, 1905. At the first trial, in November, 1905, plaintiff was nonsuited; but on 27th February, 1906, a Divisional Court set aside the nonsuit and directed a new trial. On 16th March, 1906, plaintiff gave notice of trial for a sitting beginning on 9th April, 1906.

W. R. Smyth, for defendants.

J. E. Jones, for plaintiff.

THE MASTER:—In support of the motion it was argued that it was essential to defendants' case to shew by actual working of the machinery that plaintiff's accident was entirely self-caused. It appears from the material that the mill is shut down in the autumn for refitting and necessary repairs, and it is said that it cannot be in running order before 16th or 20th April. It was, therefore, argued that the case was within the principle of giving to both parties every reasonable facility for a fair trial, and that it is on this ground that a postponement is almost of right when asked for because of the absence or illness of a necessary and material witness. It was contended that this motion was analogous to one based on such absence. I am not, however, convinced that this is so. Plaintiff is admittedly a poor man, who has been seriously disabled, and who will probably have a hard battle if the trial is deferred. He will also run the risk of losing his witnesses, and the facts will almost inevitably grow dim in their recollection.

It is to be remembered also that defendants in moving for a nonsuit took the risks incident to such a course. If they felt so strongly that plaintiff had no case as they now

say they do, they could safely have let the case proceed, and the jury could have viewed the mill in operation, if a view were thought to be a useful proceeding. They preferred to close the case without putting in a defence. If this has now proved to have been a mistake, I cannot see why plaintiff should be required to wait until defendants are ready to go on. . . .

Motion dismissed; costs to plaintiff in the cause.

MARCH 31ST, 1906.

C. A.

REX v. BROOKS.

Criminal Law—Evidence—Depositions of Witnesses at Trial of another Person—Consent—Scope of—Improper Reception—New Trial—Substantial Wrong or Miscarriage.

Case stated by the Judge of the County Court of Ontario.

E. F. B. Johnston, K.C., for the prisoner.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A., MULOCK, C.J.), was delivered by

OSLER, J.A.:—The case and the evidence returned therewith shewed that one Marshall Harmon was convicted on 10th September, 1904, for an offence against sec. 210 (2) of the Criminal Code, 1892, for having neglected to provide the necessaries of life, to wit, medical care and attendance, for his wife, he being then under a legal duty to provide the same, and his wife being unable by reason of sickness to do so. The conviction was afterwards affirmed by this Court.

On 12th December, 1905, the prisoner Eugene Brooks was brought before the Judge of the County Court of Ontario, exercising criminal jurisdiction under the provisions of the Code, charged with having on 30th July, 1904, unlawfully aided and abetted and assisted and counselled the said Marshall Harmon not to regard his said alleged duty to his wife,

who thereupon did unlawfully omit, without lawful excuse, to provide his wife with such necessaries, to wit, the necessary medical care, treatment, medicine, and assistance, whereby the death of his said wife was caused. There was a second count charging that the wife's life was endangered by reason of the aiding, abetting, counselling, etc., of the prisoner.

The prisoner, having elected to be tried without a jury before said Judge, was arraigned on these charges, and pleaded not guilty.

On 29th December, 1905, at Whitby, the trial was proceeded with, and the prosecuting counsel put in and filed a letter from a professional gentleman in Toronto, who had acted as counsel for Harmon, and who had also, as it would seem, been retained to act for the prisoner at his trial. The letter was addressed to the Crown Attorney at Whitby, and was in the following terms: "Toronto, 19th December, 1905. Dear Sir:—Rex v. Eugene Brooks. I find that I will (sic) be unable to go on with this trial on the 28th December owing to another engagement. Would you kindly see the Judge and ask him if he can take it on Saturday the 6th January in the morning? I am quite willing to accept the evidence of the family, in particular those who gave evidence at the Harmon trial, and that it would not be necessary for you to call them, nor the evidence of the doctors as to Mrs. Harmon's condition. This will clear the case down to the evidence of Harmon's letters and so forth. Kindly let me hear from you."

What reply was sent to this letter does not appear, nor whether it was ever arranged that the offer made therein was to stand good if the proposed adjournment of the trial to 6th January was not acceded to. The trial was in fact proceeded with on 29th and 30th December, 1905, continued and concluded on 6th January, when the prisoner was convicted, and on 8th January sentenced to 6 months' imprisonment in the Central Prison with hard labour.

The prisoner was represented at the trial by counsel—not the writer of the letter referred to.

Among the depositions of the witnesses examined at the trial of Harmon, which were put in and used at the trial of the prisoner, on the assent assumed to have been given by that letter, were those of one Charters, an undertaker, and a Mrs. Thom, neither of whom was a member of

the family nor a relative of the deceased. No objection was taken to the reading of these depositions as not being within the terms of the consent, nor to the use of any of them at a trial taking place at an earlier time than that at which the writer had proposed that they should be used, apparently as a concession, in order to obtain the desired postponement.

The trial Judge having refused to reserve a case, leave to appeal was recently granted by this Court, on the grounds of the improper reception of evidence, and that there was in fact no evidence of the commission of the offence charged in the indictment. . . .

The first objection, though somewhat faintly pressed on the argument, appears to us to be fatal to the conviction.

It is not a little singular that, although the prisoner seems to have been represented by counsel at the trial, no consent by that counsel to the admission of the depositions taken at Harmon's trial, appears to have been given or asked for. The only thing relied upon by the Crown as justifying or authorizing that method of proving some of the most important elements in the charge against the prisoner, was the letter . . . above referred to. In the absence of any explanation, I should have thought it reasonably clear from the terms of that letter, that the offer to admit the depositions was made as a concession for the postponement of the trial to suit the writer's convenience until 6th January, and, that not having been acceded to, that the trial ought to have been proceeded with and the case proved against the prisoner in the regular way.

It is, however, enough to say, even assuming that the consent was wide enough to authorize the admission of the depositions specified therein at a trial taking place at any time, yet some depositions, those namely of Charters and Thom, were put in which were not covered by it. These ought to have been rejected by the trial Judge. That of Charters was perhaps unimportant, but the same cannot be said of Thom's. It was urged that no objection was taken by counsel, and that is true, but, if a mistake is made by counsel, that does not relieve the Judge in a criminal case from the duty to see that proper evidence only is before the jury: The Queen v. Gibson, 18 Q. B. D. 537; The Queen v. Saunders, [1899] 1 Q. B. 490; Regina v. Petrie, 20 O. R. 317.

Section 690 of the Code permits any accused person on his trial for any indictable offence, or his counsel or solicitor, to admit any fact alleged against the accused so as to dispense with proof thereof: Regina v. St. Clair, 27 A. R. 308. This, it need hardly be said, does not warrant the admission of improper evidence nor prevent the prisoner from objecting to it, though his counsel may, by oversight or otherwise, have omitted to do so at the proper time.

The trial of this case seems to have been conducted with a degree of laxity very undesirable in any criminal case, and especially objectionable in one of a comparatively important nature, where precision in allegation and proof ought to have been required.

As regards the merits of the case, we cannot say that, if the facts disclosed by the depositions of the witnesses in Harmon's case had been regularly proved, there would not have been some evidence on which the Judge might have convicted the prisoner.

The charge is one of a very serious nature, and the conduct of the prisoner and of Harmon, however earnest their belief, very much to be discouraged, as dangerous to the community at large. While, therefore, we are obliged to quash the conviction. on the ground of the reception of improper evidence, we direct a new trial. It may be that the Crown, taking into consideration the fact that the prisoner has already undergone several months' confinement, will, on application, think it proper to direct a nolle prosequi.

The only question stated in the case which seems necessary to be answered is the second, as to which our answer is that the depositions of Charters and Thom were not properly received.

We think the case not one for the application of sec. 746 (f) of the Code, being unable to say that no substantial wrong or miscarriage was occasioned by the improper admission of such evidence.