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APRIL 24TH, 1902.

DIVISIONAL COURT.

BASTON v. TORONTO FRUIT VINEGAR CO.

Contract—By Correspondence — Proposal — Acceptance — "Final Arrangements."

Carlile v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, distinguished.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., dismissing the action.

S. B. Woods, for plaintiff.

No one appeared for defendants.

MEREDITH, C.J.—The action is brought to recover damages for the company's refusal to carry out an alleged contract between the plaintiff and them for the purchase by them from her of the whole of her crop of cucumbers grown in the year 1900.

The company had purchased the plaintiff's crop in 1899, and the agreement for that year is in writing and contains full particulars as to the quantity of ground to be planted, the times for delivery, price, quality, etc.

On 5th May, 1900, the plaintiff wrote to the company as follows:—"Are you going to buy cucumbers this year at Stouffville, and what are you going to pay for them? Please let me know, as I want to make a contract with some one for them, as I want to put in quite a few this year. As you have always dealt fair with me, I would like to sell you some more this year. Please let me know by return of mail." The company replied by post card on the 6th May, as follows:—"Yours of the 5th instant to hand, and in reply may say we are pleased to learn you are going to do a lot of growing this year, and will be pleased to take all you grow at same price as last year. We will see you later and make final arrangements." The plaintiff subsequently

planted six acres with cucumbers and delivered several loads to the company, who paid for them, but it is clear, upon the evidence, that they were not received by the company as under the alleged contract or any contract with the plaintiff, but were received and paid for as cucumbers offered for sale to the company's agent at Stouffville, and purchased by him on their account.

I do not think that the post card amounted to a proposal to purchase the crop, which, according to plaintiff's letter, she intended to grow that year, on the terms mentioned in the post card, and that the delivery of the cucumbers amounted to an acceptance of that proposal, which then remained open for acceptance by plaintiff.

Carlile v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, is, I think, plainly not applicable: see remarks of Bowen, L.J., on pp. 269 and 270.

It is plain that the company required further notification by the plaintiff, and the post card was not an offer open to acceptance by a mere affirmative answer.

Brogden v. Metropolitan R. W. Co., 2 App. Cas. 666, and Clarke v. Gardiner, 12 Ir. C. L. R. 472, do not help the plaintiff. The principle of the latter case is wholly inapplicable to this case.

FERGUSON, J., concurred.

Appeal dismissed with costs.

T. H. Lennox, Aurora, solicitor for plaintiff.

St. John & Ross, Toronto, solicitors for defendants.

APRIL 10TH, 1902.

C. A.

WHITE v. MALCOLM.

Specific Performance—Contract for Sale of Land—Correspondence—Statute of Frauds—Agent.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., in action to enforce specific performance of an alleged agreement by defendant to sell to plaintiff five acres of land in the town of Owen Sound. The Chief Justice held that there was not a binding contract to satisfy the Statute of Frauds, and, also, that the subject matter of the purchase was unascertained, the offer being for park lot 6, which contains 18 acres and for which there had been no negotiation.

H. G. Tucker, Owen Sound, for appellant.

A. G. Mackay, Owen Sound, for defendant.

OSLER, J.A.—One Rutherford, who appears to have been desirous of bringing about a sale in order to obtain a commission for himself, had been asked by the plaintiff if he had the sale of the land in question. In point of fact Rutherford had not, and on 8th February, 1901, he wrote to defendant, who was in Winnipeg, stating that he had an inquiry about the land, and . . . after some correspondence, Rutherford wrote defendant on 18th April that the party who wanted to buy would go $100 over his former offer of $2,000, and asking defendant to wire if he concluded to accept. The defendant made no reply, and in fact no such offer of $2,100 had ever been made by the plaintiff.

On the 29th April the plaintiff wrote and handed to Rutherford the following offer:—"I, William J. White, hereby offer to William M. Malcolm, of the city of Winnipeg, the sum of $2,100 cash for park lot No. 6, 2nd range, in the town of Owen Sound."

This was the first and only time the plaintiff had made such an offer; it was not communicated to the defendant; but on the same day Rutherford telegraphed to defendant: "Will $2,100 cash take park lot. Answer." And on the same day defendant replied: "Accept offer, but will not sell the house now." The latter part of the telegram referred to other property of defendant, which Rutherford had some time before been specially authorized to sell. Rutherford shewed this telegram to the plaintiff, but nothing further passed between the parties until the 2nd May, when Rutherford wrote defendant enclosing for execution by defendant and his wife a conveyance which he had at his own expense caused to be prepared by a solicitor. In this letter he says: "Mr. Wm. J. White came to me and offered $2,100, as I telegraphed you, and which you replied I was to accept. Mr. White thinks the offer he made to you a very good one, but it is his own, and he will have to be satisfied." The defendant declined to negotiate further, and on the 11th May this action was brought. Throughout the correspondence Rutherford was not the agent of either party for the purpose of making a contract except in so far as he may have been made the defendant's agent by the latter's telegram of the 29th April. It is doubtful whether that ought to be read as meaning an acceptance by the defendant himself—I accept offer—referring to the offer untruly stated in Rutherford's letter of the 18th April to have been made on the previous day, or as a direction to Rutherford to accept that or any other offer which might be made to buy at the

price of $2,100. If it means the former, there was no offer in existence to which the acceptance could be applied, and, even if Rutherford's letter had stated the facts truthfully, the name of the proposed purchaser had not been given, and the telegram cannot refer to plaintiff's written offer of the 29th April, because the defendant was in ignorance that any such offer had been made. On the other hand, if the telegram is to be regarded as a direction to Rutherford, it is no more than an answer to his inquiry whether the defendant will sell at the price named. It contemplates that a contract will be subsequently entered into: Harvey v. Facey, [1893] A. C. 552: and is an authority to Rutherford to accept any offer which may be made to buy at that price. Rutherford never acted effectively upon that authority, as he did not accept the plaintiff's offer in writing. In no point of view, therefore, is there any valid contract in writing between the parties sufficient to satisfy the Statute of Frauds, and the judgment of the learned trial Judge should be affirmed on the ground on which he rested it. The evidence suggests more than one other difficulty in the plaintiff's way, but into them it is not necessary to enter.

ARMOUR, C.J.O., MACLENNAN and MOSS, JJ.A., concurred.

Appeal dismissed with costs.

H. G. Tucker, Owen Sound, solicitor for plaintiff.

McKay & Sampson, Owen Sound, solicitors for defendants.

APRIL 10TH, 1902.

C. A.

BONNVILLE v. GRAND TRUNK R. W. CO.

Railways—Injury to Person Crossing a Main Street of a Town having Eight Tracks—High Degree of Care which should be Exercised by Defendants—Negligence of Defendants—Proximate Cause—To Fasten Liability on Defendants Immaterial to Shew that Tracks not Lawfully upon the Street.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., in favour of plaintiff in action for damages for injuries sustained by plaintiff who was run down by a box car which was being shunted by an engine along one of the eight tracks of defendants crossing King street in the town of Midland. The Chief Justice held that the defendants, having so many tracks in such a busy locality,

without apparent authority, were certainly bound to exercise a very high degree of care, even if no greater legal responsibility attached by reason of the alleged unauthorized use of the highway; that the negligent and illegal conduct of the defendants was the direct and proximate cause of the plaintiff's injury; that plaintiff had not been guilty of negligence; and that, even if he had, the defendants could in the result, by the exercise of ordinary care and diligence, by having the car under control, have avoided the accident.

W. Nesbitt, K.C., and H. E. Rose, for appellants.

E. F. B. Johnston, K.C., for plaintiff.

ARMOUR, C.J.O.—I do not think that the conclusions arrived at by the Chief Justice depend at all upon the question whether or not all of the eight tracks of the defendants' railway crossing the main street of the town, along which the plaintiff was lawfully walking when he was injured by the cars of the defendants, were lawfully upon the street, for his conclusions are supported by the evidence, assuming that they were there lawfully. The care that the defendants were bound to take in maintaining all these tracks across the main street, and running and shunting their cars upon them, was a care commensurate with the danger occasioned thereby to those passing along the street, and such care, the Chief Justice rightly held, the defendants did not take. Under the circumstances the plaintiff was not guilty of negligence.

OSLER, J.A.—The plaintiff was rightfully passing along the highway, and in doing so attempting to pass over the eight lines of track. I do not assent to the view that these tracks were wrongfully there, or laid down without authority, but it is not necessary to determine that, if it has not been already decided. But, even though they were lawfully there, the public had the right to cross them in going about their lawful business . . . and it was incumbent on defendants—so at least a Judge and jury might find—to take special precautions against running into persons passing over the tracks, more particularly when the work of shunting cars was going on, an operation which, from the comparative slowness and quietness with which it is done, does not convey to persons on or near the tracks the same warning which a large train in motion would do. It appears to me that when the plaintiff was seen by the person in charge of the car which hurt him, while some 200 feet away, and standing still, apparently unconscious of the approach of

the car, it was the duty of the former to so manage it that it should not run against him. He had plenty of time to stop the car, and in considering whether it was reasonable that he should have done so, the simple nature of the operation he was engaged in is to be regarded, as the car could very easily have been stopped and the work delayed for a time without inconvenience to any one. Instead of doing so or reducing the speed so as to bring the car more under control, he seems to have let it go on, hoping that the plaintiff would move, until it was too late to avoid collision. I do not think that the trial Judge was wrong in holding that for this the defendants must answer. . . . Whatever may be said of plaintiff's negligence, the proximate cause of the accident was defendants' negligence. Perhaps the plaintiff was standing too near the track. I do not think he was consciously doing so. But he was not aware of the approaching car, while the person in charge was aware of him and might have avoided the collision by stopping it in time.

MACLENNAN and MOSS, JJ.A., concurred.

Appeal dismissed with costs.

John Bell, Belleville, solicitor for appellants.

R. D. Gunn, Orillia, solicitor for respondent.

MACMAHON, J. APRIL 19TH, 1902.

TRIAL.

IROQUOIS ELECTRIC LIGHT CO. v. VILLAGE OF IROQUOIS.

Municipal Corporation—Electric Light Plant—Compulsory Expropriation—"Have Supplied"—R. S. O. ch. 223, sec. 566, sub-sec. 4, as amended by 62 Vict. (2) ch. 26, sec. 35, sub-sec. 4 (a).

Action by the plaintiffs (the company and Patrick Keefe) for a mandatory injunction requiring defendants to make an offer to purchase the electric light plant in the village of Iroquois belonging to the plaintiff company, and, if the offer be not accepted, then for the appointment of an arbitrator for the purpose of valuing the same under the Municipal Act to determine the compensation to be paid for said plant and to compel defendants to take it over at the value so fixed.

D. B. Maclennan, K.C., and C. H. Cline, Cornwall, for plaintiffs.

A. B. Aylesworth, K.C., and Adam Johnston, Morrisburg, for defendants.

MacMahon, J.— . . . In 1895 a by-law authorizing a contract with the plaintiff Keefe, who had been lighting private residences by contract, and some streets by private subscription, to add one more light, was submitted to the ratepayers and defeated. In July, 1897, the Dominion Government expropriated the land occupied by Keefe's plant, and he ceased to operate his works. In December, 1897, the defendants made a lease to Keefe for ten years from 1st January, 1898, for $1 a year, of the grounds, etc., belonging to the intake pipe and wheel pit on the north bank of the canal in the village of Iroquois. . . . The lease contains a covenant that Keefe shall sell, on 6 months' notice to the village, at a valuation, the leased premises and improvements, and if the parties cannot agree as to value it is to be determined by arbitration. . . . The wheel pit had been built for defendants by one Buchanan, who assigned his claim to Keefe, who recovered a judgment for $1,950 against defendants, who paid the amount. . . . In December, 1898, the Government cut off the water supply. The plaintiff company was incorporated on 3rd May, 1901. The plaintiff Keefe and his two sons are the provisional directors. The plant which plaintiffs desire to have purchased consists of two dynamos, etc., which, since 1897, have been stored in a warehouse. . . Keefe could not now sell the wheel pit to the defendants because they became owners when they paid the judgment for the amount of Buchanan's claim for building it for them.

R. S. O. ch. 223, sec. 566, sub-sec. 4, as amended by 62 Vict. (2) ch. 26, sec. 35, sub-sec. 4 (*a*), cannot apply because the plaintiff company has only been in existence since 3rd May, 1901, and never supplied electric light to the village, and the plaintiff Keefe has not, as an individual, supplied it for nearly nine years. More apt language might have been used in cl. (*a*), but the words "have supplied" must, having regard to the design and scope of the Act, mean that the company or individual has supplied and is supplying electric light for street lighting at the time notice is given by the municipality of the price at which it offers to purchase the works; and that the Act intended that the municipality should only be called on to fix a price to be offered for works and property that it could at once utilize as an existing going concern, is apparent from the language of cl. (*a* 3) of the amending Act, relating to the duties of the arbitrators as to price, which prevents them from awarding anything for prospective profits or franchises.

The statute gives neither Keefe nor the company the right to compel the village to fix a price and proceed to arbitrate in respect to the value of the chattels which he owns, forming part of what was once an electric light plant, and the lease gives no added rights to the plaintiffs or to either of them.

The action must be dismissed with costs.

ROBERTSON, J. APRIL 22ND, 1902.

TRIAL.

McLAUGHLIN v. MAYHEW.

Specific Performance—Verbal Contract—Possession by Purchaser—Part Payment—Conveyance Executed but Held for a Time as Security for Balance of Purchase Money.

McClung v. McCraken, 2 O. R. 609, 5 A. R. 596, distinguished.

Action tried at Bracebridge, brought to compel specific performance of an agreement for the purchase of a lot in the village of Huntsville containing one-eighth of an acre.

E. E. A. DuVernet and O. M. Arnold, Bracebridge, for plaintiff.

R. D. Gunn, Orillia, for defendant trustees.

D. Grant, Huntsville, for defendants Reid and Ware.

ROBERTSON, J.—McClung v. McCraken, O. R. 609, 5 A. R. 596, is clearly distinguishable, and the plaintiff is entitled to judgment. There was here an express parol agreement not only proved, but admitted; the parties to it were named; the owner of the property was the Lodge of I. O. O. F., of which defendants Mayhew, Wieler, and Whaley were the trustees, who were authorized by resolution of members of the lodge to sell, etc.; part of the purchase money was paid; the plaintiff entered into possession and was recognized as the purchaser by the trustees sending the collector to him for payment of taxes for that year, although assessed to the lodge as owner, and such taxes were paid by the plaintiff, who was assessed for taxes the following year. So, apart from the conveyance in this case, these facts are undeniable; and then the conveyance was signed by the proper parties; the plaintiff was named therein; the consideration money was expressed; the property was fully described; and by mutual assent, caused by the delay of the vendors in preparing the deeds, the vendors agreed that the payment of the balance of purchase money

should remain for a short time, holding the deed in the meantime as security for the balance of the purchase money. Refer to Chinook v. Marchioness of Ely, 4 DeG. J. & S., per Lord Westbury, at p. 646.

Judgment accordingly for plaintiff.

OSLER, J.A. APRIL 21ST, 1902.

C. A.—CHAMBERS.

LAROSE v. OTTAWA TRUST AND DEPOSIT CO.

Contract—Board and Lodging—Bequest in Lieu of—Lapse—Leave to Appeal Refused.

Motion by defendants for leave to appeal from order of a Divisional Court, *ante* p. 210.

A. B. Aylesworth, K.C., for defendants.

J. E. Jones, for plaintiff.

OSLER, J.A.—On the whole, after much consideration, a great deal being able to be said, from the evidence, in support of either side, I think it was open to the trial Judge and the Divisional Court to draw from the evidence the conclusions at which they have arrived, and that there should be no further appeal. Motion dismissed with costs.

APRIL 11TH, 1902.

C. A.

ROCKETT v. ROCKETT.

Mortgage — Covenant — Agreement for Board in Lieu of Interest—Settlement of Claim not Binding where Administrator not Appointed.

Appeal by plaintiffs from judgment of MEREDITH, C.J., in action on a covenant contained in a mortgage made in 1883 by defendant to plaintiffs, his sisters, and their mother since deceased, to secure $3,000, with a proviso that the mortgage was to be void on payment at the end of 5 years of $1,000 to Mary Rockett, $1,000 to plaintiff Mary Ann Rockett, and $1,000 to plaintiff Agnes Rockett, with interest. Mary Rockett died in November, 1898, and plaintiff Mary Ann Rockett is her administratrix. The mortgage provided for payment of interest on interest and a compounding every six months. The defendant set up an agreement made at time of mortgage that so long as the mortgagees remained on the farm, and were supported by him, interest should thereby be considered satisfied, and

further set up an agreement made by Mary Ann and Agnes after the death of their mother to accept $2,900 in full. He claimed that if the estate of the mother was not bound by the settlement, he should be indemnified by Mary Ann and Agnes, and he paid the $2,900 into Court. The Chief Justice held that the settlement was not binding because there was then no administrator to the mother's estate, but that the agreement was actually made and was binding, and also that $40 over and above the $2,900 was due, and gave judgment for $40 without costs.

G. G. McPherson, K.C., for appellants.

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

THE COURT (ARMOUR, C.J.O., MACLENNAN, MOSS, JJ.A.) held that the evidence supported the finding that the maintenance of the mortgagees on the farm was to be in lieu of interest, but that, as the amount paid into Court was $2,900, and not $2,960, as the Chief Justice thought, the judgment should be increased to $100, the amount due under the mortgage being $3,000. Judgment varied accordingly and in other respects appeal dismissed without costs; MACLENNAN, J.A., dissenting as to the costs.

LOUNT, J. APRIL 19TH, 1902.

TRIAL.

MURRAY v. EMPIRE LOAN AND SAVINGS CO.

Vendor and Purchaser—Sale of Land—Balance of Purchase Money—Evidence—Weight of—Corroboration.

Action brought to recover $3,000 alleged by plaintiff to be the balance due in respect of purchase money ($9,000) upon a sale of certain property by her to defendants. Defendants counterclaimed for arrears of taxes left unpaid by plaintiff.

W. Cassels, K.C., and A. W. Anglin, for plaintiff.

C. H. Ritchie, K.C., A. H. Marsh, K.C., and J. Turner Scott, for defendants.

LOUNT, J.—The plaintiff's evidence has been contradicted by witnesses for defendants whose evidence should, I think, be accepted. Moreover, the correspondence and documentary evidence does not support the plaintiff's account of the transaction, but corroborates and confirms that set up by defendants, and therefore should be given effect to, and the action be dismissed. There is no dispute

as to the counterclaim, and there should be judgment on it for defendants for $291.90 with costs.

Blake, Lash, & Cassels, Toronto, solicitors for plaintiff.

Scott & Scott, Toronto, solicitors for defendants.

APRIL 18TH, 1902.

DIVISIONAL COURT.

KNICKERBOCKER TRUST CO. OF NEW YORK v. BROCKVILLE, WESTPORT, AND SAULT STE. MARIE R. W. CO.

Railways—Bonds—Inquiry as to When Held as Collateral Security—Judgment—Reference—Duty of Master.

Appeal by one Hervey, a creditor, from order of FERGUSON, J., affirming report of Master at Brockville.

W. E. Raney and J. A. Hutcheson, Brockville, for Hervey.

J. H. Moss, for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The appeal should be allowed and the matter referred back to the Master to take the accounts and make the inquiries directed by the judgment, the 11th paragraph of which is certainly wide enough to cover the claims of the persons who are creditors in respect of the bonds of the railway company, as well as those of persons who have merely advanced money upon its bonds as pledgees of them. The inquiry thus directed is necessary in order that the position of the company may be ascertained. Its position is not ascertained merely by stating that bonds are outstanding to a fixed amount, unless that amount correctly represents the amounts for which the bonds are held. It was stated at Bar and not disputed, that the bonds have been issued to parties as security for debts less than the face value of the bonds so issued, but the Master has refused to take evidence of the true amount of the debt, and in so doing has erred, and the fact that further directions are reserved is no reason for not doing so.

APRIL 14TH, 1902.

C. A.

RE LORD'S DAY ACT OF ONTARIO.

Constitutional Law—Powers of Provincial Legislature—Act to Prevent Profanation of Lord's Day—Working on Sunday—Necessity—Conveying Travellers.

The following questions were submitted to the Court of Appeal by the Lieutenant-Governor in Council, pursuant to R. S. O. 1897 ch. 84:—

1. Had the Legislature of Ontario jurisdiction to enact R. S. O. 1897 ch. 246, intituled "An Act to Prevent the Profanation of the Lord's Day," and in particular secs. 1, 7, and 8 thereof?

2. (*a*) Had or has the Legislature of Ontario power by the aforesaid Act, or any Act of a similar character, to prohibit the doing or exercising of any worldly labour, business, or work on the Lord's day, within the Province, upon and in connection with the operation of lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings to which the exclusive legislative authority of the Parliament of Canada extends under the British North America Act, sec. 91, sub-sec. 29, and sec. 92, sub-sec. 10 (a), (b), (c)?

(*b*) Had or has the Legislature of Ontario power to prohibit the doing or exercising of any worldly labour, business, or work, on the Lord's day, within the Province, when such prohibition would affect any matter to which the exclusive legislative authority of the Parliament of Canada extends under any other sub-section of sec. 91, as, for example, sub-secs. 5, 10, and 13.

3. In sec. 1 of R. S. O. ch. 246, or C. S. U. C. ch. 104, as the case may be, do the words "other person whatsoever" include all clauses or persons other than those enumerated who may do any act prohibited by said section, or is the meaning of these words limited so as to apply only to persons *ejusdem generis* with the classes enumerated?

4. Subject to the exceptions therein expressed, does sec. 1 prohibit individuals who, for or on behalf of corporations, do the labour and work or exercise the business of carrying passengers for hire, from doing such labour and work and exercising such business on the Lord's day, whether the cor-

porations for or on behelf of which the work or labour is done, are or are not within the prohibition of said section?

5. Do the words "conveying travellers," as used in sec. 1, apply exclusively to the carrying to or towards their destination of persons who are in the course of a journey at the commencement of the Lord's day?

6. Does sec. 1 apply to and include corporations?

7. (*a*) Do the words "work of necessity," as used in sec. 1, apply so as to include the doing of that which is necessary for the care or preservation of property so as to prevent irreparable damage other than mere loss of time for the period during which the prohibition extends?

(*b*) If so, is the necessity contemplated by the statute only that which arises from the exigency of particular and occasional circumstances, or may such necessity grow out of or be incident to a particular manufacture, trade, or calling?

(*c*) If such necessity may grow out of or be incident to a particular manufacture, trade, or calling, do the words "work of necessity" apply exclusively to the doing on the Lord's day of that without which the particular manufacture, trade, or calling cannot successfully be carried on during the remaining six days of the week?

The questions were argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 2nd, 3rd, and 4th April, 1901.

John A. Paterson and A. E. O'Meara, for the Attorney-General for Ontario.

A. H. Marsh, K.C., and J. H. Moss, for classes of persons interested.

ARMOUR, C.J.O.—As to question 1, I am of the opinion that the Legislature of Ontario had no jurisdiction to enact R. S. O. 1897 ch. 246, intituled "An Act to prevent the Profanation of the Lord's Day," in its present form and to the full extent of its provisions.

The profanation of the Lord's day is an offence against religion, and offences against religion are properly classed under the limitation "crimes," and consequently the enacting of laws to prevent the profanation of the Lord's day, and imposing punishment therefor by fine, penalty, or imprisonment, properly belongs to the Parliament of Canada under sub-sec. 27 of sec. 91 of the British North America Act, and to this extent ch. 246 is beyond the power of the Legislature of Ontario.

The consequence of this opinion is that to this extent C. S. U. C. ch. 104 is still in force, never having been repealed by competent authority.

And as a result of this opinion I answer questions 2 (*a*) and (*b*) in the negative.

As to question 3, I say that the meaning of the words "other person whatsoever" in sec. 1 of C. S. U. C. ch. 104 is limited so as to apply only to persons *ejusdem generis* with the classes enumerated.

I answer questions 4, 5, and 6 in the negative.

Question 7 (*a*), I answer in the affirmative, and as to (*b*), I say that such necessity may grow out of or be incident to a particular manufacture, trade, or calling, and I answer (*c*) in the negative.

OSLER, J.A.—My answer to the first question is in the affirmative, referring for my reasons to my judgment in Regina v. Wason, 17 A. R. at pp. 221, 238.

2 (*a*), 2 (*b*): I answer these questions in the negative.

3: The first branch of this question I answer in the negative, the second branch in the affirmative.

4: I answer this question in the negative.

5: I answer this question in the negative.

6: I answer this question in the negative.

My reasons for these answers will be substantially found in the decisions in Attorney-General v. Niagara Falls Tramway Co., 18 A. R. 453; Regina v. Somers, 24 O. R. 244; Attorney-General v. Hamilton Street R. W. Co., 24 A. R. 170; Regina v. Reid, 26 A. R. 181, 30 O. R. 732.

7 (*a*), (*b*), (*c*): I find it difficult to understand the scope of these queries or their true meaning, and to answer them in such a way as not to make the answers of doubtful application in many of the ever-varying circumstances and conditions which may from time to time hereafter arise between parties in a real litigation. I must, therefore, with all respect, ask to be excused from attempting to solve them, as no useful answer can be given to them. Further, with the like respect, I submit that, while it may be reasonable and proper to take the opinions of the Bench as to the constitutional validity of an Act or section of an Act, it is not convenient that the power of the Lieutenant-Governor in council under R. S. O. 1897 ch. 84 should be exercised by asking the Judges to answer questions such as number 3 and the

following questions, assuming that the Act ever contemplated the submission of such questions. They relate to matters which I humbly submit ought to be left for decision when they are raised in actual litigation in the application and construction of legislative enactments with reference to an existing state of facts. When they are presented, as they here are presented, *in scena* and not *in foro*—argued and decided academically and not judicially—the answers are likely to embarrass and perplex Judges and parties who may afterwards have to deal with such questions or similar questions arising under varying facts and circumstances as they may be presented in actual litigation. More especially is this likely to be the case where answers to abstract questions are intended to be or may be made use of by inferior judicial officers, justices of the peace, police magistrates, etc., in summary proceedings before them.

I must add that I reserve, as in former similar cases I have reserved, the right to arrive at a different opinion upon all or any of the questions I have answered, except in so far as I may be precluded by authority from doing so, should they or any of them again come before me in the course of actual litigation.

MACLENNAN, J.A.—I am of opinion that the questions submitted to us should be answered as follows—

1: Yes.

2 (*a*) and (*b*): No.

3, first branch: No.

3, second branch: Yes.

4: No.

5: No.

6: No.

7 (*a*), (*b*), (*c*): I have given a great deal of attention to these questions, and to the arguments which were addressed to us, and must confess my inability to answer them. In order to do so it appears to me one would require to arrive at an exhaustive definition of "works of necessity," a definition limiting the extent of the signification of the words, and including every conceivable work to which they could apply. I have not found myself able to do that; and must, therefore, respectfully pray to be excused from answering those questions.

MOSS, J.A.—I have considered the case and the questions submitted. A number of the questions appear to me

to be covered by authority, and in the answers I give as respects such questions I am stating what I understand to be the law as declared by the decisions of the Courts, or the effect of the preponderance of authority where there have been differences of opinion.

I am of opinion that the questions submitted should be answered as follows:—

1: in the affirmative.

2 (*a*): in the negative.

2 (*b*): in the negative.

3: the first branch in the negative, the second branch in the affirmative.

4: in the negative.

5: in the negative.

6: in the negative.

7 (*a*), (*b*), (*c*): upon the same ground and for reasons similar to those stated by my brother Maclennan, I must respectfully ask to be excused from making any further answer to these questions. To undertake to answer them would be to endeavour to give an exhaustive definition of "works of necessity," or to lay down a series of abstract propositions not having application to any particular case or set of circumstances, a thing dangerous to attempt, and, if attempted, likely to lead to embarrassing and possibly mischievous results when afterwards sought to be applied to actual cases.

And upon similar considerations, I beg leave to reserve the right to reconsider the answers I have given (except of course in regard to such as are already covered by binding authority), should they or any of them arise in course of actual litigation.

LISTER, J.A., died while the questions were under consideration.

APRIL 26TH, 1902.

DIVISIONAL COURT.

MUNRO v. TORONTO RAILWAY CO.

Infant—Lease by—Repudiation—Partition—Amendment—Parties.

Appeal by plaintiff from judgment of MEREDITH, C.J., dismissing the action with costs, the plaintiff having refused to amend, adding his co-lessors as parties, as allowed by the judgment noted *ante* p. 25. The same counsel appeared.

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

STREET, J.—It is clear that we cannot declare the partition binding upon the defendants who were not made parties to it. The only question upon this part of the case is whether we can order a partition of the land between the plaintiff and defendants for the remainder of the term, without having the plaintiff's co-lessors added as parties. In my opinion, they are not necessary parties to such a partition; they have no interest whatever in any part of the land until the expiration of defendants' lease, and the partition asked for by the plaintiff can only remain in force during the term of the lease. When the term expires, the partition already made between the plaintiff and his co-tenants comes into force. At present the plaintiff holds no land in severalty as against the defendants, for he and they are tenants in common of the whole of it during the remainder of the term. What he asks is that one-third of the land may be set apart for him, to be held by him in severalty, only until the defendants' rights expire, and in this the other parties have no concern. Therefore, the co-lessors are not necessary parties to this action, and it should not be dismissed because plaintiff has refused to add them: Baring v. Nash, 1 V. & B. 551; Mason v. Keays, 78 L. T. 33. The plaintiff's right to mesne profits, and to compensation for buildings pulled down by defendants, depends upon whether he has been excluded from the land, for there has been no actual receipt of rents by the defendants: Henderson v. Eason, 17 Q. B. 701; Murray v. Hall, 7 C. B. 441. So long as one tenant in common is only exercising lawfully his rights as tenant in common, no action lies against him for trespass, but if his acts are equivalent to an exclusion of his co-tenants, then there is an ouster, and trespass will lie: Goodtitle v. Toombs, 3 Wills. 118; Doe d. Wawn v. Horn, 3 M. & W. 333; Wilkinson v. Haygarth, 12 Q. B. 837; Stedman v. Stedman, 8 E. & B. 1; Jacobs v. Seward, L. R. 8 H. L. 464. The evidence in the present case is, that defendants, having taken possession of the whole property, which before that time appears to have had a small house and barn and outhouse upon it, converted the place into a pleasure ground, pulled down the house, etc., and made extensive alterations. The plaintiff demanded possession, and, although it was never refused him, it was never offered to him. I think that, under the circumstances, however, the use made by the defendants of the property

was practically an exclusion of him from any use which he could make of it. A large part of it was cut up by roads and paths, and occupied by the defendants' buildings and railway line, and any use that the plaintiff could make of it must necessarily be interrupted by the swarms of visitors, and therefore plaintiff is entitled to mesne profits and damages. Judgment should be entered for partition. Reference to fix mesne profits and damages. Costs of action to trial inclusive and costs of appeal to plaintiff. Further directions and subsequent costs reserved.

APRIL 10TH, 1902.

C. A.

FORD v. METROPOLITAN R. W. CO.

Street Railway—Negligence—Measure of Duty—Judge's Charge to Jury—Damages—Reduction of.

Appeal by defendants from judgment of ROBERTSON, J., in favour of plaintiff upon the answers of the jury in an action for damages for bodily injury. The plaintiff on 24th May, 1900, was a passenger on defendants' railway, and when the car, which was going south, arrived at Thornhill, he alighted, and walked north on Yonge street on the track, keeping to the east side to avoid a horse and buggy coming south. The car then backed north along the track, which is on the east side of the street, and ran down the plaintiff, who alleges that the headlight was not transferred to the north end of the car, as it should have been, nor was any warning given him of approach, nor was the conductor or motorman at that end of the car. In answers to nine questions the jury found that plaintiff was not guilty of negligence, and could not, with exercise of reasonable care, have got out of the way of the car; that defendants were guilty of negligence which caused the accident, and consisted in not having a headlight at the north end of the car, nor a light inside the car, in not sounding a gong or warning, and in not giving instructions to the conductor of the car when to cross at the different switches; and they assessed the damages at $1,800.

A. B. Aylesworth, K.C., and I. F. Hellmuth, for appellants.

T. H. Lennox, Aurora, and S. B. Woods, for plaintiff.

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

OSLER, J.A.—The defendants contend that there was no evidence of negligence on their part; that the plaintiff's own negligence was the cause of his injuries. They also complain of misdirection and nondirection on the part of the trial Judge, and they say that in any event the damages are excessive.

As regards the question of negligence, I am clearly of opinion that the learned trial Judge could not, with propriety, have withdrawn the case from the jury and dismissed the action. The facts proved were proper for their consideration, and it was for them to say whether they shewed negligence on the defendants' part, or contributory negligence on the part of the plaintiff.

As to the former, the measure of the defendants' duty is stated with sufficient accuracy in one of their reasons of appeal, viz., having regard to the circumstances of time and place, and the danger to be apprehended, they are required to take reasonable precautions, and to give reasonable warning of the approach of their cars.

The time was night—a dark night—the evening of a public holiday; the hour not very late; so that travellers were not unlikely to be abroad. The place was in or near a village; a public highway where people had the right to be walking or riding. The car was proceeding in an unusual direction, or rather in a direction in which the plaintiff had no reason to expect it would be going. It was going along very slowly, it is true, but for that very reason was making less noise and thus giving less warning of its approach. Yet the defendants gave no other warning. They excuse themselves for the absence of light by the failure of the electric current, but the jury might very reasonably have thought that this only made it the more incumbent on them to give notice of the approach of the car by sounding the gong, which might have been done. The plaintiff's accident was fairly and properly attributable to the absence of some such warning; unless it could be said that it was caused by his own negligence, or contributory negligence.

As to this the jury have found in his favour, and I think properly so. He was walking where, by law, he had the right to walk. He had reason to expect warning of the approach of a car, and he had no reason to expect that this particular car would have returned to the north switch. He might well have attributed such noise as he heard to the

movement of the same car proceeding, as he supposed, on its southward journey; and his attention was distracted by the vehicles driving down towards him, of which he had to keep out of the way.

The findings of the jury in these two aspects of negligence are, I consider, well supported by the evidence.

I do not see that there was any misdirection of which the defendants are in a position to complain. Some remarks are found in the charge which the learned Judge would probably have desired to correct, had his attention been called to them; but, under the circumstances, we cannot say that they now call for notice.

The Judge, I think properly, explained to the jury the respective rights of the public and of the company on the highway. He was not bound to tell them that if the car was moving only at the rate of 3 or 4 miles an hour, there was no higher duty upon the company to give notice than would be cast upon a person driving a waggon or other vehicle. And I do not think that any observation as to its being the duty of "the car" going north to have remained at the south switch until the other had passed it there, was at all likely to have misled the jury, in dealing with the other plain facts of the case.

There remains the question of damages. The jury gave $1,800. The plaintiff's expenditure has been perhaps $100. His sufferings were severe, and he was confined to the house for several weeks. No bone was broken, and his permanent injury seems likely to be a certain flattening of the foot, some degree of lameness, and a possible tendency to rheumatism.

I cannot but think that the sum awarded by the jury is largely in excess of what has been given in the case of much more serious injuries, although, no doubt, we cannot say that there is a standard of damages in such cases.

I favour granting a new trial, unless the plaintiff consents to the judgment being reduced to $900. In that event the appeal should be dismissed with costs.

If the plaintiff does not agree to this course, then there should be a new trial. Costs of appeal to defendants, and other costs in the cause.

T. H. Lennox, Aurora, solicitor for plaintiff.

Barwick, Aylesworth, Wright, & Moss, Toronto, solicitors for defendants.

APRIL 10TH, 1902.

C. A.

HOSPITAL FOR SICK CHILDREN v. CHUTE.

Will—Trustee—Advances—Discretion.

Appeal by plaintiffs from judgment of BOYD, C., dismissing action by plaintiffs, who are legatees under the will of Alice Bilton, deceased, for an account of the dealings of the trustees under the will with the assets of the estate, restraining their further dealing with them, and to set aside certain transfers of real property assets alleged to have been made to other legatees as advances under the powers vested by the will in the trustees. The testatrix devised all her estate to trustees (her two sisters, the defendants A and E. Chute), with power to sell, etc., directed the payment of certain legacies, gave annuities to her two children, and empowered the trustees from time to time "to make such advances as they may deem proper out of the corpus or income or both of my estate for the benefit of or to my said children or any one or more of them either on their marriage or as an advancement in life or for any other purpose that may appear to them wise and reasonable. I do not desire that my trustees should consider this to be obligatory upon them nor that my children should consider that they can compel my trustees to make such advances or payments. I leave this entirely in the discretion of my trustees desiring that they should take my position in regard to my children and deal with them as they think under all the circumstances may be in their true interest;" and directed that on the death of all her children the estate then undisposed of should be divided per capita among all their children, but if none were living, then among the five charities (including plaintiffs) named. The question raised was whether the distribution of the residuary estate between F. U. and N. Bilton, the two children of the testatrix, was a lawful exercise of the discretionary power and trust to make advances. The Chancellor held that the power was an arbitrary and uncontrollable one and that the trustees might, no bad faith or conspiracy having been shewn, if they pleased, exercise it without regard to the other trusts reposed in them.

S. H. Blake, K.C., and J. Bicknell, for plaintiffs.

W. H. Blake and J. J. Lundy, for defendants the other charities in same interest as plaintiffs.

J. H. Macdonald, K.C., and F. C. Jones, for defendants executrices.

G. F. Shepley, K.C., for defendant F. U. Bilton.

W. R. Riddell, K.C., for defendant N. Bilton.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held that the power confided to the trustees is of very wide extent and is ample to justify what they have done—make advances out of the corpus, and in effect defeat other bequests; and it is difficult to imagine what language could have been employed giving more complete and absolute discretion in the exercise of the power, which the evidence shews has been exercised in good faith, and not from any indirect or improper motive.

Appeal dismissed with costs.