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MACMAHON, J. JULY 3RD, 1899.

TRIAL.

WILSON v. LINCOLN PAPER MILLS CO.

Master and Servant—Injury to Servant—Cause of Accident—Evidence—Negligence.

Action by John Wilson, as administrator of the estate of John Wilson the younger, to recover damages for the death of the latter from injuries received by him while in the employment of defendants at Merritton, owing, as alleged, to the unsafe and defective condition of a hoist in defendants' mill.

The jury found that the deceased came to his death through a defective elevator; that there was negligence of defendants in not having a guard and not having sufficient light; that the deceased was not guilty of any act which contributed to his death; and assessed plaintiff's damages at $700.

There was evidence that the approach to the hoist shaft was unguarded, and that the hoist was defectively constructed in that it had no catch.

G. Lynch-Staunton, Hamilton, and J. H. Ingersoll, St. Catharines, for plaintiff.

B. B. Osler, Q.C., for defendants.

MACMAHON, J., held that defendants were liable, notwithstanding that there was no direct evidence of how the deceased was injured. Kerwin v. Canadian Coloured Cotton Mills Co., 28 O. R. 73, 25 A. R. 36, 29 S. C. R. 478, distinguished. Groves v. Wimborne, [1898] 2 Q. B. 402, followed.

MAY 25TH, 1904.

DIVISIONAL COURT.

GALLINGER v. TORONTO R. W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Nonsuit.

Motion by plaintiff to set aside nonsuit entered by FERGUSON, J., in an action for damages for personal injuries received by plaintiff by being struck by a car of defendants.

Plaintiff, in returning home at two o'clock in the morning, alighted from a west-bound car on the north track of a street in the city of Toronto, and proceeded to cross the north and south tracks in front of an approaching east-bound car on the south track, then about one hundred feet away. He was struck by the car and injured. There was evidence that it was going at the rate of eight to ten miles an hour; that there was a bright electric light near by; that plaintiff, if careful, could have seen the approaching car; but that the motor man did not apply the brakes or sound the gong before plaintiff was struck.

B. N. Davis, for plaintiff.

James W. Bain, for defendants.

THE COURT (MEREDITH, C.J., STREET, J., ANGLIN, J.), held that the nonsuit was properly directed, and dismissed the motion with costs.

FALCONBRIDGE, C.J. DECEMBER 22ND, 1904.

CHAMBERS.

RE THOM v. MCQUITTY.

Division Court—Jurisdiction—Amount over $100—Ascertainment—Necessity for Extrinsic Evidence—4 Edw. VII. ch. 12. sec. 1 (O.)—Application to Pending Action—Prohibition.

Motion by defendant for prohibition to the 2nd Division Court in the county of Lambton, upon the ground that the Court had no jurisdiction, because the amount in question was over $100 and was not ascertained by the signature of defendant.

J. Hales, for defendant.

C. A. Moss, for plaintiff.

FALCONBRIDGE, C.J.—In view of the conflicting decisions as to the principle of construction of the word "ascertained" in the Division Courts Act, the amending provision contained in 4 Edw. VII. ch. 12, sec. 1, must be regarded as being in its nature a declaratory enactment, and it must not, therefore, be treated as inapplicable because these proceedings were launched in the Division Court before the Act was passed: Maxwell on Statutes, 3rd ed., pp. 308, 309, 313. Here other and extrinsic evidence beyond the mere production of the document and the proof of the signature to it, would have to be given to establish the claim of plaintiff; and the statute applies to oust the jurisdiction. The conflicting authorities are collected in Kreutziger v. Brox, 32 O. R. 418, and in Bicknell & Seager's Division Courts Act, 2nd ed., p. 86 et seq.

Order made for prohibition without costs.

IDINGTON, J. DECEMBER 23RD, 1904.

TRIAL.

COOKE v. McMILLAN.

Vendor and Purchaser—Contract for Sale and Purchase of Land—Specific Performance—Objection of Purchaser—Jurisdiction of Court over Foreign Defendant—Title—Will—Conveyance by Executors—Period of Distribution.

Action for specific performance of a contract.

J. G. Wallace, Woodstock, for plaintiff.

J. H. Rodd, Windsor, for defendant.

IDINGTON, J.—Plaintiff agreed to sell and defendant to buy the lands in question. Defendant resides in Detroit. The bargain was made in the county of Oxford in this Province, and the agreement executed there.

Defendant's counsel asked leave to amend his statement of defence and plead that this Court had no jurisdiction to direct specific performance against a purchaser residing in and a naturalized citizen of a foreign country, or at all events would as a matter of discretion not direct judgment in such case.

No authority was cited for such a proposition but Smith v. Hunt, 2 O. L. R. 134, 4 O. L. R. 653, 1 O. W. R. 598, which does not support it. I refused to amend as asked. If there ever has been any difficulty of the kind in the way of plaintiff's recovery herein, defendant is rather late, after pleading and coming down to trial, to try to set it up.

Defendant sought also to escape from his own agreement by suggesting that it was that of his wife, under such facts known to plaintiff as to disentitle him to succeed here. In this his evidence failed to make out what he seemed to desire to contend for.

The point chiefly relied upon by the defence was that plaintiff claimed title through the executors of the will of his father, and that by the will the title in question was vested in the executors as trustees, subject to such trusts as made it impossible for them lawfully to convey the land in question to plaintiff, as they did by the deed of 20th March, 1888, to plaintiff.

It was insisted that the testator by this will intended that the trustees should sell, and only after sale divide the proceeds, and that such division must be postponed so as to cover a period of time longer than had transpired before this conveyance was made.

The trust is quite clear, I think.

The trustees were given a discretion to retain the fund in their own hands "for an indefinite period," but permitted to pay over as and when they saw fit. And they having satisfied themselves that the time for division had come, I see no necessity for their going through the form of selling and realizing before making the division. It is the case of the beneficiaries in a simple trust being entitled, when the time for distribution has come, to have the legal estate vested in them or conveyed as they direct. Here the two beneficiaries agreed upon the division that was, as to plaintiff's share, carried out by the execution of the deed already mentioned. When the trustees determined that the time had come for this division, they had no right to sell against the will of the beneficiaries, who were entitled to take the estate without conversion if they saw fit. . . .

It is pointed out that there is a gift over, but this is only in the event of all the direct beneficiaries dying without issue before the time for distribution. It cannot affect the matter now.

I assume that all the facts are admitted that would entitle the trustees to deal with the estate and divide it, when they made the conveyance upon which plaintiff's title rests.

I think plaintiff entitled to the usual judgment for specific performance, and if there are any further questions as to the title needing investigation, let the usual reference be made in respect thereof, but with the declaration that plain-

tiff is entitled to claim under and by virtue of the conveyance of the trustees, if title otherwise good.

Judgment will be for plaintiff with costs.

See Underhill on Trusts, 4th ed., ch. 5.

MACMAHON, J. DECEMBER 24TH, 1904.

CHAMBERS.

DOULL v. DOELLE.

Arrest — Judgment against Married Woman — Proprietary Liability—Form of Order—Intent to Quit Ontario.

Motion by defendant to set aside an order under R. S. O. 1897 ch. 80, sec. 1, for the arrest of defendant, against whom a judgment was recovered by plaintiffs on 11th April, 1899, which directed that "plaintiffs recover against defendant (a married woman) $1,310.51, payable out of her separate estate, with the costs of this action and motion to be taxed."

Defendant had paid nothing on account of the judgment, and since the recovery of the judgment and within the past year, the defendant's husband died, so that she was a widow.

W. E. Middleton, for defendant.

F. J. Roche, for plaintiffs.

MACMAHON, J.—Even had defendant not been a married woman, plaintiff's claim being in judgment, an order for arrest should not have been made under sec. 1.

This motion, however, can be disposed of upon the ground that the judgment being against a married woman and limited by its terms to payment out of her separate estate, it is a proprietary liability and not a personal one; and in Scott v. Morley, 20 Q. B. D. 120, it was held that since the passing of the Married Women's Property Act in 1882 in England, enabling a married woman to enter into contracts independently of her husband, for which she would be liable in respect of her separate property, a judgment recovered against her is merely a proprietary judgment, and she cannot be arrested under the Debtors Act. . . .

The fact of defendant having become a widow since the recovery of the judgment does not alter the effect of it so as to convert it into a personal judgment against her. And even had the judgment been recovered against her as a widow on a contract entered into by her during coverture, it could only be in the form settled by the Court of Appeal in

Scott v. Morley, 20 Q. B. D. 120, in an action against a married woman, with such verbal alterations as are necessary to adapt that form to a judgment against a widow: Softlaw v. Welch, [1899] 2 Q. B. 419.

It is not, in the view I have expressed, essential that I should discuss the other ground urged. But I may say that it was not shewn that there was good and probable cause for believing that defendant was about to quit Ontario with intent to defraud her creditors. She is keeping a boarding-house in London, and on her examination as a judgment debtor she said that her brother, a physician in Pontiac, Michigan (to whom she had sent $3,000, proceeds of insurance on her husband's life), had offered her a home, but she did not state whether she intended to accept his offer or not.

The order for the arrest of defendant must be set aside with costs.

The sheriff will be protected.

DECEMBER 27TH, 1904.

DIVISIONAL COURT.

SMITH v. NIAGARA, ST. CATHARINES, AND TORONTO R. W. CO.

Railway—Injury to Animal Crossing Track—Way—Highway—Negligence — Neglect to Give Warning — Contributory Negligence—Findings of Judge—Appeal.

Appeal by defendants from judgment of Judge of County Court of Lincoln in favour of plaintiff for $175 and costs. A servant of plaintiff was driving plaintiff's horse and waggon along a narrow way which led across a track of defendants in the village of Merritton. The way was arched over, and the view on both sides was obstructed by buildings and other obstacles which hemmed in the way on both sides until within a distance of 3 feet 6 inches of the track of defendants. The waggon was piled high with empty tin cans, and, the way being uneven, the servant was occupied as he passed under the archway in holding the cans on his waggon to prevent their falling off. As he emerged from the archway, travelling at a walk, the horse was struck by an engine of defendants, in charge of 4 men, which had just shunted some cars to a lime house near the spot, and was returning at a rate of 2 to 4 miles an hour past the archway. The horse was forced against the sides of the archway and injured, and this action was brought to recover damages for the injuries.

Plaintiff's servant was not looking out for an engine or train; the persons on the engine had whistled and sounded the bell a short time before the collision, but had not done so for a time which they variously estimated at from a minute and a half to 4 minutes before the collision. The siding was used by defendants only two or three times a week. The way was used by the public constantly, and a sidewalk was built upon it. The Judge below found that the way was a public highway; that defendants had been guilty of negligence in not taking proper precautions; and that plaintiff's servant had not been guilty of contributory negligence: and he assessed the damages at $175.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

W. H. Blake, K.C., for defendants.

A. W. Marquis, St. Catharines, for plaintiff.

STREET, J.—The evidence seems to establish that the road or way upon which plaintiff's servant was driving his horse at the time of the accident was a "highway" within the meaning of sec. 3 (g) of the Railway Act of 1888.

The point at which this highway emerges from the archway and strikes the siding, is so close to the rails, and the view of the track on each side is so completely obstructed until the traveller approaching it has almost put his foot on the nearest rail, that the crossing is an unusually dangerous one. The question then arises whether defendants took reasonable and proper precautions to guard against accidents, considering the dangerous character of the place in question. It is admitted that the precautions of ringing the engine bell and blowing the whistle, required by sec. 256 of the Railway Act of 1888, were not taken; but defendants dispute the application of that section to the case of an engine shunting cars in the railway yard, as this one was doing. I do not think it is necessary to determine that question here. The cases seem to have established that, apart from that section and in cases in which it is not applicable, a duty is cast upon the defendants to take reasonable precautions at dangerous points for the avoidance of accidents. Here there seems to have been an entire absence of any precaution. The engine left the point at which it had discharged its cars, that point being from 90 to 100 feet away, and proceeded slowly along and past the highway in question without giving any warning whatever of its approach. In my opinion there was therefore evidence

from which the learned Judge in the County Court was justified in finding that defendants had been guilty of negligence: Hollinger v. Canadian Pacific R. W. Co., 20 A. R. 244, 251, 252; Grand Trunk R. W. Co. v. McKay, 34 S. C. R. 81, 101; Lake Erie and Detroit River R. W. Co. v. Barclay, 30 S. C. R. 360; Bonnville v. Grand Trunk R. W. Co., 1 O. W. R. 304; Moyer v. Grand Trunk R. W. Co., 2 O. W. R. 83.

Defendants, however, insist that the action should have been dismissed upon the evidence of the servant in charge of the horse. It is asserted that he blindly walked into the danger which lay in front of him without the ordinary precaution of looking or listening. In determining the weight and effect to be given to this contention the surrounding circumstances must be considered. The place was one which was traversed by an engine only two or three times a week; the approach to the track was an ascent and was so uneven that the horse was driven at a walk, and the driver was engaged in holding his load on the waggon as he approached the track. Approaching so slowly as he did he may well have expected to receive warning of the approach of an engine, and to have been able easily to draw up before it reached the crossing. I think the question of contributory negligence under these circumstances was one which could not properly have been withdrawn from a jury, and that the learned Judge who tried the case might not unjustly come to the conclusion that the driver had not been guilty of negligence which contributed to the accident.

I cannot therefore see my way to interfering with the judgment, and in my opinion the appeal should be dismissed with costs.

BRITTON ,J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., concurred.

FALCONBRIDGE, C.J. DECEMBER 28TH, 1904.

CHAMBERS.

WILLIAMSON v. MERRILL.

Discovery — Examination of Party — Disclosing Names of Witnesses—Modified Rule—Relevant Fact.

Appeal by plaintiff and cross-appeal by defendant in action for libel from order of Master in Chambers refusing

to order defendant to answer certain questions on examination for discovery, but ordering defendant to answer one question.

A. E. O'Meara, for plaintiff.

G. M. Clark, for defendant.

FALCONBRIDGE, C.J.—The learned Master seems to me to have been entirely right except as to one point, viz., as to the refusal (questions 217 ad fin.) to give the names of the two men to whom (besides defendant) plaintiff is charged with having "allowed familiarity."

The point involved here is extremely fine, impinging apparently on the general rule against disclosure of the names of witnesses.

The modified rule is to be gathered from the judgments of Lord Esher, M.R., and of Bowen, L.J., in Marriott v. Chamberlain, 17 Q. B. D. 154, at pp. 163, 164, 165, and it is, that, although one party cannot compel the other to disclose the names of his witnesses as such, yet, if the name of a person is a relevant fact in the case, the right that would otherwise exist as to information with regard to such fact is not displaced by the assertion that such information involves the disclosure of the name of a witness. And Lord Esher thought that it did not signify in dealing with these questions on whom it lies to prove the facts with regard to which the interrogatory is put.

I venture to think that the condition of affairs here is such as to make the above canon entirely applicable.

The other cases along the same line are: Storey v. Lord George Lennox, 1 Keen 341; Humphries v. Taylor Drug Co., 39 Ch. D. 693 (a case for infringement of trade mark); Kuhliger v. Bailey, W. N. 1881, p. 165; Dalgleish v. Lowther, [1899] 2 Q. B. 590; Attorney-General v. Gaskill, 20 Ch. D. 519.

Eade v. Jacobs, 3 Ex. D. 335, is distinguished in Marriott v. Chamberlain, and is also said by the learned Judge who decided it (Cotton, L.J.), to have been "somewhat misunderstood" (Attorney-General v. Gaskill, at p. 529.)

As to this ground the appeal will be allowed, and the defendant ordered to appear for further examination at his own expense.

Otherwise the order is affirmed. Costs of this appeal and cross-appeal to be costs in the cause.

DECEMBER 28TH, 1904.

DIVISIONAL COURT.

HAMMOND v. GRAND TRUNK R. W. CO.

Master and Servant—Injury to Third Person by Negligence of Servant — Scope of Employment — Railway — Watchman.

Action by George Hammond, an infant under the age of 21 years, by Elizabeth Hammond, widow, his next friend, and the said Elizabeth Hammond, against the Grand Trunk R. W. Co. and Horace Jarman, to recover damages for an injury sustained by the infant plaintiff at the hands of the defendant Jarman under the following circumstances.

The line of the Grand Trunk R. W. Co. crossed Queen street at the western outskirts of the city of Toronto; and bars crossing the highway, two or three feet above the level of the highway, were lowered when a train was approaching, so as to prevent traffic from proceeding along the highway crossing until the train had passed, when they were raised.

The defendant Jarman was the watchman employed by the company at the crossing, and his duty was to raise and lower the bars by means of a lever at the watchman's house or shelter close to the crossing. At the point in question the railway tracks ran east and west, and the watchman's lever was on the north side of the track. On 16th July, 1903, the infant plaintiff, who was then about 16 years of age, with two other boys, was coming along Queen street from the south, and found the bars down and a train approaching; they all leaned on the gate and watched the train pass, and as they followed it with their eyes they felt the jar of the bars caused by the effort of the defendant Jarman, the watchman, to raise them. They did not immediately remove their weight from them, and Jarman picked up a cinder and threw it towards them and struck the infant plaintiff in the eye, putting it out.

The action was tried before ANGLIN, J., with a jury, and resulted in a verdict for the infant plaintiff for $800 against both defendants.

The action was dismissed so far as the claim of Elizabeth Hammond was concerned.

The defendant company appealed from the judgment, and moved in the alternative for a new trial, upon objections taken during the trial and to the charge of the learned Judge, that there was no evidence of liability on the part of the railway

company, the act done by the defendant Jarman being outside the scope of his employment and not authorized by them.

W. R. Riddell, K.C., for defendants the Grand Trunk R. W. Co.

R. C. Clute, K.C., and E. G. Morris, for plaintiffs.

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

STREET, J.—Defendant Jarman was employed by defendants the Grand Trunk R. W. Co. to lower the bars across the highway as a train was approaching, and to raise them as soon as it had passed. This duty carried with it that of warning persons who were obstructing the raising or lowering of the bars, and thereby preventing him from using them for the purpose for which they were required. The infant plaintiff was obstructing the raising of the bars, and defendant Jarman threw a cinder at him, or in his direction, and put out his eye. This was an act for which the defendant company might or might not be answerable. If the acts were done out of mere malice and ill-temper and to punish the boy, the company would not be answerable; but if it were done for the purpose of warning him to get off the bars so that they might be raised, then it is clear that they would be answerable, although the act done was a tort: Bayley v. Manchester R. W. Co., L. R. 7 C. P. 415; Seymour v. Greenwood, 6 H. & N. 359; Dyer v. Munday, [1895] 1 Q. B. 742; Richards v. West Middlesex, 15 Q. B. D. 660; Coll v. Toronto R. W. Co., 25 A. R. 55.

This distinction was clearly put before the jury by my brother Anglin in his charge. He said to them: "Now what was the object with which Jarman threw that cinder? If he threw it in a moment of irritation—annoyed at the boys being on the gate—not for the purpose of getting them away so that he could open the gate, but simply to gratify some spiteful feeling of his own against the boys, then it was not an act done in the course of his employment, and the railway company would not be responsible for it. If, on the other hand, his object was not to hit the boy, but to attract his attention and get him away from the gates so that they could be opened, you all probably come to the conclusion that he did it in the course of his employment—the opening of the gate—and if you reach that conclusion, then that makes the employers liable for the act which the servant did."

Upon this charge the jury found for plaintiff, and they must be taken to have found, as they might properly do upon

the evidence, that the act done by Jarman was done in the course of his employment.

In my opinion, the charge and judgment were right, and the present motion should be dismissed with costs.

CARTWRIGHT, MASTER. DECEMBER 29TH, 1904.

CHAMBERS.

GLOSTER v. TORONTO ELECTRIC LIGHT CO.

Pleading—Statement of Claim—Personal Injuries by Electric Wires—Subsequent Removal of Wires—Admissibility of Evidence.

This action was brought to recover damages for injuries to a boy by touching the wires of defendant company on Glen road bridge. It was alleged that the wires were not properly guarded, and that they were in a dangerous position, which lured unsuspecting children to their certain injury and possible death.

The 9th paragraph of the statement of claim concluded with these words: "After the injury to the plaintiff, the defendants insulated the said wires and removed them further away from the said bridge to prevent a recurrence of injury to other members of the public such as the plaintiff sustained."

The defendants moved to strike out this as being contrary to the Rules.

R. H. Greer, for defendants.

W. N. Ferguson, for plaintiff.

THE MASTER.—I think the motion must succeed, on two grounds:

1st. Because the case of Cole v. Canadian Pacific R. W. Co., 19 P. R. 104, seems exactly in point.

2nd. Because, even if evidence of the facts pleaded is admissible at the trial, it is only evidence. It cannot possibly be one of the material facts which the plaintiff must prove in order to succeed at the trial. Being only evidence at the most, it should not be pleaded. This question is well illustrated by the case of Blake v. The "Albion," 35 L. T. 269, where allegations of fact were struck out of the statement of claim, though evidence of them was allowed to be given at the trial. This appears from the report of the same case on motion after the trial, in 4 C. P. D. 94.

Mr. Ferguson contended that such facts could be proved at the trial, and might be pleaded. He relied on Atchison

v. McKee, 15 Pac. Rep. at p. 490. This case only gives the law of Kansas, and is in direct conflict with the case of Nalley v. Hartford Carpet Co., 51 Conn. 524, a judgment which will well repay perusal.

He cited with more confidence Willey v. Boston Electric Light Co., 168 Mass. 40. At first sight this seems in point. But on examination it does not support his position. It decided that, as what was done after the accident would, if done before, have prevented the death of the night patrolman, this could be used at the trial to shew that leaving the wires in the first condition was "a defect in the condition of the machinery" within the meaning of the Massachusetts statute. The weight of evidence of this fact would consist not in its having been done after the accident, but in its not having been done before. Even then, it would still only be evidence, and even under Millington v. Loring, 6 Q. B. D. 190, I do not think that it could properly be pleaded. It is only evidence of actionable negligence. It is the negligence which is the cause of the accident as alleged, and it is that which plaintiff must prove.

The motion is allowed with costs to defendants in any event.

TEETZEL, J. DECEMBER 29TH, 1904.

CHAMBERS.

RE HARKNESS.

Insurance—Life—Certificate of Benefit Society—Disposition of Proceeds by Will—Identification of Certificate—Residuary Estate—"Including."

Motion by executor under Rule 938 for order determining a question arising under the will of Adam Harkness as to the disposition of life insurance moneys.

The testator was the holder of a policy of insurance issued by the Ancient Order of United Workmen, payable to "his order or heirs."

After devising certain real estate, the will contained the following clause: "(2) I give the residue of my property, including life insurance, to my wife Harriet Elizabeth, and to my two youngest children, Adam Weir and Andrew Edmund, share and share alike, it being understood that my wife accepts this in lieu of dower," etc.

Excluding the insurance money, the estate was not sufficient to pay the testator's debts, and the question was whether

the insurance money was available for creditors or went to the widow and two children.

A. R. Clute, for executor.

A. H. Marsh, K.C., for widow.

F. W. Harcourt, for infants.

A. C. McMaster, for creditors.

TEETZEL, J.—The answer to the question depends entirely upon whether the will sufficiently identifies the policy, within the meaning of the Ontario Insurance Act.

Upon this point, the case is, in my opinion, governed by Re Cheesborough, 30 O. R. 639. . . .

I think the language of this will, "the residue of my property, including life insurance," although not using the words "policy" or "certificate," makes it as certain and clear as in the Cheesborough case what policies or certificates of insurance are meant, namely, any and every policy securing insurance on testator's life in respect to which he had a disposing or an appointing power.

It was argued by Mr. McMaster that the effect of the language used, particularly the word "including," was to make the life insurance a part of the residuary estate, and therefore liable for debts to the exclusion of the beneficiaries named. I think, however, in this connection the word "including" does not mean to declare that the life insurance is a part of his residuary estate, but that it is given in addition to residuary estate.

Jarman on Wills, 5th ed., p. 1090, defining the meaning of the words "namely" and "including," says: "Namely imports interpretation, that is, indicates what is included in the previous term; but 'including' imports addition, that is, indicates something not included;" and the same definition is given in Stroud's Judicial Dictionary under title "namely." See also Re Duncombe, 3 O. L. R. 510, 1 O. W. R. 153.

Not being able to distinguish this case from the Cheesborough case, the order I make must be that the widow and children are entitled to the insurance moneys to the exclusion of the creditors.

The costs of the creditors out of the general estate; the costs of other parties out of the insurance fund.

ANGLIN, J. DECEMBER 30TH, 1904.

WEEKLY COURT.

RE WAKEFIELD MICA CO.

Company—Winding-up—Contributories — Subscriptions for Shares—Payment—Transfer of Property—Defective Organization of Company.

The Wakefield Mica Company, incorporated under the Ontario Companies Act, was being wound up in the office of the local Master at Ottawa. He reported that J. S. King and C. A. Johnson sr. were holders of stock in the company to the extent of $15,000, which, excepting credit given by way of set-off for $2,515.14, the value of certain chattel property, remained unpaid, and in respect of such stock he placed them upon the list of contributories for $12,484.86. The Master found C. E. D. Chubbuck and K. B. Holland to be holders of $25,000 of stock, which, he held, they acquired as fully paid up, in consideration of a transfer to the company of some mica properties.

King and Johnson appealed from the finding that they were contributories; the liquidator appealed from the finding that Chubbuck and Holland were not contributories; and the liquidator also moved for leave to appeal from the finding that King and Johnson were entitled to the set-off of $2,515.14, allowed them by the Master.

W. N. Tilley, for King and Johnson.

T. A. Beament, Ottawa, for the liquidator.

H. A. Burbidge, Ottawa, for Chubbuck.

ANGLIN, J.—Chubbuck and Holland owned certain mica properties. Johnson, Willats, & Co. owned a stock of mica, some mining machinery, and some agencies. Of the latter firm of C. A. Johnson jr., H. M. Johnson, and one Willats were members, and J. S. King and C. A. Johnson sr. large creditors. A preliminary arrangement was come to between Chubbuck and Holland and Johnson, Willats, & Co., for the formation of a joint stock company to take over their respective properties and businesses. There can be no doubt that it was the design of Johnson, Willats, & Co., immediately upon the formation of the projected company, to transfer whatever stock they should acquire to J. S. King and C. A. Johnson sr., in satisfaction of their claim as creditors of Johnson, Willats, & Co. On 30th May, 1903, a formal instrument was executed between Chubbuck and Holland, of the one part, and King and Johnson, of the other, in which (the latter

assuming to deal as owners with the Johnson, Willats, & Co. property) the parties agree that a company shall be formed with a capital stock of 500 shares of $100 each, of which, upon incorporation, Chubbuck and Holland shall receive 250 shares in payment of their properties to be turned in to the company, and King and Johnson sr., 150 shares, in payment for the property of Willats, Johnson & Co., which they, treating it as their own, likewise undertake to turn in. This agreement was executed by C. E. D. Chubbuck, K. B. Holland, J. S. King, and C. A. Johnson sr. Why J. S. King and C. A. Johnson sr.—instead of Johnson, Willats, & Co.—became parties to this instrument, is not very clear, unless it was because of the understanding that they should ultimately become the holders of Johnson, Willats, & Co.'s interest in the new company. In his evidence before the Master, Charles A. Johnson sr. says, at one time, that he and King were acting as agents for Johnson, Willats, & Co., and, at another, that Johnson, Willats, & Co., in the incorporation, represented himself and King. The Master, in giving reasons for placing J. S. King and C. A. Johnson sr. on the list of contributories, states that H. M. Johnson, C. A. Johnson jr., and one Kennedy (a book-keeper with Johnson, Willats, & Co.) "in signing the memorandum for incorporation for 150 shares, as subscribers, and in procuring the issue to themselves of stock certificates pursuant to their subscriptions, acted merely as the nominees or agents of the proposed contributories" (King and Johnson sr.) J. S. King and C. A. Johnson sr. were not petitioners for the incorporation of the Wakefield Mica Company, Limited; they did not sign the memorandum of agreement for incorporation; nor are they named, as incorporators or shareholders, in the letters patent, which bear date 22nd June, 1903. The 150 shares, in respect of which it is now sought to make them contributories, were subscribed for by H. M. Kennedy (one share), H. M. Johnson (one share), and C. A. Johnson jr. (148 shares).

The minute book shews that the Wakefield Mica Company was never validly organized. The provisional directors' meeting, the only shareholders' meeting and the only directors' meeting recorded, appear to have been held on 13th June, 1903. At this time there was no company in existence. Moreover, it was stated at the bar, and not disputed, that all these meetings were held in the Province of Quebec. No other meeting of directors or shareholders was ever held. It follows that all subsequent proceedings, taken upon the assumption that the company had been validly organized on

13th June, 1903, are absolutely void. There was no president, no secretary, no permanent board of directors; the issue of stock certificates and their subsequent transfers, through supposed officers of the company, to Messrs. King, Johnson sr., and others, were all alike unauthorized—and mere nullities. The Wakefield Mica Company, Limited, stands to-day with its provisional directors still in office and the original subscribers to the memorandum of agreement of the company, the petitioners for incorporation, Messrs. C. E. D. Chubbuck, K. B. Holland, H. M. Johnson, T. R. Kennedy, and C. A. Johnson jr., as its only shareholders.

Whatever may have been the relation borne by Messrs. H. M. Johnson, T. R. Kennedy, and C. A. Johnson jr. to Messrs. J. S. King and C. A. Johnson sr., whatever may have been the understanding between them in regard to the shares to be subscribed for and acquired by the three former gentlemen, though they may be trustees for and mere nominees of King and Johnson sr., they, and they alone, are holders of the 150 shares in question: Re London Speaker Co., 16 A. R. 508-517; Re Haggert Bros. Co., 19 A. R. 582. Section 10, sub-sec. 4, of the Ontario Companies Act provides that "each petitioner (for incorporation) shall be the bona fide holder in his own right of the share or shares for which he has subscribed in the memorandum of agreement." It may be that Messrs. H. M. Johnson, Kennedy, and C. A. Johnson jr. were obliged to hold their stock subject to the order and disposition of Messrs. J. S. King and C. A. Johnson sr.; it may be that upon the agreement of 30th May, 1903, Messrs. Chubbuck and Holland have some rights against J. S. King and C. A. Johnson sr.; the Wakefield Mica Company, Limited, had no rights whatever against them which its liquidator can ask the Court to enforce. They are not and never have been shareholders, and are therefore not liable to be placed on the list of contributories. Their appeal must be allowed.

It follows that the appeal of the liquidator as to the set-off allowed in favour of Messrs. J. S. King and C. A. Johnson sr., of $2,515.14, must succeed. I find it difficult to understand how the Master, treating these gentlemen as contributories in respect of unpaid stock, allowed them a set-off for the value of property transferred to the company, not by them, but by Johnson, Willats, & Co. Their only claim that this property should be deemed to have been taken by the company in payment or on account of liability for stock, seems to have rested on the agreement of 30th May, which, because made before the incorporation, the Master held not

binding on and incapable of confirmation by the company. As creditors they would have no right of set-off. The liquidator will have the leave to appeal, therefore, which he seeks, and this appeal will be allowed.

Messrs. Chubbuck and Holland signed the memorandum of incorporation—C. E. Chubbuck for $23,000 and K. B. Holland for $2,000—and they are named in the letters patent as incorporators. The letters patent state "the acquisition of the business now being carried on by the said Charles Edwin Dixon Chubbuck and the said Kenneth Blackmore Holland under the firm name of the Wakefield Mica Company," to be an object of the incorporation. The evidence clearly establishes that by notarial instrument, dated 13th October, 1903, C. E. D. Chubbuck transferred to the company, in consideration of $25,000, the mica property in which he and Mr. Holland were interested. That this property was conveyed by Mr. Chubbuck in payment for the shares for which he and Mr. Holland had subscribed, and was so accepted by the company's pseudo directors, is abundantly clear.

The company would never have acquired it unless taken in payment for the 250 shares in question. The liquidator has, with the sanction of the Court, sold it in the course of these proceedings. It would be most inequitable under such circumstances to deny to the vendors the benefit of what undoubtedly was the real consideration for their transfer to the company. Rescission of this transfer is now out of the question: Re Hess Manufacturing Co., 23 S. C. R. 644, 665. The very charter of the company provides for the acquisition of the property transferred. In such circumstances, I should regret to find myself, by stress of authority, obliged to become instrumental in imposing upon Messrs. Chubbuck and Holland a liability to which the learned Master has declared them not subject. Having found no authority precluding my so doing, I shall dismiss this appeal.

In view of the result of these appeals and the apparent uncertainty and confusion as to the rights and positions of their respective clients which prevailed amongst the solicitors for the several parties in the Master's office, the interests of justice will probably be best served by an order that there shall be no costs of the proceedings taken in the Master's office to place Messrs. J. S. King, C. A. Johnson, sr., C. E. D. Chubbuck, and K. B. Holland, upon the list of contributories, or of these appeals.

FALCONBRIDGE, C.J. DECEMBER 30TH, 1904.

TRIAL.

LANE v. GEORGE.

Easement—Right of Way—Reconveyance—Indemnity—Party Wall—Prescription—Chimney.

Action to set aside a conveyance of a right of way made by plaintiff to defendants in exchange for another right of way, and for a declaration and injunction in respect of an easement claimed by defendants.

J. Shilton, for plaintiff.

G. H. Watson, K.C., and T. A. Gibson, for defendants.

FALCONBRIDGE, C.J.—The only question as to the right of way was whether plaintiff had the right to demand a certain covenant of indemnity in the reconveyance. It seems to me that all she was reasonably entitled to was the rescission of the agreement which she complained of, and relegation to her original position.

It now appears that the right of way actually used by plaintiff and her predecessors for nearly 30 years, with the assent of defendants and their predecessors, is not the same as the right of way as originally described and as described in the conveyance by plaintiff to defendant and in the draft reconveyance. Plaintiff says she wants the right of way as it was when she bought the property. Defendants have no objection to a declaration substituting the right of way as used for that originally described. This plaintiff may have if she choose; but, subject to this, her action on this branch fails. . . .

The second branch of the case is as to the chimney. According to the evidence of William Prowse, the kitchens and sheds were built in the spring of 1874, and the houses 3 or 4 years later; the party wall is as originally constructed, and there always was a hole in it from the south kitchen; there was continuous user of the hole from the south house up to 1886. Sykes proves that the hole existed when he bought the south house in 1887, and right along; he purchased the north house in July, 1889, and owned both until April, 1892.

The law applicable to such a state of facts appears to have been particularly defined in the United States, and it is summarized in the Am. & Eng. Encyc. of Law, 2nd ed., vol. 22, p. 247: "The use of a party wall to maintain chimney flues is a lawful use, especially where such is the customary method of construction. Both parties are entitled

to use the flue when it is built in the middle of the wall, though the lower part of it is wholly in that part of the wall, which is on the land of one owner." See Fidelity Lodge v. Bond, 147 Ind. 437; Ingals v. Plamondon, 75 Ill. 118; Weill v. Baker, 39 L. R. A. 1102. . . .

Action dismissed with costs.

DECEMBER 30TH, 1904.

DIVISIONAL COURT.

BEEMER v. BEEMER.

Malicious Prosecution—Proof of Favourable Termination of Prosecution—Informal Abandonment—Reasonable and Probable Cause—Findings of Jury—Costs.

Appeal by defendants from judgment of MEREDITH, C.J., in favour of plaintiff, upon the findings of a jury, for $1 damages in an action for malicious prosecution. The plaintiff was a married woman, the defendant Lydia Beemer was plaintiff's mother-in-law, and defendant Hannah Beemer, her sister-in-law. The defendant Hannah laid an information before the police magistrate for the town of Woodstock charging plaintiff with setting fire to the house of defendant Lydia Beemer, and plaintiff was arrested and admitted to bail. The information was not further proceeded upon, but there was no formal dismissal of the charge.

The appeal was heard by BOYD, C., MEREDITH, J., MAGEE, J.

C. J. Holman, K.C., for defendants.

L. F. Heyd, K.C., for plaintiff.

BOYD, C.—Information laid by Hannah Beemer against plaintiff for unlawfully setting fire to dwelling-house on 18th September, 1902, and warrant of same date to arrest issued. Under this plaintiff was arrested and brought before the police magistrate (since dead), and was let out on bail. That was on Saturday, and she says she was to return on Monday before the magistrate, but did not do so, and heard no more of the matter.

Tisdale, the high constable of Oxford, who arrested plaintiff, says the case did not come on for trial, but he does not know why. He served 11 summonses for the Crown preparatory to the hearing. Being asked if the information was withdrawn, the question is objected to and is not an-

swered by him. His fees were paid by Mr. Ball, and the money apparently came from one of the defendants.

Zeats, chief constable at Woodstock, handed the police magistrate's warrant to Tisdale to be executed in the country; he says the bail was granted on Saturday, and the subpœnas to witnesses were set for the following Tuesday. He says the hearing did not come on upon Tuesday, and he says he thinks he got instructions from the police magistrate—but being interrupted does not complete his answer, which had reference to withdrawal of the proceedings.

Mr. Ball, of counsel for the defendants, says with reference to the payment of the fees by the defendant Lydia Beemer: "She simply came and paid the money to withdraw the proceedings. Surely that would not bind her for what took place previously."

When a nonsuit was moved because it was not proved that the prosecution had terminated, the Chief Justice said: "It is not a court at all before the police magistrate; it is a preliminary inquiry. . . . Must I not take notice of the fact that there could not have been an enlargement of the 8 days, and that the prosecution must have come to an end in that way? There was here no enlargement after the Tuesday." He thinks that there is evidence because it did not go on then, and concludes that he will reserve the question and not dispose of it then.

Defendant Lydia Beemer in cross-examination says "she paid money to Mr. Ball for Tisdale, but as for settling it she did not settle it because she had nothing to do with it" (i.e., laying the information). She is asked, "How did the proceedings come to be withdrawn?" A. "I told you I went up a while after and Mr. Ball told me I had better pay Mr. Tisdale's expenses, and I said I did not have anything to do with it, although if he thought it right I would." Upon re-examination she is asked by her own counsel: "Why did you go and pay the costs and withdraw the proceedings?" A. "I cannot mind that."

The other defendant is asked: "Why did you not go to Court and prosecute?" A. "I did not have to go to Court." Q. "Well, how was it stopped?" A. "I do not know how it was stopped." Q. "Tell me, what stopped the proceedings?" A. "Mr. Zeats ought to know better than I do."

The Chief Justice treats it in charging the jury as proved that the defendant Lydia Beemer paid the costs of the prosecution, and at Mr. Ball's request, and says also that "the

prosecution did not go on apparently, and he puts the hypothesis that defendants were advised by Mr. Ball that it would not be wise to go on with the prosecution and to pay the costs at this stage in order "that the prosecution might be put an end to. . . . The parties have not told what became of the prosecution, and therefore you have to get from the facts as well as you can how that was." . . .

It is said that a prosecution may be regarded as terminated when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor, if he intends to proceed further, must institute proceedings de novo: Am. & Eng. Encyc. of Law, 2nd ed., vol. 19, p. 681.

In this case I think the evidence suffices to shew—and is eked out by the questions of counsel for defendants—that the summons was not prosecuted by defendants before the magistrate, but that the costs were paid and the matter was allowed to drop. No written termination of the proceedings is needed in such a preliminary investigation, and the death of the magistrate precluded his being called. Enough was shewn here, under the authority of Reid v. Maybee, 31 C. P. 392, to justify the jury and the Court in assuming that the prosecution had terminated favourably to the accused before the action was brought on 9th January, 1903: see Criminal Code, secs. 567, 580, 586; Stevens on Indictments, p. 73.

In other respects upon the points argued I agree with the conclusion of my brother Meredith that the case could not properly have been withdrawn from the jury, and their finding should not be set aside. Finding that there is proof of a favourable termination of the prosecution, as alleged, I think that altogether the judgment should be affirmed with costs.

These costs, I think, should be on the lower scale and no set-off.

MAGEE, J., gave reasons in writing for the same conclusion.

MEREDITH, J.—The trial Judge could not rightly have withdrawn from the jury the question whether defendants really believed plaintiff to have been guilty of the crime with which she was charged, the whole course of unfortunate antagonism and quarrelling between the parties, left that to some extent an open question; and so the jury were very properly told that it was for them to find whether the charge was made in good faith, and that if they found that it was,

then they must find for defendants, for in that case there would be reasonable and probable cause.

There was also some evidence, which could not be dealt with except by the jury, from which it might be found that the elder defendant had joined with the younger in the prosecution, in not only the testimony of the witness Zeats and the admission of counsel for defendants, but also in the antagonistic attitude and conduct of the parties, the one towards the other, the defendants together on the one side, and plaintiff and her husband on the other. . . .

But I am unable to find any reasonable evidence of the determination of the criminal prosecution in plaintiff's favour. . . .

I would allow the motion and dismiss the action, on this ground, with costs.

DECEMBER 30TH, 1904.

DIVISIONAL COURT.

VALIQUETTE v. FRASER.

Negligence—Injury to Person—Falling of Wall of Building—Exceptional Storm—Defective Construction—Knowledge of Owner—Employment of Competent Superintendent and Builder.

Appeal by plaintiff from judgment of TEETZEL, J., ante 60, dimissing the action.

Action under the Fatal Injuries Act by the widow and administratrix of one J. S. Valiquette, a boiler maker, who, while working for a contractor at a mill in course of erection for defendants, was killed by the falling of a wall of the building in which he was working. The accident took place in the Province of Quebec. It was admitted by counsel at the trial that the law of that Province was to be treated as identical with that of Ontario so far as the rights of the parties were concerned, except that there was no Employers' Liability Act in Quebec. The law to be applied was, therefore, the law of Ontario without the Workmen's Compensation Act.

The fall of the wall was caused by a severe storm of wind on 7th August, 1903. The action was brought against the

Frasers, who were the owners of the building, and against one Garrock, the contractor for the brick work.

J. Lorn McDougall, Ottawa, for plaintiff.

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

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

STREET, J.—. . . A very careful perusal of the evidence has led me to the conclusion that the collapse of the building was probably caused by the fact that the storm came upon it in its unfinished state. The wind—a very violent one—rushed into the building through the openings left for doors, and lifted the roof; and the wall, having no support at the top, was forced over by the pressure of the wind. The evidence of Proper (the superintendent of the building work) gives reasons for not having doors fitted at the openings; the openings were being used for bringing in large pieces of machinery in connection with the construction of the boiler. I think his explanation affords a sufficient reason for not having these openings closed by doors at the time; and I do not think that it was incumbent upon him to incur the inconvenience of temporarily closing them with planks, because it was within the possibilities that such a storm might overtake them. The question is, whether it was his duty, as a reasonably prudent man, to have kept these openings blocked up with planks, at all times when they were not in actual use by the construction boiler makers at work there, lest an unusually severe storm should suddenly obtain entrance and force off a roof weighing 18 tons. I think plaintiff has failed to shew any actionable negligence on the part of defendants in this or in any other respect: Pearson v. Cox, 2 C. P. D. 369.

The highest ground upon which plaintiff can put the liability of defendants Fraser & Co is that deceased was lawfully upon premises owned and occupied by them, and that they owed a duty to him to see that due care had been exercised in the construction and maintenance of the building in which he was lawfully at work: Indermaur v. Dames, L. R. 2 C. P. 311; Marney v. Scott, [1899] 1 Q. B. 986.

Defendants Fraser & Co. were not insurers of the safety of the workmen employed at the building, nor bound by an implied guarantee to them that it was absolutely safe. Guarantees which are implied are not to be extended beyond those

implications which are reasonable in the circumstances. It would be an unreasonable implication that a land owner putting up a building upon his land, who has let the contract for it, according to a plan prepared by a reputable and experienced architect, to a reputable and experienced contractor, is bound to acquire the technical knowledge necessary to enable him to pronounce upon and approve or reject the plans of the architect and the work of the contractor, upon pain of being held guilty of negligence. It would be unreasonable because it is entirely contrary to the established usage and practice for an owner to attempt to acquire the complete professional knowledge of the principles of architecture and construction which would be necessary to enable him to deal with the subject, before he could venture to put up a building for his own use. The universal practice is for the owner to employ persons whose professional training is supposed to fit them for the purpose; and when due care has been taken in the selection of persons to draw or approve of proper plans and to do the work without interference or stint, the duty of the owner in general has been performed, unless special circumstances, not appearing here, impose upon him higher obligations: Black v. Ontario Wheel Co., 19 O. R. 578; Searle v. Laverick, L. R. 9 Q. B. 122. Cf. Francis v. Cockrell, L. R. 5 Q. B. 501, 508.

Even, therefore, upon the assumption that the construction of the walks did not afford the margin of safety required by the rules upon which such buildings should be erected, or that the manner in which the roof was attached to the walls might have been improved upon, those were matters upon which experienced architects and practical builders are not in accord, and the owner cannot, consistently with the principles upon which liability is founded, be held answerable. They are matters of strictly technical knowledge, and he is obliged to rely upon persons whose business it is to possess it. If the alleged defect were one not requiring that knowledge, but patent to any ordinary person, such as an open trap door, or an unfenced opening in his building, different considerations would be properly applied. This is, in effect, the rule laid down in Indermaur v. Dames, L. R. 1 C. P. 274, L. R. 2 C. P. 311, viz., that a person lawfully on the premises on business, and not as a mere licensee, is entitled to expect that the occupier shall use reasonable care to prevent damage from unusual danger which he knows or ought to know.

I find nothing in the cases decided since Indermaur v. Dames extending the rule there laid down, although the

language used in some of them must be limited by the facts with regard to which it is used. The cases are well grouped, and a comparison is invited by the grouping, in vol. 19 of Ruling Cases, pp. 4 et seq. and 60 et seq. The rule in Indermaur v. Dames is, of course, not applicable to all circumstances, and the liability of an owner or occupier may be much extended, where, for instance, a duty to the public, statutory or otherwise, is involved, as in Tarry v. Ashton, 1 Q. B. D. 314, and Button v. Great Western R. W. Co., L. R. 7 Ex. 130, or where, for a valuable consideration, something is supplied by defendant to be used by plaintiff for a particular purpose, as was the case in Francis v. Cockrell, L. R. 5 Q. B. 501—see p. 508, where the rule is formulated.

Appeal dismissed with costs.

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