THE

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WINCHESTER, MASTER. FEBRUARY 5TH, 1902.

CHAMBERS.

## CANADIAN MINING, ETC., CO. v. WHEELER.

*Judgment Debtor—Transferee of—Examination—Third Mortgagee—"Exigible under Execution"—Legal and Equitable Execution—Receiver—Rule 903—56 Vict. ch. 5, sec. 9 (O.)*

The holder of a third mortgage given by a judgment debtor is not examinable under Rule 903.

Application by the plaintiffs, who are execution creditors of defendant, for an order to examine his transferee.

W. R. P. Parker, for plaintiffs.

J. J. Maclennan, for transferee.

The Master in Chambers:—The transferee is a mortgagee to whom the judgment debtor has given a mortgage on certain lands belonging to the debtor, and who had previously given two prior mortgages thereon to other parties

Counsel for the transferee contends that the rule under which the plaintiffs apply, does not include him, as he is not a person "to whom the debtor has made a transfer of his property or effects *exigible under execution*." He admits that the debtor has given him a mortgage on certain real estate belonging to the debtor, but claims that it is a third mortgage upon the property, and therefore is not a transfer of property exigible under execution: Jarvis v. Ireland, 4 A. R. 118 at p. 122.

Counsel for the plaintiffs claim that the words "exigible under execution" include equitable execution, and the appointment of a receiver: *In re* Pope, 17 Q. B. D. 743.

The former Con. Rule 928, from which the present Rule 903 is taken and under which the present application is made, was not limited by the words "exigible under execution." These words were, for the first time, added to the present Rule at the last consolidation, and were apparently taken from similar words used in 56 Vict. ch. 5, sec. 9 (O.) This section became Rule 904 in the last consolidation of the rules, and, no doubt, Rule 903 was made to harmonize

with Rule 904 in this respect. This term "exigible under execution" in the Act referred to meant a legal execution only, as that statute related exclusively to "certain duties, liabilities and fees of sheriffs," and I am of opinion that the same meaning to these words attaches to them in Rule 903 as in sec. 9, ch. 5, 56 Vict. (O.), and that equitable execution or the appointment of a receiver is not included by their use. As to the difference between a legal and equitable execution, I would refer to *In re* Shepherd, 38 W. R. 133

The motion must be refused.

Parker & Bickford, Toronto, solicitors for plaintiffs.

Robertson & Maclennan, Toronto, solicitors for defendants.

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MACMAHON, J. FEBRUARY 10TH, 1902

TRIAL.

## KEITH v. OTTAWA AND NEW YORK R. W. CO.

*Railway and Railway Companies—Injury to Passenger—Alighting from Moving Car—Contributory Negligence.*

Washington v. Harman, 147 U. S. R. 571, and Central R. W. Co. v. Miles, 88 Ala. at p. 261, referred to.

Action to recover damages for injuries sustained by plaintiff, who endeavoured to get off a train as it was moving out of Finch station.

George McLaurin, Ottawa, for plaintiff.

W. Nesbitt, K.C., and W. H. Curle, Ottawa, for defendants.

MACMAHON, J.—At the conclusion of the trial I submitted certain questions to the jury, which, with their answers, are as follows:

(1) How long did the train stop at Finch station? A. Cannot say.

(2) Was the time the train remained there sufficient to enable the plaintiff to alight? A. No.

(3) Was Keith aware when he reached the platform of the car that the train was in motion A. Yes.

(4) If Keith was guilty of any negligence which contributed to the accident, what was such negligence? A. None.

(5) If Keith is entitled to recover, at what do you assess the damages? A. $1,000.00.

I reserved the consideration of the motion by counsel for the defendants for non-suit, and have reached the following conclusion:

The motion for a non-suit cannot prevail. In my charge to the jury, I said: "If they (the company) gave the plaintiff ample facilities to get off, but he did not do so, but attempted to get off when he knew there was danger in getting off, the company ought not to be held responsible for his act, and looking at it in that way, it is for you to say whether he acted reasonably in getting off under the circumstances appearing in the evidence." The answer therefore to the fourth question, that the plaintiff was not guilty of any negligence which contributed to the accident, is a finding that he was acting as a reasonable man would in getting off the train, although it was in motion. And according to the evidence of Daniel E. Seese, the company's station agent at Finch, the car had only gone thirty feet when the plaintiff got off, and the jury might properly conclude that the plaintiff was not acting unreasonably in endeavouring to alight.

See Washington v. Harman, 147 U. S. R. 571, Central R. W. Co. v. Miles, 88 Ala., at p. 261; and refer also to Loyd v. Hannibal R. W. Co., 4 American Negligence Cases, 481; Covington v. Western R. W. Co., 81 Ga. 276; Radley v. L. & N. W. R. Co., 1 App. Cas. 754; Filer v. N. Y. C. R. W. Co., 49 N. Y. 47.

I direct that judgment be entered for the plaintiff, for $1,000, with costs.

McLaurin & Miller, Ottawa, solicitors for plaintiff.

Scott, Scott, & Curle, Ottawa, solicitors for defendants.

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MOSS, J.A. FEBRUARY 11TH, 1902.

C. A.—CHAMBERS.

## RE CARLETON PLACE VOTERS' LISTS.

*Parliamentary Elections—Voters' Lists—Notice of Complaint—Statement of Grounds—Signing by Complainant—Amendment.*

Case stated by the County Judge of Lanark, for the opinion of the Court of Appeal or a Judge thereof, under R. S. O. ch. 7, sec. 38, as follows:—1. At the sitings of the Court to hear and determine complaints of errors and omissions in the voters' lists, it was objected that in the notice of complaint the printed "M. F. and" did not disclose any ground of complaint within the meaning of the Act.

Without calling for evidence, I expressed the opinion that "M. F." had, in connection with voters' lists matters, acquired the meaning of "Manhood Franchise," and the word "and" could be treated as surplusage. Was I right?

2. The notice of complaint as filed consists of fifteen sheets, each in itself in the form number 6 in the Act, the lists Nos. 1, 2, 3, and 4 being printed on the back of the notice of complaint. Only the notice of complaint on the last sheet was filled out and signed by the complainant, but evidence was given that the whole fifteen sheets were attached together as they now appear when the complainant signed the notice of complaint on the last sheet, and handed the whole to the clerk. I expressed the opinion that, considering it my duty to further the franchise, while entertaining great doubts, I thought that sufficient. Was I right?

3. The complainant asked leave to amend, if necessary, under sec. 32 of the Act, by making the signed notice refer explicitly to the annexed sheets. I refused the amendment upon the grounds that if any necessity for it, the effect would be to confer jurisdiction on myself, and that sec. 32 can be satisfied in its words by confining it to notices other than notices of complaint. Am I right?

G. H. Watson, K.C., for those against the ruling of the County Judge.

E. Bristol and Eric N. Armour, for those supporting the ruling.

Moss, J.A.—Question 1 must be answered in the affirmative. The Legislature did not intend to bind parties to exact observance of the words of the forms (sec. 4). What is intended is that the list should afford such information of the nature of the qualification of the person named as will enable the other voters to ascertain, by inquiry, the truth or untruth of the statement. In this instance it cannot be well imagined that other voters, or persons who usually interest themselves in the revision of the lists, will be misled by the form of statement. The right of a person to be on the voters' list ought not to depend upon a too critical examination of the forms in the schedule, which are inserted merely as examples, and are not required to be followed implicitly.

The second question must also be answered in the affirmative. It may be treated as really one of fact. It is impossible to say that the lists are not subjoined. They are annexed or attached, which means subjoined. Looking at the lists, and reading them in the light of the notice, there

is no sufficient ambiguity to lead to the rejection of them on the ground that they are not part of the complaint.

Question 3 must also be answered in the affirmative in this particular case. In a case of a notice defective in some material respect, *e.g.*, unsigned, which renders it valueless as a foundation for the proceedings, which the Judge is authorized to take upon receipt by the clerk of a notice in conformity to the Act, there is no jurisdiction to amend; but, assuming the notice and lists to be properly before a Judge, a misnomer or plain mistake in description and many other like errors may be amended.

Watson, Smoke, & Smith, Toronto, and Bristol, Cawthra, & Bayly, Toronto, solicitors.

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MEREDITH, C.J. FEBRUARY 11TH, 1902.

CHAMBERS.

## CARSWELL v. LANGLEY.

*Bankruptcy and Insolvency — Contingent Debts — Sums Payable Quarter-yearly by Person Becoming Insolvent — Not Provable under R. S. O. ch. 147.*

Special case.

J. J. Warren, for plaintiff.

F. E. Hodgins and W. M. Irwin, for defendant.

MEREDITH, C.J.—The defendant is the assignee for benefit of creditors of one E. F. Robinson, and the action is to establish the right of the plaintiffs to prove and rank upon the estate of Robinson for the present value of $100 per quarter, which he, before the date of the assignment, covenanted with them to pay to one Jane Robinson on the first day of each quarter-year during her natural life.

These growing quarterly payments are in their nature contingent debts, and not provable under R. S. O. ch. 147; Grant v. West, 23 A. R. 533; Mail Printing Co. v. Clarkson, 25 A. R. 1. Judgment for defendant without costs.

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CHAMBERS.

MEREDITH, C.J. FEBRUARY 11TH, 1902.

## CROWN CORUNDUM AND MICA CO. v. LOGAN.

*Action — Order dismissing — Undertaking — Default in Giving — Effect of.*

Carter v. Stubbs, 6 Q. B. D. 116, followed.

Collinson v. Jeffery, [1896] 1 Ch. 644, distinguished.

Appeal from order of Master in Chambers.

The defendants moved before the Master in Chambers to dismiss the action for want of prosecution, and on 5th October, 1901, he made an order directing that in default of plaintiffs, within 4 weeks, undertaking to bring the action for trial at Peterborough in December, 1901, and proceeding to trial then, that the action be dismissed with costs. On appeal MEREDITH, C.J., affirmed that order, and on further appeal, a Divisional Court affirmed his order, and refused to extend the time for trial or relieve plaintiffs from the consequences of failing to give the undertaking. Subsequently, defendants applied to the Master in Chambers for an order dismissing the action, and on 31st January, 1902, he made an order allowing plaintiffs to go to trial at Peterborough on 27th May next. The defendants appealed.

G. M. Macdonnell, K.C., for defendants.

W. E. Middleton, for plaintiffs.

MEREDITH, C.J.—At the expiration of the time allowed for giving the undertaking, the action was at an end: Whistler v. Hancock, 3 Q. B. D. 83; King v. Davenport, 4 Q. B. D. 402; Carter v. Stubbs, 6 Q. B. D. 116; Hollander v. Ffoulkes, 16 P. R. 225, though pending an appeal, but not afterwards, an order extending the time for trial might have been made: Carter v. Stubbs, supra, and the time, though it has expired, for appealing from such an order, may be extended: Carter v. Stubbs, supra, Burke v. Rooney, 4 C. P. D. 226. . . .

In Collinson v. Jeffery, [1896] 1 Ch. 644, Kekewich, J., recognized that a different rule, from that which he had adopted, was applicable where the order was one dealing with the dismissal of an action for want of prosecution?

In Script Phonography Co. v. Gregg, 59 L. J. Ch. 406, North, J., treats Whistler v. Hancock, and King v. Davenport, supra, as settling the law. . . .

Even if the Master in Chambers had jurisdiction to make his second order, it would have been improper to do so after the order of the Divisional Court.

Appeal allowed with costs, but motion dismissed without costs, because it was unnecessary.

Kilmer, Irving, & Porter, Toronto, solicitors for plaintiffs.

Macdonnell & Farrell, Kingston, solicitors for defendants.

LOUNT, J. FEBRUARY 12TH, 1902.

TRIAL.

## HARRIS v. STEVENS.

*Sale of Goods—Credit—Promise Written to Mercantile Agency to be Responsible for Goods Delivered to Another Person Carrying on Business in Another Name—Not within Statute of Frauds—Partnership.*

Action tried at London, brought to recover $985, the price of goods sold and delivered to the Stevens Manufacturing Company, and $900, the amount of the company's promissory note, given for price of other goods.

E. Meredith, K.C., and J. C. Judd, London, for plaintiff.

G. C. Gibbons, K.C., and M. D. Fraser, London, for defendants Labatt and Stevens.

W. C. Fitzgerald, London, for defendants Fitzgerald & Co.

LOUNT, J.—The plaintiff alleges that at the time of the sale of the goods, the defendants Labatt and Fitzgerald were the real owners of the business carried on as the Stevens Manufacturing Co., and that the goods were supplied on their credit, or that the defendants were carrying on the business in partnership. He also alleges that defendants Labatt and Fitzgerald & Co. furnished to R. G. Dun & Co., mercantile agency, a writing stating that "In reply to your enquiry, we beg to say that we hold ourselves responsible for the payment of all goods which may be bought for, and delivered to or on account of the Stevens Manufacturing Co., in the course of their business," which was furnished for publication to the trade, to be communicated to plaintiff and others having dealings with the Stevens Co., to enhance its credit, and to induce the furnishing of goods on credit; that this statement was shown to him, plaintiff, and he supplied the goods on the strength of it; and that said defendants authorized one T. A. Stevens, the company's manager, to pledge their credit for the goods. I find, on the evidence, against the plaintiff, and I find, also, that although the memorandum sent to R. G. Dun & Co. at their request was for publication, to the knowledge of the senders, the defendants Labatt and Fitzgerald & Co., it did not create a liability on their part to the plaintiff, to whom it was not addressed, and who is not a party to it. It is not a sufficient memorandum in writing to satisfy the Statute of Frauds. See Williams v. Lake, 2 Ell. & Ell. 349; Williams

v. Byrnes, 1 Moo. P. C. N. S. 195; Richard v. Stillwell, 8 O. R. 511; White v. Tomlin, 19 O. R. 513; McIntosh v. Moynihan, 18 A. R. 237.

Judgment for plaintiff against John Stevens, with costs. Action dismissed with costs as against the other defendants.

Meredith, Judd, Dromgole, & Elliott, London, solicitors for plaintiff.

Fraser & Moore, London, solicitors for defendants Labatt & Stevens.

W. C. Fitzgerald, London, solicitor for other defendants.

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OSLER, J.A.

FEBRUARY 11TH, 1902.

COURT OF APPEAL—CHAMBERS.

## WIEDEMAN v. GUITTARD.

*Promissory Note—Holder in Due Course—Effect of Indorsement—Evidence Necessary to Hold Indorser—Leave to Appeal—Bills of Exchange Act, 1890, secs. 29, 55.*

Herdman v. Wheeler, 18 Times L. R. 190, approved.

Application by defendant S. A. C. White for leave to appeal from order of a Divisional Court affirming judgment at the trial.

W. M. Douglas, K.C., for the motion.

F. A. Anglin, for plaintiff.

OSLER, J.A.—The promissory note sued on was made by T. M. White and M. Guittard, payable to Hutchinson, Cramer & Co., indorsed by them to Mrs. S. A. C. White, and indorsed by her to plaintiff. . . . It is not denied that her legal relation is that of indorser to the plaintiff, and that being so, he is a holder in due course within sec. 29 of the Bills of Exchange Act, as explained in Herdman v. Wheeler 18 Times L. R. 190. Her indorsement admits, *prima facie* at all events, the ability and signature of all prior parties: sec. 55. In order to recover against her, the holder had only to prove her signature, and the performance of the conditions on which her liability as indorser depends, viz.: presentment, non-payment, and notice of dishonour. Has this been proved? A person named Henry Wiedeman, the name of the plaintiff, was called. He spoke of his being trustee for creditors of Windsor Brewery Co. . . . A sale of the property was made . . . in respect of the purchase money, he received the note in question . . . he said the note was not paid at maturity, and that it was protested (which *qua* any effect

to be given to the protest may be disregarded, if it be thought that the protest was not proved) after presentment, and notice sent; that it was presented the day it was due, and that notice was duly sent. This is the evidence of the holder of the note, the plaintiff, and from this it certainly ought to be inferred by any Judge, in the absence of any weakening of the statement by cross-examination, that the presentment was on the day the note became due, and that payment was refused. But it is contended that no one can tell what notice was sent or to whom. This is very like a special demurrer to the evidence, an attempt to pick holes in common phraseology, of which every one understands the meaning, language used by the holder of the note in testifying upon the issues joined in the action. The appellant was represented by counsel at the trial, and if she chose to leave the matter as plaintiff stated, it must be assumed that she could not have bettered her case or weakened his by cross-examination, and therefore that he was testifying that notice of dishonour of the note sued on was sent as required by law . . . I do not think it necessary to rely on the protest. It must be considered too, in dealing with the question of leave to appeal, that there is every reason to suppose that the objections are merely technical, and that the court would on the hearing of the appeal allow any defect to be supplemented by further evidence.

Motion refused with costs.

Murphy, Sale, & O'Connor, Windsor, solicitors for plaintiff.

Fleming, Wigle, & Rodd, Windsor, solicitors for defendant S. A. C. White.

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OSLER, J.A. FEBRUARY 12TH, 1902.

C. A.—CHAMBERS.

## CITY OF HAMILTON v. KRAMER-IRWIN ROCK ASPHALT, ETC., CO.

*Appeal Book—Contents—Action for Breach of Contract for Repair, etc., of Streets—Finding on Proper Construction of Contract—Appeal as to—Evidence on Various Issues—Inclusion of, in Appeal Book.*

A motion by consent for direction as to the contents of the appeal book.

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

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

Osler, J.A.—The action was brought on a contract for the construction of pavements on certain streets in the city of Hamilton. It was tried at great length, and an immense volume of evidence taken on various issues relating to the condition of the streets, the causes of their disrepair, etc., et ., and from defendants' point of view, whether all or any of these causes were such as they were, within the contract, liable to make good. The trial Judge held that they were all within it, on the proper construction of the contract, and so holding, also held that it was not necessary for him to pass upon the specific issues of fact presented on the pleadings and evidence, and that plaintiffs are therefore entitled to succeed to the full extent claimed. He finds the amount of damages, apparently measured by the whole cost of the repair, giving the defendants a reference at their own expense and risk, if so advised. The defendants are appealing, and they desire to limit their appeal, in the first instance, to the point on which the trial judgment has turned, viz.: the construction of the contract, in order to avoid, if possible, the expense which would be entailed by an appeal upon the evidence and the special issues of fact. The additional expense of this it was said would be not far from $1,000. The motion was opposed on the ground that the respondents would be embarrassed by having the appeal launched in this manner, involving, as it possibly (probably) would, two arguments in this Court, and a difficulty in possible subsequent appeals to the Supreme Court. If the whole case were before us, as in strictness and according to the usual practice it ought to be, as it was before the trial Judge, the plaintiff would have the right to support his judgment, in whole or in part, upon every ground open to him on the evidence in the issues, as well as upon that on which the learned trial Judge has rested it. We might direct the argument on the former to stand over until we could see that it was necessary for the plaintiff to enter upon that branch of the case, delaying in that event our final judgment until after the second argument. Either party would then be in a position to go to the Supreme Court upon the whole case. The strict right of the respondents here is to be in that position should our judgment be adverse to them on the question of construction.

If, on the other hand, this Court should be prepared to support the judgment at the trial, on the ground on which the learned Judge placed it, the defendants may go to the Supreme Court (and they are not prepared to say that they will not do so) and in that event also they must supply the evidence, so that the plaintiffs in the exercise of their right

may support the judgment on any ground they may think proper. The evidence ought, in that event, also to be before us when we give judgment, for it is the case as presented to us which should go to the Supreme Court, and it is, as I have said, the now respondents' right to have the case before us as fully as it was before the trial Judge. The defendants suggest that I might impose terms by which the evidence might be introduced for the purpose of the appeal to the Supreme Court. But this may lead to embarrassment, for I cannot say—no one can—how that Court may look at the case when it comes before them. They may raise all sorts of objections to hear the case in any other way than as it was argued and came before us, and I do not think I could order (or safely for the plaintiffs order) that the evidence shall be brought in merely for the purpose of the further appeal. It is quite conceivable that the Supreme Court would hold, that, even by consent of the parties, or by the imposition of terms, I had no authority to do so, or to provide for the case going before them in any other way than it had judicially come before us. From any point of view therefore, as the defendants are not prepared to say that in the event of judgment adverse to them on the construction of the contract they will go no further, it would be merely a matter of postponing the introduction of the evidence, and there is no object to be gained that I can see by doing that. If indeed the defendants could say that they were not going to the Supreme Court, and would submit to imposition of such a term, I might, so far as the appeal to this Court is concerned, accede to their application, although Mr. Riddell suggests that even on the question of construction there are some parts of the evidence which he desires to be in a position to refer to. This, however, is as far as I could go.

I may add that the matter of settling the appeal book in respect of the subject I have dealt with, has been referred to me, or some Judge of the Court, by the trial Judge to whom in strictness it appertains, and comes before me in this way by consent of the parties. For the actual order to be made in the settlement of the book remains to be made by the proper Judge, but I may say without going beyond the line of my duty, that I hope the parties in their own interests, as well as in that of the Court, will make an effort to limit the evidence brought up, to what is actually necessary for the purpose of the appeal.

McKelcan & Counsell, Hamilton, solicitors for plaintiffs.

Lee, Farmer, & Stanton, Hamilton, solicitors for defendants.

LOUNT, J. FEBRUARY 12TH, 1902.

TRIAL.

## LASJINSKI v. CAMPBELL.

*Contract—Foreigner—Fraud in Reducing Contract to Writing—Void not Voidable—Sale of Standing Timber—Interest in Land—Void if Wife of Patentee of Homestead not a Party—R. S. O. ch. 25, sec. 17.*

Handy v. Carruthers, 5 O. R. 280, and Anderson v. Anderson, [1895] 1 Q. B. 749, followed.

Action brought for an injunction to restrain defendants from trespassing upon lot 35, in the 8th concession of the township of Hagarty, in the County of Renfrew, and to recover $700, the value of 637 cedar, ash, spruce, and basswood trees, cut and removed, and $200 damages for trespass.

T. W. McGarry, Renfrew, for plaintiff.

W. B. Craig, Renfrew, and R. C. McNab, Renfrew, for defendants.

LOUNT, J.—The plaintiff is patentee of the land in question, under the Free Grant and Homestead Act. The patent issued to him in April, 1885. He and his wife are Poles, unable to speak English, and not able to read or write. The agreement, under which defendants claim the right to cut and remove timber, purports to have been made and registered in December, 1887. It was made by plaintiff and his wife with one R. White, and purports for $80, $5 in cash and balance before removal, to sell all the standing trees on the lot. The document was executed by mark, in the presence of J. C. Thompson, then an agent of White, but now employed by defendants. White, within 2 years, cut certain pine trees, paying one-half the price the first year, and the other half the second year. In 1889, White and his brother, who were then in partnership, assigned to O'Meara for benefit of creditors, and in January, 1890, O'Meara, by registered deed, conveyed to one Dunlop "all the red and white pine trees and timber" on the lot, and the defendants, by mesne conveyances, are assignees of Dunlop.

The plaintiff says he did not make the agreement in question; that he agreed to sell only the pine for the consideration mentioned; that the agreement was made at the house of one August Blanc, who acted as interpreter, but could not read or write; that Thompson wrote out the agreement after it was made, and said it was the one just made, and he, plaintiff, then put his mark to it. Blanc corroborated

the plaintiff's evidence, as did Mary Blanc, then a girl of 9 years. Thompson merely says that the agreement was made at Blanc's house, but does not give further explanation, and does not deny the evidence of plaintiff, Blanc, or his daughter. Plaintiff's wife says that she never put her mark to the agreement, and that she was not present when it is said to have been made. I think the agreement set up by defendant is not the true agreement. McNeill v. Haines, 17 O. R. 479, is not the same as this case. . . . I think the alleged agreement is void, not voidable, and that defendants did not acquire any rights under it, to the trees in question; nor is there any equity in defendants' favour, certainly none as against earlier equity of plaintiff. Sec. 98 of the Registry Act cannot help defendants. I do not think the agreement can be upheld, owing to R. S. O. ch. 25, sec. 17. It is undoubtedly a sale of an interest in land: Handy v. Carruthers, 25 O. R. 280, citing Summers v. Cook, 28 Gr. 179, McNeill v. Haines, 17 O. R. 479, and Lavery v. Purcell, 39 Ch. D. 50. While I recognize that the evidence of the plaintiff and his wife, parties interested, should be scrutinized and accepted with great caution, I see, under all the circumstances of the case, no good reason for doubting their evidence, and, as the wife did not execute the agreement, it is void under sec. 17 of the Homestead Act. . . . Moreover the words "and timber" are *ejusdem generis*, and mean red and white pine timber, whether growing, standing or being on the lot: Anderson v. Anderson, [1895] 1 Q. B. 749. Judgment for plaintiff for $78 in addition to the $150 paid into Court, and injunction granted with costs. Counterclaim dismissed without costs.

McGarry & Devine, Renfrew, solicitors for plaintiffs.

Craig & McNab, Renfrew, solicitors for defendants.

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FEBRUARY 12TH, 1902.

DIVISIONAL COURT.

## CHEVALIER v. ROSS.

*Amendment—Pleading—Diligence in Moving—Rule 312.*

An appeal from the order of LOUNT, J., *ante* p. 12, was heard before a Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) and argued by the same counsel.

The judgment of the Court was delivered by

FALCONBRIDGE, C.J.—The filing of the memorandum according to form 53 (Rule 423) was a mistake, and a motion to rectify was made with all reasonable promptness. Emery

v. Webster, 9 Ex. 242, decided fifty years ago, when the practice was much stricter, is a stronger case than this, for there the money was taken out of court. Appeal dismissed with costs.

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FERGUSON, J.

FEBRUARY 12TH, 1902.

TRIAL.

## GLENN v. RUDD.

*Master and Servant—Wrongful Dismissal—Construction of Agreement—Statute of Frauds—R. S. O. ch. 157, sec. 5.*

Brace v. Calder, [1895] 2 Q. B. 253, applied.

Action, tried at London, brought to recover damages for alleged wrongful dismissal of plaintiff. The Raymond Company of Guelph manufactured National cream separators for defendants, who had the sole agency for Ontario, and traded as the Creamery Supply Company. The defendants appointed the plaintiff sole general agent for five western counties, and agreed that the contract between plaintiff and them should remain in force so long as the Raymond Company should continue to manufacture separators for defendants. Subsequently defendants dissolved partnership, and each taking half of the Province as his territory, continued in business, the Raymond Company supplying each with separators.

T. T. Macbeth, K.C., for plaintiff.

G. C. Gibbons, K.C., and J. J. Drew, Guelph, for defendants.

FERGUSON, J.—It is to me manifest that this contract must have come to an end, and, as to time, be performed at any time the Raymond Company should cease to manufacture the separators for the defendants. There was nothing to prevent their ceasing so to do at any time. The contract, therefore, might or might not be performed within the year. On this subject I refer to secs. 274, 275, and 276 of Browne on the Statute of Frauds, and Addison on Contracts, 9th ed., p. 34, where the author refers, *inter alia*, to McGregor v. McGregor, 21 Q. B. D. 424. I refer also to pp. 428 and 429, at which Lord Esher deals with Davey v. Shannon, 4 Ex. D. 81, and adopts Murphy v. Sullivan. I am decidedly of opinion that the Statute of Frauds has no application to the agreement in question, nor has R. S. O. ch. 157, sec. 5. The Raymond Company had not at or prior to the time of dissolution of defendants' partnership, ceased to manufacture separators for them. There was at that

period a valid parol agreement between plaintiff and defendants. According to the decision in Brace v. Calder, [1895] 2 Q. B. 253, the fact of the dissolution, which was of course the act of the defendants, operated as a wrongful dismissal of the plaintiff (or was a breach of the agreement) . . . The plaintiff seems to have been realizing about $50 a month, and has not been able to obtain suitable employment, but has been able to make only trifling sums since his dismissal. I think he should not be put off with only nominal damages, nor yet recover heavy damages, and upon the best consideration I can bestow upon the matter, I arrive at the sum of $300 as damages.

Judgment accordingly with costs on High Court scale.

Macbeth & Macpherson, London, solicitors for plaintiff.

Macdonald & Drew, Guelph, solicitors for defendants.

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FEBRUARY 13TH, 1902.

DIVISIONAL COURT.

## REX v. COLE.

*Criminal Law—Incitement to Give False Evidence—Or Evidence Regardless of its Truth or Falsehood—Misdemeanour—Single Justice—Grand Jury—Common Law—Criminal Code—Repugnancy—Bail—Estreat—C. Code, secs. 530, 641.*

Motion by A. F. Bowman to make absolute a rule *nisi* calling upon the Attorney-General for Ontario to show cause why the estreat roll upon the recognizance of bail entered into by Oliver Cole and A. F. Bowman, and the writ of *fi. fa.* and capias thereupon issued, and all proceedings to estreat, should not be set aside and proceedings forever stayed. The defendant was committed for trial by A. Freeborn, a justice of the peace, upon an information charging that on January 7th, 1901, the defendant did, at the village of Southampton, in the county of Bruce, unlawfully attempt to incite, procure, counsel and induce one Sylvester Cole, unlawfully, willingly, and knowingly and corruptly to commit the crime of perjury, by swearing on the trial of a certain election petition then soon thereafter coming on to be heard of Campbell v. McNeill, that George Smith, C. E. Vanstone, James John, or the member elected for North Bruce, or some one of them, had corruptly paid him, Sylvester Cole, $5 to vote for the said McNeill, whereas in fact and in truth no such offer had been made. The defendant was admitted to bail by the said justice of peace. The grand jury found thereafter a true bill, and defendant not appearing, the presiding Judge

at the Spring Assizes at Walkerton directed a warrant to issue for his apprehension, and ordered the bail to be estreated, giving effect to the contention of the counsel for the Crown, viz., that the charge was not one under secs. 120, 121, 146, 147, 148 to 152 of the criminal code as to perjury, for which defendant would be liable to imprisonment for five years, but that it came under sec. 530, under which defendant is liable to one year's imprisonment for inciting or attempting to incite any person to commit any offence under any statute for the time being in force, and not inconsistent with the code.

C. H. Ritchie, K.C., for Bowman.

J. R. Cartwright, K.C., for Attorney-General for Ontario.

The judgment of the Divisional Court (BOYD, C., FERGUSON, J.) was delivered by BOYD, C.:—The offence as set out in the recognizance (the warrant not being before the Court) is not an attempt to commit the crime of subornation of perjury, as was argued, but something less, being an incitement to give false evidence, or to give particular evidence regardless of its truth or falsehood, which is a misdemeanour at common law, punishable by fine and corporal punishment: Russell on Crimes III., p. 3. In such a case it is competent for a single justice of the peace to commit for trial, and also to admit to bail, as at common law. It was competent for the grand jury to go beyond the charge contained in the magistrate's commitment if founded upon the facts or evidence disclosed on the depositions: C. Code, s. 641. As to any such variance the bail have no ground to complain, for they are bound in a sum certain, and not to stand in the place of the principal, and his failure to appear is the cause of the forfeiture of the recognizance; see R. v. Ridpath, 10 Mod. 152. The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law; R. v. Carlile, 2 B. & Ald. 161. But here, the offence as set forth in the recognizance is not specified in the Code, and the power of the justice may be exercised as at common law in liberating the prisoner into the hands of bailsmen. Rude *nisi* discharged with costs.

J. Frank Palmer, Walkerton, solicitor for Bowman.

MacMahon, J. February 13th, 1902.

TRIAL.

## THOMPSON v. KING.

*Vendor and Purchaser — Commission — Reopening Negotiation— Agent's Advertising Expenses.*

Action tried at Ottawa, brought to recover a commission after sale of a house in the city of Ottawa by the defendant, through the instrumentality of plaintiff, as he alleges.

R. G. Code, Ottawa, for plaintiff.

W. D. Hogg, K.C., for defendants.

MacMahon, J.—I do not think that it was through the instrumentality of plaintiff that the negotiations were re-opened between the purchaser and defendant. The purchaser says that he had been negotiating with defendant to buy before plaintiff spoke of his being defendant's agent, and when plaintiff told him he was defendant's agent, he (Fielding) refused to discuss the matter further. The plaintiff therefore is not entitled to a commission. The nearest case is Thompson v. Thomas, 11 Times L. R. 304, but it is clearly distinguishable. On the authority of Taplin v. Barrett, 6 Times L. R. 30, and Chiswick v. Salisbury, 3 Times L. R. 258, the plaintiff may be allowed $45, expenses incurred in advertising, for which there will be judgment for him, with Division Court costs. Defendant may set off the costs of the action

Code & Burritt, Ottawa, solicitors for plaintiff.

O'Connor, Hogg, & Moyer, Ottawa, solicitors for defendant.

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February 13th, 1902.

DIVISIONAL COURT.

## GAUL v. TOWNSHIP OF ELLICE.

*Malicious Arrest and Prosecution — Constable — Acting Bona Fide Warrant Bad on its Face—Civil Action—Notice—Time—Municipal Corporation — Resolution of Council — Want of Malice Ultra Vires—Funds for Prosecution—Liability of Individual Members—Justice of the Peace—Dominion Officials Enforcing Criminal Law—Not Within Respondeat Superior.*

Appeal by plaintiffs from judgment of County Court of Perth, in action for damages for malicious prosecution, false arrest, and imprisonment. The defendant corporation, in 1899, granted an application made by one James Hishon, on

behalf of himself and his neighbours, to clean out a spring on a highway, to be used for watering cattle. As soon as the spring was cleared, the plaintiffs filled it in. The defendant Murr, as a peace officer and constable, upon the complaint of one Hishon and others, laid an information against plaintiffs for having wilfully committed damage, injury, or spoil to or upon the highway. Plaintiffs allege that after the conviction, which was made by a Justice of the Peace, and which was entirely illegal to his and defendants' knowledge, and which he refused to enforce until indemnified by a resolution of defendant corporation to do so, the Justice issued his warrant to defendant Murr, and plaintiffs were wrongfully arrested, fined, and imprisoned. The Judge below held, that under sec. 15 *et seq.* of the Criminal Code, the defendant Murr, acting as a constable in pursuance of a warrant, was not a trespasser, because the conviction was bad; that acting without malice and reasonably, he was entitled to the protection afforded by R. S. O. ch. 88, as to notice of action, and time within which it must be brought, and that tne defendant corporation were liable to repay the fine imposed.

J. P. Mabee, K.C., for plaintiffs.

G. G. McPherson, K.C., for defendants.

The judgment of the Divisional Court (Boyd, C., Ferguson, J.) was delivered by Boyd, C.—The defendant Murr is not liable. It is shown that defendant is a constable and acted as such, and he is entitled to all the protection extended by the law to public officers of the peace. The warrant being bad on its face, the officer is relieved under sec. 21 of the Code, but is still liable to civil action, but in regard to it he is protected by R. S. O. ch. 88, which is pleaded. The action has not been brought within six months, nor has notice been given: see also Code secs. 975, 976, and 980. *Ex p.* McClean, 3 N. B. R. 100, is contrary to Reg. v. Hefferman, 13 O. R. 616. Then as to the corporation:—There is no proof as regards it, that the Council had the conviction or warrant before them, or that they had any knowledge of its illegality on the ground of a joint fine, and there is no proof that the Council was not acting *bona fide* for the protection of the spring on the highway. There is no evidence of malice. But assume that imputed knowledge of the invalid conviction and warrant is to be attributed to the corporation, then their resolution is *ultra vires.* It transcends the powers of municipal corporations to award funds for illegal purposes. The legal consequences of any illegal conduct must be visited on the offending members: Ferguson

v. Kinnoul, 1 Bell App. (Scotch) 662, Cornell v. Guildford, 1 Denio N. Y. 510, Pocock v. Toronto, 27 O. R. 639, Tynemouth v. Eby [1899], A. C. 293. The maxim respondeat superior on which McGorley v. St. John, 6 S. C. R. 531, proceeds, does not apply, for the constable and Justice were acting as Dominion officials in the enforcement of criminal law. Appeal dismissed with costs.

Mabee & Makins, Stratford, solicitors for plaintiffs.

McPherson & Davidson, Stratford, solicitors for defendants.

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BOYD.
FERGUSON.

FEBRUARY 13TH, 1902.

DIVISIONAL COURT.

## FORD v. HODGSON.

*Vendor and Purchaser—Sale of Standing Timber—Vendor's Lien—Not Displaced by Cutting or Sale — If Timber Capable of Identification—Injunction.*

Summers v. Cook, 28 Gr. 179, approved.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., in action for injunction and a declaration that plaintiff has a lien for unpaid purchase money upon certain cordwood piled on lot one in the first concession of the township of Glamorgan, in the county of Haliburton. On September 29th, 1899, one G. St. George owned said lot, and one R. Scott owned another lot, and their agent made an agreement with one W. Edgar, to sell the timber and trees on both lots to him for $400, payable $100 cash, to be paid to Scott, a promissory note to him for $100, and the remaining $200 in two notes payable to G. St. George. Edgar, at the time, assigned his interest and endorsed the notes to one Jason Shaver, for whom he was agent. On November 28th, 1900, G. St. George sold and conveyed lot one to plaintiff, and assigned to him her right, title, etc., in the timber and trees, and in the agreement and notes. All the notes remain unpaid. Shaver cut and removed more than $400 worth of timber, and has now piled on lot one about 250 cords of wood, which defendant alleges he has purchased, and was about to remove when the action was brought. By indenture, dated January 22nd, 1901, made by G. St. George (now Comber) to plaintiff, it was recited that by the former conveyance it was intended to grant him all the timber, etc., on the land, but such a grant was by inadvertence omitted, and is now thereby granted. The Chief Justice affirmed the decision of the local Judge at Lindsay, who granted the

injunction, and who followed Mitchell v. McGaffey, 6 Gr. 361, referred to in McLean v. Burton, 24 Gr. 1, by Spragge, C., at p. 136, in preference to McCarthy v. Oliver, 14 C. P. 290, and held that plaintiff was entitled to a lien. Lavery v. Pursill, 39 Ch. D. 508, Summers v. Cooke, 28 Gr. 179, and McNeill v. Haines, 17 O. R. 479, were also referred to. The local Judge also held that defendant had notice because he claimed title to the wood only through the contract, and he must therefore be assumed to have had notice of all it contained, and it showed $200 of the purchase money (two of the notes) not to be then due, and that the taking of the notes was not an abandonment of the lien, referring to Dart V. & P. at p. 829, and cases there cited, and to Mitchell v. McGaffey, *supra.*

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

R. J. McLaughlin, Lindsay, for plaintiff.

The judgment of the Divisional Court (BOYD, C., FERGUSON, J.) was delivered by BOYD, C.—The appeal is concluded by authorities, binding on this count, in favour of the judgment pronounced at the trial. The sale of the timber, to be removed in three years by the purchaser, was of an interest in land, and in respect of which a vendor's lien arose by operation of law. This was not displaced by the cutting or sale of the timber as long as it could be identified and remained on the land. The remedy is by way of injunction and enforcement of lien on the property so identified, as was held in Summers v. Cook, 28 Gr. 179, and the earlier cases therein cited. Appeal dismissed with costs.

McLaughlin, McDiarmid, & Peel, Lindsay, solicitors for plaintiffs.

G. H. Hopkins, Lindsay, solicitor for defendants.

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MEREDITH, J. .. FEBRUARY 13TH, 1902.

CHAMBERS.

## RE NEWBORN, TORONTO GENERAL TRUSTS CORPORATION v. NEWBORN.

*Will — Construction — Election — Dower — Annuitant—Lapse—Intestacy—"Balance."*

Summary application, under Rule 938, by the corporation, administrators with the will annexed of the estate of Richard Robinson Newborn, late of the township of Etobicoke, farmer, for an order declaring the true construction of the will, which was executed in 1892, and was in the testator's own handwriting, except some formal parts, which were printed in a common form, filled up by the testator, who died in 1900. In the will he gave annuities to his wife and

only child, but the latter predeceased him. The testator was illiterate; the will was not separated into sentences, nor punctuated. The material parts of the will are as follows: —"I give devise, and bequeath all my real and personal estate . . . in the manner following . . . I give to my wife $200 per year as long as she remains my widow and to my daughter the sum of $200 per year as long as she remains unmarried but in case she marries then she is only to receive $50 per year the fifty taken off to go to my wife per year . . . And at her death the said $150 is to go to the Toronto Home for Incurables until the farm is sold my wife and daughter to have and to hold the house and lot with furniture and chattels while they remain unmarried at the death or marriage of either of them it is to go to the other. But after the death or marriage of both the house and lot is to be sold and the money is to go to the Sick Children's Hospital in Toronto the above annuities are to be taken out of the farm rent . . . Any balance of money received from rent . . . is to go with the interest of what money is in the Permanent Building Society and interest annually divided equally between the Presbyterian Church at Mimico and the Toronto Home for Incurables until the farm is sold I here give the executors power to sell the farm in case of increased expenses or rise in property the amount to be invested in first mortgages the amount of interest required to be used in place of rent the balance of interest to go to the aforesaid two institutions until the death or marriage of my wife and daughter after the death of both $1,000 goes to Presbyterian Church at Mimico and $500 to the Protestant Orphans' Home the balance to be divided equally between the Home for Incurables of Toronto and the Sick Children's Hospital" The estate of the testator was substantially the same at the date of the will and at his death, and consisted of his farm, which was rented, a small lot and house where he lived, and $2,600 which was deposited with the Canada Permanent Loan and Savings Company at the time the will was made, and at the death, with the Dominion Bank.

W. N. Ferguson, for the administrators.

W. M. Clark, K.C., for the Home for Incurables.

E. F. B. Johnston, K.C., for the Hospital for Sick Children.

Huson Murray, for the Protestant Orphans' Home.

J. D. Montgomery, for the widow.

S. H. Bradford, for two sisters of deceased.

E. W. J. Owens, for others interested.

Meredith, J.—The widow is put to her election between the provisions of the will in her favour and her dower. See Hill v. Hill, 1 Dr. & War. 94, Thompson v. Burris, L. R. 16 Eq. 592, Amsden v. Kyle, 9 O. R. 439, Leys v. Toronto General Trusts Co., 22 O. R. 603. There is no authority for the contention that because the first annuitant died in the testator's lifetime, those who were to take at her death take nothing. The annuity is payable to them from the testator's death, but only $150 a year. See Hardwick v. Thurston, 4 Russ. 383, Edwards v. Saloway, 4 DeG. & Sm. 248. There is no intestacy as to the additional $50. Upon the facts, as found by the Judge, with regard to the money on deposit, there are no reasons impelling the conclusion that therei s an intestacy as to the interest thereon, in the face of the testator's declaration that he disposes of all his property. There is no intestacy as to the corpus or any part of it. By the word "balance," the testator meant the rest or residue of the whole of his property. There is no intestacy as to the fuaniture and chattels, after the expiration of the interest therein given to the widow; this property is included also in the "balance."

Order made declaring accordingly, unless the findings as to the material facts are disputed, in which case an action or issue must be tried, and there will be no order upon this motion as to costs or otherwise. If order goes, costs of all parties out of the estate, those of the administrators as between solicitor and client.

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February 15th, 1902.

DIVISIONAL COURT.

## BELLING v. CITY OF HAMILTON.

*Municipal Corporation—Highway—Non-repair—Carriage-way—Footway—Different Standard of Repair—Finding of Fact by Trial Judge—Review of.*

Boss v. Litton, 5 Car. & P. per Lord Denham, at p. 408, explained.

Appeal by defendants from judgment of County Court of Wentworth in action for damages. The plaintiff was crossing, in a diagonal direction, McNab street, at a point 30 feet distant from a crossing, when she slipped on the edge of a hole, about 2 feet square by 2 inches deep, in the asphalt pavement, and fell, sustaining injury. The evidence conflicted as to whether there was another hole in the pavement 90 feet away. The hold in question was 19 feet from

the curb, and 31 feet from the place where persons were in the habit of crossing. The trial Judge found that the accident was due to defendants' negligence in allowing the pavement to be and remain dangerously out of repair, considering the fact that the road is one of the busiest streets in Hamilton, and one over which hundreds of people are daily hurrying in all directions; that plaintiff had not been negligent; that the street was not sufficiently out of repair to be at all dangerous to horses or vehicles; and gave plaintiff $150 damages.

J. P. Stanton, Hamilton, for defendants.

J. H. Long, Hamilton, for plaintiffs.

Judgment was delivered on February 15th, 1902.

Britton, J.—I agree fully with the statement of the Chief Justice, *infra*, that the finding of fact by a Judge ought to be viewed with at least as much respect as such a finding by a jury. What is actionable negligence under sec. 606 of the Municipal Act, by reason of default of a corporation to keep a street in repair, must be a question of fact depending upon a variety of circumstances. A general rule as to the kind or size of hole cannot be laid down. See as to kind of defects which do not constitute want of repair, Ewing v. Toronto, *supra*, and Messenger v. Bridgetown, 31 S. C. 379 . . . But this case turns on the finding of the trial Judge that "the roadway was not sufficiently out of repair to be at all dangerous to horses and vehicles." That is what the roadway was for. . . . Unless municipal corporations are to be insurers against accident, they ought not to be held liable for such a defect, and upon the facts as found by the Judge below. Upon this point I agree with my brother Street. The appeal should be allowed.

Street, J.—It has been well settled by a long line of cases, that the duty imposed upon municipalities by R. S. O. ch. 223, is to keep highways in a reasonable state of repair, having regard to their situation, and the travel upon them. That is, that the highway is to be kept in such a state of repair, as that persons using it might reasonably expect to do so without danger: Castor v. Uxbridge, 39 U. C. R. 113, Lucas v. Moore, 3 A. R. 602, Foley v. Flanborough, 29 O. R. 139. The repair need not be perfect, nor the safety of persons using it insured. . . . A finding of fact by a Judge is to be treated with great respect, but, in the present case, we are not embarrassed in considering it by any conflict of evidence upon the really material questions. Besides, courts are in the habit of more freely reviewing findings of fact in

cases tried by a Judge alone, than in cases with a jury, *inter alia*, by reason of the expense and uncertainty, in the latter case, of a new trial, and I see no good reason why we should hesitate to review the judgment of a judge in a case against a municipality more than in any other case. . . . With the greatest possible respect I must express my opinion, that the finding, that this hole or depression is a breach of statutory duty to keep in a reasonable state of repair, carries the liability of corporations many degrees further than it has ever been carried before, and seeks to impose upon them a standard of perfection far beyond the reasonable state of repair which is the measure of their duty under the statute. The Judge below appears to have erred as to the standard, by basing it upon the decisions referred to at p. 911 of 2nd Edition of Elliott on Roads and Streets. All of which are founded on a dictum of Lord Denman's, at *Nisi Prius*, in Boss v. Litton, 5 Car. & P. at p. 408. . . . It does not at all follow from his language that there is a duty to keep carriage-ways and ways for foot passengers up to the same standard. . . . The degree of repair in which each is to be kept is to be measured by the use for which it is intended. The carriage-way was not out of repair, and it is erroneous to hold that it must be kept so as to ensure foot passengers against accident. That is a mistake in view of Lord Denman's remarks. . . . And so when the Judge below held that the carriage-way was not improperly kept, so far as vehicles are concerned, I think he put the plaintiff out of Court. Moreover, after a careful review of the evidence, I am of opinion that it is impossible to say that the condition of this roadway was such as to lead any reasonable man to foresee the remotest chance of danger to any person, either on foot or in a carriage, from the hole, and, therefore, the defendants were not guilty of ngligence with respect to it: Ewing v. Toronto, 29 O. R. 197, Burroughs v. Milwaukee, 86 North West Reporter 159. . . . Because the line between a dangerous defect and one not dangerous is a difficult or impossible one to define, and a hard and fast rule cannot be laid down, it does not follow that the finding of the trial Judge must be accepted. We cannot, by such reasoning, refuse the responsibility of dealing with each case upon its own merits . . . We are bound in each case to enquire, whether the defect in question was one from which a reasonable man would have apprehended danger.

The appeal should be allowed.

FALCONBRIDGE, C.J.—Inasmuch as the municipalities have secured legislation (to which they would seem to be in

nowise better entitled than railways or insurance companies or any other corporation) transferring the trial of certain actions for negligence from a jury to a Judge, it occurs to me, that the finding of fact of their chosen tribunal ought to be viewed with at least as much respect as that which is accorded to the finding of a jury, and unless we are prepared to hold, as a matter of law, that the depression or hole, which existed here, was not an actionable defect in the highway, the judgment ought to be upheld. I do not know of any Canadian cases which would compel us to so hold. There is at least one in the U. S. which would probably go that far, Burroughs v. Milwaukee, *supra*, but in considering these authorities, regard must always be had to the law relating to, and standard of maintenance of, highways of the particular place or state. I do not feel called on to generalize further in the present case. Whether the plaintiff using the highway was exercising ordinary care, was also a question of fact for the Judge. Proceeding on a way known to be defective is not necessarily inconsistent with reasonable care. A pedestrian is not guilty of negligence merely because he walks on the roadway, and he may cross a street at any point without waiting to reach a crossing: Boss v. Litton, *supra*, Beven on Negligence, Vol. 1, p. 659, Thompson on Highways, 1881, p. 441. In my opinion the appeal ought to be dismissed.

Appeal allowed with costs, and action dismissed with costs.

Lee, Farmer, & Stanton, Hamilton, solicitors for plaintiff.

Farmer & Long, Hamilton, solicitors for defendants.

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FERGUSON, J. FEBRUARY 15TH, 1902.

TRIAL.

## BURKE v. BURKE.

*Master and Servant—Liability of Master for Act of Servant—Trespass to Person — Forcible Removal of — By Owner from his House—Unnecessary Force—Continuation of After Removal—Continuous Act—Solicitor—Damages by Jury for Specific Acts — General Damages besides on Erroneous Assumption of Liability—Effect of.*

Action, tried at London with a jury, brought to recover damages for assault by defendants, and for ejecting plaintiff from the house of M. J. Burke, an American Consul, at the city of St. Thomas, and using unnecessary violence in so doing.

E. Meredith, K.C., and P. H. Bartlett, London, for plaintiff.

J. A. Robinson, St. Thomas, for defendant Cook.

J. M. McEvoy, London, for defendant Burke.

Joseph Montgomery, for defendant Robinson.

FERGUSON, J.—The jury answered a series of questions and made assessments. By consent, anv part or parts of the case, whether of law or fact, not fully covered by the findings, were to be considered and determined by me. The undisputed evidence shews that defendant Burke was some years ago appointed American Consul at St. Thomas, and that he invited plaintiff, his first cousin and foster-sister, then living in Chicago, to come and live with him in his family, while he would hold the office, a period of about four years. The plaintiff accepted the invitation, and parted with a little business she had, and went to St. Thomas. The authorities shew clearly that plaintiff, notwithstanding, had no legal right to remain in defendant Burke's home against his will, no matter how commendable her conduct while there may have been. . . . Personal differences arose, and defendant Burke consulted a lawyer, defendant Robinson, who requested plaintiff to leave Burke's house, and she declined, no doubt thinking that owing to his invitation, and her coming from Chicago in purusance of it, she had a right to remain. Robinson, still acting for Burke, employed defendants, Cook and Donahue, giving them full instructions not to use unnecessary violence in removing plaintiff from the house, and not to act unless under Burke's instructions. Cook and Donahue went to Burke, and told him their instructions, and he told them to remove the plaintiff, and to act in accordance with Robinson's instructions. The plaintiff was removed accordingly and in Burke's presence. I do not think Robinson is liable. He acted as a solicitor. It was Burke, the master and owner of the house, who ordered the men to expel plaintiff. Donahue's name has been stricken from the record. Cook is the one, who actually removed plaintiff. The jury have found that unnecessary force was used, and have assessed the damages at $200, and on the authority of Ferguson v. Roblin, 17 O. R. 167, and cases there collected, I think defendants Cook and Burke are liable for this sum. The jury have also found $300 damages for what occurred after the plaintiff passed the boundary of Burke's house. She was put and held in a cab, and driven to a Mrs. Peters' house. The

evidence shows that what was done to plaintiff was one continuous act, and on the authorities referred to, supra, the defendants Cook and Burke are liable as joint wrongdoers. In answer to the eighth question put to them, viz.: Q. If the whole conduct if the defendants was wrongful, what damages do you give the plaintiff for this? The jury gave $1,000. This was on the assumption by them that there existed no right whatever to remove the plaintiff from the house, and hence that the whole conduct from the beginning was wrongful. This assessment, based as it was upon an erroneous hypothesis, should have no effect whatever. The result is that the action should be dismissed with costs as against Robinson, and there should be judgment for plaintiff against defendants Burke and Cook for $500 damages, with costs.

R. M. C. Toothe, London, solicitor for plaintiff.

McCrimmon & Wilson, St. Thomas, solicitors for defendant M. J. Burke.

H. B. Travers, St. Thomas, solicitor for defendant J. A. Robinson.

J. A. Robinson, St. Thomas, solicitor for defendant J. W. Cook.

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STREET, J. FEBRUARY 17TH, 1902.

CHAMBERS.

## RE WATTS.

*Criminal Law—Foreign Criminal Law—Presumption—Child-stealing by Father—Extradition Proceedings—Foreign Decree of Divorce—Collusion—Practice—Contempt of Court—Crim. Code, sec. 284.*

Re Murphy, 26 O. R. 177, followed.

Motion, on return of writ of *habeas corpus* with *certiorari* in aid, for discharge of prisoner. The evidence shows that the prisoner was married to the complainant, Mary E. Watts, in 1895, in the State of Illinois, which was their domicil. A child was born in 1897, and in 1900 an absolute divorce on the ground of cruelty was granted to the complainant, and by terms of the decree, the prisoner was to be at liberty to see the child at all suitable times, but the custody was given to the complainant. The prisoner one day took the child and did not return it the same day, or the next, as usual, but took it out of the State of Illinois, and eventually brought it into Canada. The grand jury of

the county of Saugaman, Illinois, found a true bill against the prisoner, for that "he did wilfully and without lawful authority, forcibly and feloniously take and carry away one Catharine H. Watts, an infant under the age of 12 years, without the consent of the lawful custodian of such child, contrary to the form of the statute in such case," etc.; another count charged the same offence, leaving out the word "forcibly," and adding that the child was taken away with intent to deprive its lawful custodian of its custody. The prisoner was arrested and lodged in jail at Sandwich for extradition, and subsequently admitted to bail.

A. B. Aylesworth, K.C., and F. A. Anglin, for prisoner.

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

Street, J., held, following Re Murphy, 26 O. R. 177, that proof of foreign law by the complainant is unnecessary, and in absence of proof to the contrary on behalf of defendant, it must be assumed that the law relating to crimes scheduled to extradition act is the same in Canada as in the State of Illinois; also, that sec. 284 Crim. Code, as to child-stealing, is wide enough to cover this case; also, that objections to the validity of the foreign decree on the ground of collusion, and that prisoner acted in the *bona fide* belief of his right, are matters of defence open to prisoner on a trial, but not on these proceedings; and also, that the fact that the act charged may be a contempt of Court does not prevent it being also a crime. Prisoner remanded to custody.

Murphy, Sale, & O'Connor, Windsor, solicitors for prisoner.

Clark, Cowan, Bartlett, & Bartlett, Windsor, solicitors for complainant.