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APRIL 23RD, 1906.

C. A.

GAMBELL v. HEGGIE.

Seduction—Evidence of Plaintiff's Daughter Disclosing Rape —Father's Statutory Right of Action—Presumption of Service—Right of Jury to Believe Part of Evidence only —Evidence of Paternity.

Appeal by defendant from judgment of a Divisional Court (6 O. W. R. 184, 10 O. L. R. 489) allowing an appeal from the judgment of TEETZEL, J. (5 O. W. R. 746), dismissing action for seduction, after disagreement of jury.

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

W. E. Middleton, for defendant.

T. J. Blain, Brampton, for plaintiff.

GARROW, J.A.:— . . . The action has been tried 3 times, and each time the jury disagreed.

As will be seen, defendant's whole contention at present is not that there is no evidence that he had had carnal connection with plaintiff's daughter, by reason whereof she became pregnant and was delivered of a child, but that the

evidence of the daughter, if believed, proves that this connection was obtained by force, and in circumstances amounting to a felony. And Vincent v. Sprague, 3 U. C. R. 283, was relied on as an authority that, in such circumstances, the action must fail. And to this contention Teetzel, J., appears to have acceded by granting the order dismissing the action. The Divisional Court, however, took the opposite view, and set aside the order.

At p. 495 of 10 O. L. R. the Chancellor quotes with approval from the judgment in Kennedy v. Shea, 110 Mass. 147, 151, the following passage: "The gist of the action is the debauching of the daughter, and the consequent supposed or actual loss of her services. It is immaterial to plaintiff's claim under what special circumstances the injury was wrought, or whether it was accompanied with force and violence, or not. The action will lie although trespass vi et armis might have been sustained. It would be no defence that the crime was rape and not seduction." I, too, approve, and I have repeated the quotation because, in my opinion, it succinctly meets and answers Mr. Middleton's ingenious argument for defendant, and indeed covers the whole substantial ground involved in this appeal.

The common law action of seduction was based upon the relationship, not of parent and child, but of master and servant, and the gist of the action was the loss of service caused by the illness resulting from the connection. Where the daughter was an infant residing at home, this service was presumed, but where she was adult or residing elsewhere, the service had to be proved. And that is the case still in England: see Whitbourne v. Williams, [1901] 2 K. B. 722. But, as modified by R. S. O. 1897 ch. 69, the service necessary at common law to maintain the action is, in the case of a parent suing, to be presumed, and no evidence to the contrary is to be received. In other respects the action is still, in my opinion, the common law action, and not a new or statutory action merely.

And at common law the action always involved the idea of trespass: see Dodd v. Norris, 3 Camp. 518. And the declaration might have been either in trespass or in case: Chamberlain v. Hazlewood, 5 M. & W. 515. In such an action consent by the servant could only bind herself. It could not bind the master. If she did not consent, she too might have an action for the assault, but the injury to the master was the same whether she consented or not.

Vincent v. Sprague, 3 U. C. R. 283, unless read, as I think it should be, in conjunction with the subsequent cases on the subject, is somewhat misleading. Reading it alone, one might almost infer that proof of the crime was actually a defence to the civil action for damages. But Sir John Robinson, C.J., who delivered the leading judgment in that case, also delivered the judgment in the subsequent case of Brown v. Dalby, 7 U. C. R. 160, in which it is apparent that he did not proceed in that case out of consideration for defendant, but rather in conformity to the rule of public policy that where the facts disclosed a crime there could be no recovery of damages in a civil action until the criminal had been prosecuted—a consideration which leads me to think that the earlier case also proceeded upon a similar principle, although not so expressed in the judgment.

This rule is again referred to in Walsh v. Nattrass, 19 C. P. 453, and in Williams v. Robinson, 20 C. P. 255.

The so-called rule has been variously stated, and even sometimes doubted: see Pollock on Torts, 7th ed. (1900), p. 198. But, at the utmost, its effect was simply, in the interest of public justice and the administration of the criminal law, to cast the duty upon the courts to stay proceedings until the demands of the latter had been satisfied: see Taylor v. McCullough, 8 O. R. 309. And it is very doubtful if the rule ever extended to the case of a person not a party to the criminal act, but who was merely suing to recover damages by reason of a collateral consequence of that act: see per Hagarty, C.J., in Walsh v. Nattrass, supra; Appleby v. Franklin, 17 Q. B. D. 93; Wells v. Abraham, L. R. 7 Q. B. 554; Ex p. Bell, 10 Ch. D. 667.

But by sec. 534 of the criminal Code, 1892, which came into force on 1st July, 1893, it is declared that after the commencement of that Act no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence. And the rule thus ceasing, the cases which rested upon it of course cease to be binding authorities.

Appeal dismissed with costs.

MOSS, C.J.O., and OSLER, J.A., each gave reasons in writing for the same conclusion.

MACLAREN, J.A., and CLUTE, J., also concurred.

APRIL 23RD, 1906.

C.A.

WRIGHT v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Track—Failure to Look for Train—Efficient Cause of Accident—Nonsuit—Contributory Negligence.

Appeal by plaintiff from order of a Divisional Court, 5 O. W. R. 802, setting aside judgment for plaintiff, and dismissing action.

W. Proudfoot, K.C., for plaintiff.

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

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

CLUTE, J.:—The jury have found that plaintiff's injury was caused by the defendants' negligence, by not using sufficient signals to attract the injured man's attention, and that the conductor was not on the rear end of the car. They have also found that plaintiff could not by the exercise of ordinary care have avoided the injury.

Having regard to the facts of the case and the charge of the learned Judge, the meaning of the findings is that defendants did not discharge their statutory duty by sounding the whistle and ringing the bell, and that there was no one on the front of the rear car as the train was being backed into the siding.

There is sufficient evidence to support these findings, and plaintiff is entitled to retain the judgment entered for him at the trial, unless it appears that plaintiff was the cause of his own injury. It is upon this ground that the judgment appealed from proceeds. That is, that, notwithstanding the finding of the jury that there was no want of care on the part of plaintiff, it is so clearly manifest that he was the cause of the injuries complained of, that there was neither any fact nor inference from fact to be left to the jury to decide.

The able argument of Mr. Riddell amounts to this: That had plaintiff looked east when he might have done so, he must have seen the backing train, and had he seen it he could and should have avoided the accident, and his neglecting to look was the cause of the accident. I by no means assent to this view, even if the facts in the present case could be so stated, because it might well be, in my judgment, that, although plaintiff might be guilty of some neglect in approaching the track, it is still for the jury to say whether defendants might not still have avoided the accident if they had discharged their statutory duty, the neglect of which was the sine qua non of the injury. But in the present case there were excuses offered for the omission of plaintiff to look east, after he had done so, in approaching the track.

The plaintiff puts it in this way: As he was approaching the crossing and about 20 rods distant, he saw a long train going east,—very fast—and looking to the west he saw a train coming into the station and stop there. He then looked to the east just before he got to the track and did not see anything.

Q.—Anything to obstruct your view? A.—Yes.

Q.—What? A.—There was the tavern and those trees that I could not see it.

Q.—Was there anything else? A.—I see cars over to this side standing there.

Q.—Then you got to the track and looked to the east? A.—Yes.

He then looked to the west, his attention being drawn in that direction, by the steam which was escaping from the express train which had just come in, and so he passed on to the track without again looking to the east.

It was natural, I think, that plaintiff, having seen a train pass to the east and seeing a train standing on the track, should give his attention where the danger appeared,—to the west. At all events it was for the jury to say whether the reason given for not having seen the train was sufficient. It is for the jury to say, under all the circumstances, whether plaintiff exercised reasonable care: Vallee v. Grand Trunk R. W. Co., 1 O. L. R. 224. The facts and the inferences from the facts in this case require to be pronounced upon. They are such as, it is not too much to say, might lead different minds to different conclusions. There is nothing in the

nature of an admission, either express or implied, that plaintiff was the author of his own injury.

I think the case was properly left to the jury, and that their findings are sufficient to support the judgment entered at the trial.

See the judgment of the Privy Council in Peart v. Grand Trunk R. W. Co., now reported in 10 O. L. R. 753.

The judgment of the trial Judge should be restored, with costs of this appeal and of the Divisional Court to plaintiff.

APRIL 23RD, 1906.

C.A.

REX v. BANK OF MONTREAL.

Bills and Notes — Forged Cheques — Crown — Forgeries by Clerk in Government Department—Payment by Bank—Negligence—Pass-book—Duty of Customer to Check Accounts—Settlement of Accounts—Audit Act—Estoppel—Laches—Deposit of Cheques in other Banks—Liability over—Duty of Knowing Customer's Signature—Alteration in Position—Mistake—Liability as between two Innocent Parties.

Appeals by defendants from judgment of ANGLIN, J. (5 O. W. R. 185, 10 O. L. R. 117), in favour of the Crown (Dominion Government), for $71,731.75 and costs, and dismissing the claim of defendants against the third parties, the Quebec Bank, the Sovereign Bank, and the Royal Bank. The action arose out of the forgeries of one Abondeus Martineau, who was a clerk in the Department of Militia and Defence at Ottawa, and who during 1901 and 1902 forged cheques to the amount of $75,705, drawn in favour of fictitious persons upon the defendants and paid by them and charged against the account of the Receiver-General of Canada, after having been deposited by Martineau to his credit under fictitious names in accounts kept with the third party banks.

The appeals were heard by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

G. F. Shepley, K.C., and J. F. Orde, Ottawa, for defendants.

W. Barwick, K.C., and J. H. Moss, for the Crown.

W. R. Riddell, K.C., and R. B. Matheson, Ottawa, for the Quebec Bank.

J. A. Ritchie, Ottawa, for the Sovereign Bank.

G. F. Henderson, Ottawa, for the Royal Bank.

MACLAREN, J.A. (after setting out the facts) :—The trial Judge has reviewed very fully the leading English and American cases in which the effect of the receipt from a bank of a pass-book and vouchers and their retention by a customer have been considered and discussed. He comes to the conclusion that under the principles laid down in Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, and Critton v. Chemical National Bank, 171 N. Y. 219, the customer might be held in the United States to be estopped from objecting where he had failed to check over his pass-book himself or had not exercised reasonable supervision over the clerk to whom he had intrusted it, under circumstances where he would not be estopped in England. In support of this conclusion he refers particularly to the case of Chatterton v. London and Counties Bank, a summarized report of which appears in Paget on Banking, at pp. 120 et seq., and also to the cases discussed in Hart on Banking, at pp. 200-203.

It is to be observed that in most of these cases the question considered is whether the customer who receives his pass-book and vouchers owes a duty to the bank to examine them, and whether he is estopped from objecting if he does not do so, or does not object before the bank has altered its position. In the present case there is more. The department regularly notified the bank each month that the cheques and statement had been examined and the balance had been found to be correct. Such receipts are not at all on the same footing as those that are frequently signed at a bank by the messenger of the customer when he receives the cheques and vouchers at the end of the month or at other periods. These latter can have little binding effect unless there be an express or implied contract that the customer will examine them and report within a reasonable time as to their correctness. Or-

dinarily the retention of the pass-book and the vouchers without objection could only operate against the customer, when there existed such a contract, by way of estoppel, and where the facts of the particular case were such as to justify the application of this doctrine.

The contention of defendants that the receipts acknowledging the correctness of the monthly statements and balances were settlements of the accounts between the department and the bank is answered in the judgment appealed from by referring to sec. 30 of the Audit Act, R. S. C. 1886 ch. 29, and asserting that the only mode of settling such accounts is the one there pointed out, namely, by the Receiver-General and the Auditor-General giving reimbursement cheques to cover proper payments by the bank; that, however convenient in practice the sending of the pass-book sheets and the taking of the receipts and acknowledgments from the department might be, it could not be a substitute for the mode of settlement prescribed by the Audit Act; and that, as none of these reimbursement cheques covered the Martineau forgeries, there was no binding settlement which included or recognized them. In answer to this it is contended by the bank that the Audit Act only governs the internal administration of the departments of the Government, and was not intended to regulate or vary as between the Government and the bank the usual relations and obligations between a bank and its customer.

The principal ground, however, upon which the defence of the bank was disposed of in the Court below, was the broad one that the King is not bound by estoppel, and that the Crown is not responsible for the negligence, laches, or torts of its servants. A number of English authorities and some cases in our Courts are cited in support of this proposition. United States cases are also referred to as shewing that the same principle is applied in that country to the Government and its officers and servants.

In the argument of the present appeal before us, counsel for the Bank of Montreal admitted that the doctrine of estoppel was not applicable to the Crown. It was also admitted that according to our law, in the absence of contract, the customer of a bank was not bound to examine his pass-book; but it was contended that if he did examine it and contracted with reference to it, he would be bound, and there would then exist the contractual relation of a settled account. It was

argued that if the department had not settled the account for December, 1901, as was done, then the forgeries would have been stopped, and there would have been a loss of only $3,115.04, the amount of the first two cheques, which were paid in that month.

Notwithstanding the ingenious argument of defendants' counsel on this point, I am utterly unable to see how, under the facts and circumstances of this case, the receipts given by the accountant can operate to prevent plaintiff from correcting the mistakes that were made in them, or avail as a defence to this action, unless they are sufficient, in connection with the other facts, to create an estoppel. To my mind it is either a question of estoppel or no valid defence at all. If plaintiff is precluded from going behind the receipts, and shewing the real facts, it must be only because he is estopped from doing so by the conduct of his officers and servants.

On this branch of the case I am consequently of opinion that the judgment appealed from is correct and ought to be affirmed.

There remains to be considered the appeal of the Bank of Montreal against that part of the judgment of Anglin, J., which dismissed their claim for indemnity against the three banks which presented the forged cheques for payment.

The trial Judge has found that there was no negligence with respect to these cheques on the part of any of the banks, except that of the Bank of Montreal respecting the one which bore the name of only one of the officials of the department. He absolves the Quebec Bank from negligence with regard to this one, on the ground that there is no evidence that they were aware of the fact that the departmental rule required two signatures. He has also found as a fact that the third party banks did not indorse the cheques in question; but that they merely stamped their names upon them for the purpose of identification and of indicating that they were their property.

In support of the appeal against the third party banks, the appellant urged two main grounds: (1) that the money having been paid under a mistake it might be recovered back; and (2) that these banks in presenting the forged cheques and demanding payment warranted their genuineness.

There can be no doubt that money paid under a mistake of fact can be recovered back as money had and received unless there are special circumstances which would render this inequitable, such, for instance, as payment to an agent who

in good faith has paid it over to his principal: Bavins v. London and S. W. Bank, [1900] 1 K. B. 270. Each of the collecting banks in this case had placed to the credit of Martineau the face value of the respective cheques before they were presented to the Bank of Montreal for payment, so that they did not present them as his agents, but as holders for value: Capital and Counties Bank v. Gordon, [1903] A. C. 240.

The third party banks not having indorsed any of these cheques, there was no person to whom it would have been necessary to give notice of dishonour in case payment had been refused, and there is no ground for the application of the strict rule laid down in Cocks v. Masterman, 9 B. & C. 902, and London and River Plate Bank v. Bank of Liverpool, [1896] 1 Q. B. 7. See Imperial Bank v. Bank of Hamilton, [1903] A. C. 49.

The evidence in this case shews conclusively that with regard to each one of these cheques, if payment had been refused, or if notice of the forgery had been given shortly after payment, the banks could have protected themselves, as the proceeds were still in their hands. As to the two cheques deposited in the Royal Bank, instructions were given to the ledger-keeper not to allow Martineau to withdraw any of the money until after payment by the Bank of Montreal, and none of the money was actually withdrawn until several days later. The Quebec Bank had a rule requiring notice to be given before withdrawal, and this was printed in the pass-book given to Martineau, but the rule was not always strictly enforced.

Martineau's forgeries were perpetrated so skilfully that it has been held that the Bank of Montreal were not guilty of negligence in honouring the cheques. No doubt bankers are bound to know the signature of their customer, and are liable to him if they pay on a forged signature, even if there be no negligence. But it is said that they are under no such obligation or liability to the holder of paper purporting to bear the signature of the customer, or to any person but the customer himself.

Can the fact that the bank paid these cheques be taken as a representation that they were genuine, upon which the collecting banks were entitled to rely? No doubt, if they had made an express representation to that effect, and it had been acted upon, they would be bound. There is direct evidence that the Royal Bank did in fact rely upon the action of

the Bank of Montreal, and it is a fair inference from the facts that the other banks did so as well. They were justified in assuming that the Bank of Montreal would be the best possible parties to determine whether her signatures were genuine or not, and I think it a fair inference that the Bank of Montreal would know, from the usage of bankers, that the collecting banks would probably rely on such knowledge and would take the fact of payment by them as equivalent to a representation that the cheques were genuine, and would be likely to act upon it.

To hold the Bank of Montreal liable on the ground of estoppel, under the circumstances, is not, in my opinion, in conflict with the decision of the Privy Council in Imperial Bank v. Bank of Hamilton, [1903] A. C. 49, as one of the grounds given for the judgment in that case was that no loss had been occasioned by the delay in giving notice of the mistake (p. 58).

In support of the second ground, namely, that the collecting banks in demanding the payment of the forged cheques warranted their genuineness, counsel for the appellant relied strongly on the judgment of the House of Lords in Sheffield v. Barclay, [1905] A. C. 392, which reversed the decision of the Court of Appeal cited in the judgment of Anglin, J., in support of the opposite doctrine. That was the case of a forged power of attorney for the transfer of corporation stock, and it was held in the House of Lords that the respondents, who had presented it and requested the corporation to transfer the stock, were bound to indemnify the corporation upon an implied contract that the power of attorney was genuine. No authority was cited to us that would extend this liability to the holder of an instrument in the form of a bill or cheque who presented it to the drawee for payment without indorsing it, and I am not aware of any such authority.

No doubt there are decisions in England and the United States, as well as in our own Courts, to the effect that the drawee of a bill or cheque who pays it on the forged signature of the drawer has no right of action against the bona fide holder to whom he has paid it, and a number of these decisions are referred to in the judgment appealed from. It is not necessary, however, to go so far in the present case. I am of opinion that on the ground of estoppel the appellants must fail. The repeated payments of these cheques were, to

my mind, sufficient to lead the third party banks to believe that the Bank of Montreal were willing to assume responsibility for these cheques as genuine.

The appeal from this part of the judgment of the Court below should also be dismissed.

MOSS, C.J.O., OSLER and GARROW, JJ.A., concurred, for reasons given in writing.

APRIL 23RD, 1906.

C.A.

MULVANEY v. TORONTO R. W. CO.

Street Railways—Injury to Person Crossing Track—Consequent Death—Negligence — Contributory Negligence—Findings of Jury—Action under Fatal Accidents Act—Right of both Father and Mother to Recover for Death of Child—Damages.

Appeal by defendants from the judgment at the trial before FALCONBRIDGE, C.J., and a jury, in favour of the plaintiffs, the father and mother of Lillian Mulvaney, in an action to recover damages for the death of their daughter, caused by the alleged negligence of the defendants in operating their street railway.

D. L. McCarthy, for defendants.

N. F. Davidson, for plaintiffs.

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

GARROW, J.A.:—The facts are, that on 23rd March, 1905, at about 8 o'clock in the evening, the deceased Lillian Mulvaney, aged 20 years, was a passenger on a west bound car, and alighted from it at the corner of Queen and Soho streets, intending to go south across Queen Street. After alighting, she crossed in front of the car which she had left, and while upon or near the south track was struck by an east bound car and so injured that she shortly thereafter died. She was seen by the motorman in charge of the west bound car to

pass in front of his car, but she was not apparently seen by the motorman of the east bound car until he was within about 12 feet away. After the deceased had passed in front of the car which she had left, it was moved forward a short distance. The east bound car was then coming at a rapid rate, estimated by some of the witnesses up to as high as 20 miles an hour. When upon the devil strip, as it is called, that is, the strip between the two tracks, or possibly when she had actually stepped upon the south track, some one shouted, and this apparently directed her attention to the rapidly approaching east bound car, with the result that she attempted to retrace her steps, but her retreat had then been cut off by the forward movement of the west bound car.

At the trial a number of witnesses for the plaintiffs and for the defendants were examined, and, after a careful charge from the Chief Justice, the jury found in answer to questions that the defendants were guilty of negligence causing the death of the deceased, such negligence consisting in (1) the excessive rate of speed of the east bound car, (2) the moving forward of the west bound car, and (3) that the gong was not sounded at the proper time; that the injuries were not caused by the negligence of deceased; that she was guilty of contributory negligence, but that defendants might, notwithstanding, by the exercise of reasonable care, have avoided the accident. And they assessed the damages at $2,000, divided $500 to the father and $1,500 to the mother, for which judgment was given.

Counsel for defendants moved at the close of plaintiffs' case for a nonsuit, upon the ground that the plaintiffs had not established a case of actionable negligence, and in effect the main argument for the defendants before us was a renewal of such motion. And this must, of course, necessarily have been so, because the questions involved are essentially questions of fact, and, if there was any reasonable evidence in support of plaintiffs' case, it was for the jury alone to find the proper result.

In my opinion, the motion for a nonsuit was properly denied, and the same result should follow in this Court. There certainly was evidence that the gong did not sound on the east bound car. And there was evidence that that car came on at a high and indeed an excessive rate of speed, having regard to the fact that it was crossing the intersection of the streets north and south with Queen street, a leading

and busy street, and to the further fact that the west bound car, which was plainly in sight of the motorman on the east bound car, had been standing still. And there was evidence that the motorman on the west bound car saw the deceased pass in front of his car and thereby place herself in the place of danger, immediately after which, notwithstanding his denial, he moved his car forward; that, in fact, it must have been in motion when she was struck, because one of her feet was actually found under the wheel of that car.

The failure to sound the gong is, perhaps, under the circumstances, the least important of these circumstances found by the jury as acts of negligence. Those really important are the other two, namely, the high rate of speed of the east bound car and the movement forward of the west bound car. And it required apparently the conjunction of both to create the situation which resulted so disastrously, because it is evident, I think, that, whether as the result of the shout or of her own sight, the deceased did in the end see the east bound car before she was struck, in time to have crossed in safety had it been going at a more reasonable rate, or on the other hand to have saved herself by retreating across the north track, as she attempted to do, but for the forward movement of the other car.

The defendants' rules were quite properly put in and referred to. Rule 44 provides that the motorman is to bring his car under perfect control at the moment any person, waggon, or obstacle is seen to be upon the track. 47 is: "Always shut off current and ring gong when passing cars, whether they are standing or in motion." 58: "When approaching crossings and crowded places, where there is a possibility of accidents, the speed must be reduced and the car kept carefully under control." 68: "Always ring the gong well when within 100 feet of any cross street and on approaching and passing a standing car or a crowd, and also whenever necessary to attract attention, and repeat as often as necessary. Never pass a standing car at greater speed than 6 miles an hour, and keep the car under control." And it is not going too far to say that there was evidence of a violation and disregard of some, if not all, of these upon the occasion in question by those in charge of the east bound car. The rules are, as the Chief Justice told the jury, good rules, and if observed well adapted to prevent such accidents as the one under consideration. And they also serve in this case to measure not unfairly the standard of duty which the

defendants themselves consider they owed to deceased and to others who like her are lawfully upon the highway.

Under all these circumstances, it seems to me, clearly, that the case could not have been withdrawn from the jury, and that the course pursued at the trial was right.

Some difficulty is no doubt created by the finding that the deceased was guilty of contributory negligence.

But, taking the findings as a whole, and having regard to the evidence and the charge, it is, I think, clear that the jury were of the opinion that the deceased saw the east bound car in time to have retreated to a place of safety if the west bound car had not moved forward, and therefore that that circumstance, the latest in point of time, was the real or efficient cause of the injury—a conclusion, in my opinion, well warranted by the evidence. The findings are, it will be observed, very different as a whole from those in question in Brown v. London Street R. W. Co., 31 S. C. R. 642.

The defendants also contended that the action, which was brought under the provisions of R. S. O. 1897 ch. 166, could only be maintained by the father where he as well as the mother is alive, or, in other words, that the mother is not entitled to share in the apportionment of the damages if the father is alive.

The statute has now been in force for nearly 60 years in this province and in England, as well as for many years in several of the States of the Union. And it is suggestive, but of course not conclusive, that although there must in that prolonged period have been many similar actions in which the claim was made on behalf of the father and mother, for instance, such as Dalton v. South Eastern R. Co., 4 C. B. N. S. 296, the objection has in this action the merit, so far as a somewhat diligent search enables me to say, at least of novelty. But it has, I think, no other merit. The statute gives the right of action. And it also declares that only one action shall be brought, which shall be for the benefit of all parties entitled, and that in such action there shall be an apportionment of the damages among those entitled. And one whom the statute declared to be entitled is, among others, the "parent," which "shall include father, mother, grandfather, grandmother, step-father, and step-mother." The only construction which would exclude the mother would be one holding that she should be included only if the father is dead, but not otherwise. This result could only be reached

by implying some very important words not to be found in the statute, nor involved, as I think, in its true meaning or intention. "Father" and "mother" by means of the interpretation clause are both expressly named, apparently on equal terms, as beneficiaries. And there would, I think, be as much authority for excluding the one as for excluding the other.

Objection was also taken to the amount of damages. But, while of the opinion that the amount is more than the evidence strictly warrants, I am quite unable to say that it is so excessive as to justify us in interfering and directing a new trial upon that ground.

I think upon the whole the appeal fails and should be dismissed with costs.

APRIL 23RD, 1906.

C. A.

SIMS v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Track—Failure to Look for Train—Negligence—Contributory Negligence—Question for Jury—Verdict against Evidence—Excessive Damages—New Trial.

Appeal by the defendants from judgment of STREET, J., 5 O. W. R. 664, 10 O. L. R. 330, refusing a motion for a nonsuit and directing judgment to be entered for plaintiffs.

The action was brought by the plaintiff Alexander Sims, an infant, by W. H. Sims, his father and next friend, to recover damages caused by the alleged negligence of the defendants. The father was also a plaintiff, and claimed damages for loss and expense incurred by him for medical and other care and attendance upon and for the maintenance of the infant plaintiff.

The defendants denied all negligence on their part, and alleged that the accident was caused by the infant plaintiff himself, or by his contributory negligence.

The jury found for plaintiffs, assessing damages in favour of the infant plaintiff $2,200, and for the father $300.

Defendants appealed on several grounds, among others that there was no evidence to justify the findings; that the answers to the questions submitted to the jury were perverse and contrary to the evidence and the weight of evidence; and that the damages were excessive.

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

John MacGregor, for plaintiff.

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

OSLER, J.A.:—It appeared that the plaintiff Alexander Sims was a youth of 18 years of age at the time of the accident. He resided with his father, but was employed apparently on his own account in his trade of a cabinet maker in May's billiard factory in West Toronto Junction, at the wages of $9 per week. He met with the accident at a few minutes past 6 o'clock in the afternoon of 23rd July, 1903, at the crossing of defendants' railway on Bloor street west, Toronto. He was returning from his work, accompanied by a friend, one Prince, who was employed in the same factory. They were riding eastward on their bicycles along a narrow pathway or bicycle track on the south side of Bloor street, Prince being a little way ahead. The evening was fine, and for a distance of 137 feet along Bloor street west of the crossing there was nothing to obstruct the view of the railway track to the north or of a train thereon approaching the crossing. The plaintiff and his friend first crossed the tracks of the Canadian Pacific Railway Company, said to be about 400 yards west of the Grand Trunk Railway track. As they approached the latter, they saw another bicyclist, who was standing with his wheel on the pathway a short distance from the crossing, talking to a friend. Plaintiff heard Prince call to him, and they slowed up to give him time to take his wheel out of their way. When he had done so they started on again more quickly, Prince being then about 15 feet ahead of plaintiff. He crossed the track in safety, though barely so, but the plaintiff in following him was struck by a freight train coming from the north. He was knocked some distance by it and his leg so seriously injured that it became necessary to amputate it. The bicycle, which was found after the collision lying in the middle of the highway, was practically uninjured, only a small chip being broken off the right

handle. Plaintiff said that the first wheel of the bicycle had just crossed the westerly rail of the track when he was struck, as he thought by the cow-catcher of the engine. He had not looked to see if a train was coming—just glanced up when it was on top of him. Had he looked when he was 30 feet away, he could not have failed to see it, and had he seen it two seconds sooner than he did, or when 10 feet away from it, he could have turned his wheel and escaped. He was watching his wheel and the path and did not think to look for the train. The bell of the engine, he said, was not rung, nor the whistle sounded; if they had been, he must have heard them. He did not hear the noise of the train. He knew the track was there and had crossed it on his wheel several times before.

This was the plaintiff's own account of the occurrence and the evidence of the situation of the crossing with respect to the railway track.

Opposed to this was a large body of evidence both that the statutory warnings had been given and that the plaintiff had run his bicycle into the engine and had not been struck by the cow-catcher. In this last respect the defendants' evidence is to some extent corroborated by the situation in which the bicycle was found after the accident and the nature of the damage suffered by it.

Upon a full consideration of the whole evidence, and having had the advantage of hearing a second argument of the appeal before a full Court, we are strongly of opinion that the findings of the jury cannot be allowed to stand, as being opposed to the great weight of the evidence on the main points of the case. The evidence was, no doubt, such as was proper to have been submitted to them under the authority of Peart v. Grand Trunk R. W. Co., 10 A. R. 191, affirmed by the Judicial Committee of the Privy Council, now reported 10 O. L. R. 753 Appx., Vallee v. Grand Trunk R. W. Co., 1 O. L. R. 224, and other cases in this Court; and therefore the trial Judge was right in holding that he could not dismiss the action. The verdict is, however, so unsatisfactory that we think there must be a new trial. That being so, it is not desirable to discuss the details of the evidence or to say more about it than that it appears to us that the jury have not given it the consideration it ought to have received at their hands.

For myself, I must add that I cannot divest myself of the opinion that the introduction into the case of improper remarks and appeals, contrary to the warning and rebuke of the trial Judge, has had its effect upon the jury, and that if anything of that kind should be attempted at a future trial, the jury ought at once to be dispensed with and the trial had without a jury.

As regards the case of the adult plaintiff, there was no evidence whatever before the Court to justify a verdict for more than the medical fees ($50) paid by him, and as to that there must have been a new trial in any case.

The appeal will, therefore, be allowed with costs to be costs to defendants in any event. The costs of the last trial to be costs in the cause.

APRIL 23RD, 1906.

C. A.

MISENER v. WABASH R. R. CO.

Railway — Injury to Person Crossing Track — Consequent Death — Negligence — Excessive Speed — Contributory Negligence — Failure to Look a Second Time for Approach of Train—Question for Jury—Findings.

Appeal by defendants from the judgment at the trial before MEREDITH, J., and a jury, in favour of plaintiffs, in an action brought under the provisions of R. S. O. 1897 ch. 166, to recover damages resulting from the death of Robert Misener, the husband of the plaintiff Isabella Misener, and the father of the other plaintiffs, through the alleged negligence of the defendants.

At the trial an amendment was allowed whereby the plaintiff Isabella Misener was permitted to add a claim as administratrix and to recover damages for the destruction of the chattels of her late husband in the collision which caused his death.

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

G. H. Pettit, Welland, for plaintiffs.

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

Garrow, J.A.:—The facts are simple, and not seriously in dispute. On 13th August, 1904, about 2 p.m., Robert Misener, aged 48 years, a farmer, was driving with a team of horses and a waggon along a highway in the county of Welland, which is crossed by defendants' line of railway, and at the intersection he was struck by an engine in charge of defendants' servants and instantly killed, his horses killed, and his waggon and harness destroyed.

The engine was unattached, and was running through from Niagara Falls to St. Thomas at a high rate of speed; one witness, Mrs. Louisa Pew, who had resided near the crossing for 13 years, stating that she had never seen an engine going so fast since she lived there, and even the train men admitted that they were going at from 35 to 40 miles an hour.

Deceased, as he approached the track, was driving at a pace of about 3 miles an hour. Immediately behind him, going in the same direction, was one William Locke, also driving, who was called as a witness by plaintiffs. Asked to tell what took place, Mr. Locke said: "Well, the engine gave toot toot and then the crash came about the one time." The engine ran, after the collision, from a quarter to half a mile. When it struck the waggon, it made it "go up in splinters," and deceased was thrown up the track "out of our sight." He did not stop because the sight had made his wife, who was with him, ill. He saw deceased as he approached the crossing look towards the "Falls" (the direction from which the engine came) and then look the other way. He (the witness) also looked at the same time and saw and heard nothing on the track. At the time deceased looked, his horses "were going on to the rails, I could not say how far." On cross-examination he became a little more definite as to the exact place at which deceased looked, which was, he said, at the raise of the road to go up to the track, which would be at least as far back as the railway fence. Until the line of the railway fence is reached, there are obstructions to a clear view, such as the fences themselves, an orchard which approaches but does not reach the corner, and a walnut tree, which was then in leaf, as was also the orchard. But when the fences are reached and passed, and before the rails are

actually reached, there is an unobstructed view for a considerable distance, perhaps a quarter of a mile, along the track in the direction from which the engine came, and if deceased had looked again when at or past the fence and before he reached the rails, this witness deposed that he could have seen the approaching engine, and could, as his horses were going at a slow pace, have turned towards the side, and thus have avoided the collision.

There was no evidence that deceased looked more than once, and the substantial point in the case is whether, under the circumstances, his failure to look again is fatal, the defendants contending at the trial and before us that such failure to look again was conclusive proof of contributory negligence, and that the case should have been withdrawn from the jury. The Judge refused a motion for nonsuit, holding that there was evidence proper to be submitted to the jury.

The jury in answer to questions found that the whistle was not sounded nor the bell rung, and that such neglect was the proximate cause of the injury, and that deceased could not by the exercise of ordinary care have avoided the injury. Other questions based upon the possibility of an affirmative answer to the question as to contributory negligence were also put and answered, but they apparently became of no consequence when contributory negligence was negatived. And the jury assessed the damages as follows: to the widow Isabella Misener, $800; daughter Ethel, $300; daughter Flossie, $500; son Norman Robert, $800; and the damages to personal property, $440.

Was the omission to look again such a circumstance as would have justified withdrawing the case from the jury? This brings up again the familiar question in such actions of the nature and extent of the so called "stop, look, and listen" rule. There is, of course, no such rule as a rule of law in force in this country. Each case must depend upon its own particular facts. The plaintiff must of course prove the negligence, and that it caused the injury. He proves the first by proving the neglect of the statutory warning, and the question whether that neglect or his own want of care was the efficient cause of the injury must usually be a question for the jury, if there is any reasonable evidence to shew that a collision subsequently followed under circumstances which might reasonably justify attributing it to the lack of warning. This would probably be so in any case (speaking generally of course), whatever the nature of the negligence might

be, but seems to be peculiarly so where, as here, the negligence consists in a failure to warn the party injured of an approaching danger. He presumably knew of the statutory provision made for his benefit, and had, I think, a right to depend upon its due performance, and to proceed in the absence of such warning, in the belief that he had nothing to apprehend. He was, of course, bound to act with reasonable care, that is, with such care appropriate to the situation in which he was placed, as would have been exercised by an ordinarily prudent man. A railway crossing is a place of danger; and a person driving over it would be expected to exercise a higher degree of care than would ordinarily be required in driving elsewhere. And a jury might well find that, even where the statutory warnings had been omitted, a person who drove upon the crossing without any reasonable excuse for not taking what may be regarded as the usual precaution of looking or listening, was guilty of contributory negligence fatal to his action. But on the authorities by which we are, I think, bound, it is for the jury and not for the Judge to so find: Peart v. Grand Trunk R. W. Co., 10 A. R. 191, and the judgment in the Judicial Committee, now repeated for the first time in 10 O. L. R. 753 (appendix); Vallee v. Grand Trunk R. W. Co., 1 O. L. R. 224; Smith v. South Eastern R. W. Co., [1896] 1 Q. B. 178; Brown v. Great Western R. W. Co., 52 L. T. N. S. 622; North Eastern R. W. Co. v. Wanless, L. R. 7 H. L. 12.

There may, of course, be cases in which the facts are so clear and undisputed that the Judge might be called upon to say as matter of law whether the plaintiff had established the onus which rests upon him to prove not only the negligence but that he was injured thereby, but I agree with Kay, L.J., in Smith v. South Eastern R. W. Co., supra, at p. 188, in thinking that they must be rare. See also per Lord Watson in Wakelin v. London and South Western R. W. Co., 12 App. Cas. 41, at p. 48, and per Lord Fitzgerald at p. 52.

The evidence in the case at bar shews that the deceased did look when approaching and quite near the track, although he did not, it is true, look at the latest moment consistent with safety. But at the time he looked he was near enough to have heard the bell or the whistle had either been sounded, and even the noise caused by the approach of an ordinary train. He had lived in the near neighbourhood for many years, and was familiar with all the surroundings, including the habit, which may under the circumstances be presumed,

of the defendants to give statutory warnings when a train was approaching the crossing. And hearing nothing and seeing nothing, he might not unreasonably have assumed that he could safely traverse the short intervening space between where he then was and the other side of the track without again looking.

The failure, under the circumstances, to look again may be, and I do not doubt was, some evidence of contributory negligence, but was clearly not such a circumstance as alone would have justified a withdrawal of the case from the jury.

The appeal, in my opinion, fails and should be dismissed with costs.

APRIL 23RD, 1906.

C.A.

HAMILTON DISTILLERY CO. v. CITY OF HAMILTON.

HAMILTON BREWING ASSOCIATION v. CITY OF HAMILTON.

Municipal Corporations—Waterworks—Water Rates—Equality—Discrimination against Brewers and Distillers—By-law.

Appeal by defendants from judgment of STREET, J., 6 O. W. R. 143, 10 O. L. R. 280, in favour of plaintiffs.

The appeals were heard by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

W. R. Riddell, K.C., and H. E. Rose, for defendants.

G. F. Shepley, K.C., P. D. Crerar, K.C., and J. D. Gausby, Hamilton, for plaintiffs.

GARROW, J.A.:—Both actions involve practically the same question, namely, the validity of certain by-laws of the city of Hamilton whereby certain water rates were imposed upon plaintiffs in excess of the rates charged against other manufacturers.

Street, J., considered himself bound by the judgment of the Supreme Court in Attorney-General for Canada v. City of Toronto, 23 S. C. R. 514, and decided in favour of plaintiffs in both actions.

We too are of course bound by that decision, and the only question really is, can the present cases be distinguished? And I agree with Street, J., in thinking that they cannot.

The circumstances are not, of course, identical. There was a distinguished element of more or less importance in that case, in the fact that the complaint came from the Crown represented by the Attorney-General, and that the Crown is entitled to exemption from taxation under the B. N. A. Act. But it was conceded that a water rate is not a tax, and that the Crown is liable to pay, or at least is willing to pay, a proper water rate lawfully imposed, and such concession it seems to me quite exhausted whatever virtue there was in the reference to the B. N. A. Act and the exemption therein declared. So that it must now be taken, I think, as if the plaintiff there had been merely a manufacturer or any other private citizen complaining of a discriminating rate. And, if I am so far correct, there seems to be no escape from the position that it was determined by that case that in all cases a water rate imposed by a municipal authority must be an equal rate to all consumers, unless express legislative authority has been given to discriminate.

I am unable to find any such authority in the several statutory enactments upon which the defendants rely. Reliance was chiefly placed on the power to establish by by-law a tariff of rents or rates for water supplied or ready to be supplied contained in 24 Vict. ch. 56, sec. 3, the argument being that the term "tariff" does not mean a uniform charge, but a scale of charges, and reference was made by way of illustration to the customs tariff. The comparison, however, is not, I think, serviceable, and indeed operates rather against than for defendants. They supply only the one article—water. The diversity in the customs tariff is caused by the diversity of articles covered, but upon any given article the rate is the same to all consumers.

Reliance was also placed upon the case of Fortier v. Lambe, 25 S. C. R. 429, as having modified the rule laid down in Attorney-General for Canada v. City of Toronto, but this, I think, is erroneous. The power of discrimination in question in Fortier v. Lambe was expressly conferred by a provincial statute, and the question was, therefore, not of the

authority of a municipal council, but of a provincial legislature.

The general rule that municipal by-laws imposing a burden of any kind must be fair and just is beyond question, and to be fair and just they must bear equally upon all affected thereby. If inequality is intended, it must be expressly conferred or must appear by necessary implication. In these cases it is not even claimed that express power to discriminate has been conferred, and I am unable to see anything in the legislation from which an implication favourable to defendants' contention could be drawn. They have special powers under sec. 29 of the Municipal Waterworks Act, R. S. O. 1897 ch. 235, to make any agreements which they deem expedient for the supply of water to any railway company or manufactory. And water supplied under an agreement made in pursuance of this power would no doubt be excepted from the operation of the general by-law respecting rates.

But this, on the principle of the maxim expressio unius est exclusio alterius, seems to make against rather than for the defendants.

Some, although perhaps not much, additional light is cast upon the general principle against discrimination by a reference to the provision of the Consolidated Municipal Act, 1903, secs. 591, sub-sec. 12, and 591 (a), sub-sec. (e), where the supplying of water to a manufactory freely, or at rates less than those charged to other persons and corporations in the municipality, is regarded as a bonus, and requires the assent of the electors as in the case of any other bonus authorized to be given under the Act. This, of course, applies only to manufactories proposed to be established, and does not therefore conflict with the provisions before referred to of sec. 29 of the Municipal Waterworks Act, which has reference apparently to those already existing. And its importance, if it has any, lies in the apparent assumption by the legislature of an uniformity of rate (notwithstanding the use of the plural "rates") among other "persons and corporations," only to be disturbed in the special manner pointed out, and not under any inherent power of discrimination supposed to already exist in the municipal council.

One cannot help feeling that there is force in the contention that a municipal council ought to have the power contended for. There are wide variations in the needs and circumstances of the individual water consumers which justice

requires should be taken into consideration by the council, and these varying circumstances could, I think, be fairly met by a wide power of classification, and perhaps, in addition, a power to deal specially with special cases.

But such considerations must now, I think, since the decisions of the Supreme Court, be addressed to the legislature.

The appeals, in my opinion, fail and should be dismissed with costs.

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

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

APRIL 23RD, 1906.

C.A.

RE PAKENHAM PORK PACKING CO.

GALLOWAY'S CASE.

Company—Winding-up—Contributory—Allotment of Shares—Preference Shares—Common Shares—Delegation of Power of Allotment—Terms of Allotment—Ratification—Acceptance—By-law—Directors.

Appeal by one Wade, the liquidator of the company, from order of ANGLIN, J., 4 O. W. R. 22, dismissing an appeal by the liquidator from the decision of an official referee, upon a reference for the winding-up of the company, in settling the list of contributories, striking Galloway's name from the list in respect of 16 so-called preference shares in the company, and allowing an appeal by Galloway from the referee's decision retaining Galloway's name on the list in respect of 8 shares of the common stock.

W. M. Douglas, K.C., and W. J. McWhinney, for the liquidator.

R. J. McLaughlin, K.C., and R. D. Moorhead, for Galloway.

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

MOSS, C.J.O.:—Galloway was never a subscriber for shares either originally or at any time. He made application

in writing for both classes of shares, and one question is whether his applications were ever accepted in due and proper form, and whether shares were duly allotted to him, and notification thereof given him. There are, besides, other questions, one being whether the company had at the time of his application any such class of shares as preference shares, so as to be in a position to accept his application and allot and give to him shares of that description or quality, and another whether they had common shares which they could allot and give to him in compliance with the application therefor.

The company were incorporated under the Ontario Companies Act by letters dated 13th June, 1901, with a share capital of $100,000, divided into 2,000 shares of $50 each. The memorandum of agreement shewed that of the capital stock, shares to the amount of $38,100 were subscribed for by the persons petitioning for the letters of incorporation as follows: James Pakenham $30,000, John Kendrick $2,000, Jonas Byer $2,000, W. C. Renfrew $3,000, Alexander Bruce $1,000, and H. J. Morden $100. And all of these except Kendrick were declared to be provisional directors.

Nothing was said in the letters of incorporation concerning preference shares. Section 22 of the Companies Act provides that the directors may make a by-law for creating and issuing any part of the capital stock as preference stock, giving the same such preference and priority, as respects dividends and otherwise over ordinary stock, as may be declared by the by-law, but (sub-sec. 2) no such by-law shall have any force or effect whatever until after it has been unanimously sanctioned by a vote of the shareholders present, in person or by proxy, at a general meeting of the company duly called for considering the same, or unanimously sanctioned in writing by the shareholders of the company.

No such by-law was ever made by the directors. The company was not organized until 2nd April, 1902. On that day, at a meeting not called for the purpose of considering and voting on a by-law for creating and issuing preference stock, but called, so far as appears, for the purpose of organization, and at which some but not all of the shareholders were present, general by-laws were passed, a board of directors and a managing director were appointed, and immediately afterwards it was resolved "that of the total capital stock of the company of $100,000, the sum of $75,000 par

value thereof be and is hereby created preference stock, the said stock to have a priority in respect of dividends to the extent of 7 per cent. upon the par value thereof, and no dividends to be declared upon the common or ordinary shares until said 7 per cent. upon the said preferred stock shall have been paid, said preferred stock to be entitled to such dividends cumulatively yearly upon and until dividends at the rate of 7 per cent. per annum from the time at which such preferred stock shall have been paid up in full, shall have been paid thereon, no dividend shall be paid upon the common or ordinary shares forming the balance of the stock of the company. The said 7 per cent. per annum shall be all the dividend to which the said preferred stock shall be entitled, and any balance of profits after setting aside such reserve fund as the directors may see fit under the by-laws of the company shall be applicable to the payments of dividends upon the common or ordinary shares, and the directors are hereby authorized to pass a by-law for creating and issuing the said 75 per cent. of the said capital of this company as preferred stock accordingly, giving same the said preference and priority in respect of dividends as are hereinbefore set out and not otherwise."

This carried unanimously, all present voting, but the directors did not proceed to pass a by-law as directed by the resolution, and as required by the Companies Act, and the matter does not appear to have ever come again before the shareholders. Two prospectuses seem to have been issued, but the one put in evidence (exhibit 9) is not that which is printed in the appeal book. The latter, though appearing to bear date as of 15th April, 1902, speaks of the company as being organized and of the provisional directors, while exhibit 9, though bearing no date, shews that the work of organization has been completed. In that document appears a statement purporting to shew the position of the capital stock thus:

Capital authorized		$100,000
Issue of $75,000 7 per cent. preference stock (on 1500 7 per cent. cumulative shares of $50 each).		
Stock already subscribed	$85,000	
Per cent. cumulative stock now offered for subscription	12,000	
Ordinary stock	3,000	
		$100,000

Reference is again made to preferred stock under the heads of "Division of profits" and "Guarantee." And that is all that appears to have been done towards the creation of preferred stock. There was no alphabetical list of holders of either preference or common stock, and there is nothing shewing the names of persons to whom preferred stock was issued unless they can be picked out of a book produced and called by the secretary of the company the stock book, which appears however to have been very imperfectly kept, and is evidently not a complete or correct record.

On 3rd October, 1902, Galloway, at the solicitation of one Hunter, an agent of the company, signed two applications addressed to the directors of the company, one for an allotment of 16 shares of $50 each of 7 per cent. cumulative stock in the company, containing an undertaking to accept same or any less amount, paying therefor according to the terms named in the prospectus; the other for an allotment of 8 shares of $50 each in the company, with an undertaking to accept same or any less amount, paying therefor $60 per share according to the terms named in the prospectus.

But in lieu of the terms of payment named in the prospectus, it was arranged that Galloway should give his promissory note for $1,280, the amount of the two applications, payable to the company 12 months after date. This was done, and the note was delivered to Hunter. Galloway's applications were never brought before or dealt with by the board, but the secretary, on 13th October, 1903, sent a registered letter to Galloway notifying him that the directors had that day allotted to him the shares in accordance with his application. This letter is not produced, and Galloway says he never received it, but it would appear that it was received by a member of his family, probably during his absence from home. But it was not the case, as stated in the notice, that the directors had allotted the shares. They had not passed a by-law or otherwise ordained with respect to the allotment of shares to Galloway.

They neglected to comply with the directions of sec. 26, as they had neglected to comply with sec. 22. There was, therefore, no acceptance by them of Galloway's applications. Reliance is placed on a resolution of the board passed on 30th May, 1902, that the secretary be instructed to allot all stock as applications are passed in. But neither under the statute nor the by-laws of the company is there any authority for such action on their part.

There is no such authority as was found in the articles of association in Harris's Case, L. R. 7 Ch. 585, enabling the directors to delegate the duty to a committee of their body. And the act of the directors in this case in assuming to delegate their authority to a subordinate officer of the company goes far beyond what was done in that case. In Howard's Case, L. R. 1 Ch. 561, the deed of settlement provided that the allotment or distribution of such shares as had not been subscribed for, should belong to and be vested in the directors of the company for the time being, and should be disposed of by them in such manner as, in their opinion, would best promote and advance the credit and interest of the company. And it was held that a resolution providing that the shares remaining undistributed should be allotted according to the discretion of the manager and two private directors was an invalid act, for the board of directors could not delegate its powers of allotment; and further that the resolution did not enable the manager and two directors to validly accept a proposal for shares containing a variation from the terms of payment set forth in the circular asking for applications.

In the present case the secretary was aware, notwithstanding the terms of the applications signed by Galloway, that he was making them on the condition of payment that his promissory note payable in a year should be accepted instead of the payments in the manner and at the times set out in the prospectus.

Yet the secretary assumed to deal with the applications and accept the terms offered without reference to the board, and, as there never was any authority to him to act in such a case, it follows that there was never any agreement for the shares concluded between Galloway and the company.

Further, the company were not, at the time of Galloway's applications, nor at any time afterwards, in a position to give him what he had applied for. They had not created preference stock in accordance with the provision of sec. 22 of the Companies Act. This is admitted, but it is argued that what was done was sufficient for the purpose, and that in any case Galloway is not in a position to contend the contrary. It is said that there was power in the directors to create the preference stock, and that the failure to comply with the conditions of the Act were mere irregularities in the proceedings; there was a resolution of the shareholders in favour of the creation of such stock and a direction to the

directors to pass a by-law, and that was enough. Now, whether that would constitute a sufficient answer to the company if they were seeking to repudiate or get rid of preference stock held by persons who had dealt for them with the company, is not the question. The question is as to their position when seeking to hold Galloway as a shareholder. In order to the valid creation of preference stock, the directors must first make a by-law for that purpose, which was not done. But even a by-law by the directors is not sufficient. It is of no force or effect whatever until after it has been unanimously sanctioned by a vote of the shareholders at a meeting duly called for the purpose of considering the same.

The by-law and the subsequent sanction of the shareholders are the essential elements of the power to create the preference stock. The power is not otherwise conferred, nor is it inherent in the directors or the company. It is not a question of mere form, for the form in this instance is matter of substance. In this case there was a complete failure to comply with the provisions of the Act as regards the passing of a by-law, the first prerequisite to the creation of preference stock.

If a by-law had been passed, it might have been argued with some plausibility that, having regard to the previous resolution, the want of a subsequent resolution sanctioning the by-law was an irregularity — or informality — and that preference stock created and issued in that way might, under some circumstances, be held to be valid. But, even in that case, it could only be held valid as against third persons upon grounds of estoppel, through acquiescence or delay. Here there is no acquiescence, delay, or conduct on Galloway's part to estop him from alleging and shewing that at the time when he made his application, and thenceforth until the liquidation proceedings, the company was not in a position to give him that for which he applied. There was no concluded contract, and he never received or became the holder of shares of the nature and quality specified in his application or any others. As regards the 16 shares of preferred stock, the decision of the Judge should be affirmed.

Then as regards the 8 shares of common stock, what has been said as to the acceptance and allotment by the secretary applies. The variation in the terms of payment applied to them as well as to the shares of preference stock, and there was no valid acceptance of his actual application in the one

case more than in the other. Besides, upon the evidence it is a very serious question whether at the time of the application the company held shares which they could validly allot to him. In the position which they had taken with regard to preference stock they could not insist upon Galloway treating as common stock that which they had put upon the market as preference stock. And without recourse to it they were not validly possessed of common stock so as to comply with his application.

It is said that there were shares erroneously allotted to Pakenham, that only 200 shares should have been allotted to him, whereas 600 were allotted by mistake, and there is his testimony to that effect. The records of the company do not shew any allotment to him, but in the petition for letters of incorporation, the statements of which are verified by his affidavit, it is set forth that he had taken stock to the amount of $30,000, that is, 600 shares. And he signed the memorandum of agreement filed with the petition, as a subscriber for $30,000. In the absence of anything further, the memorandum of agreement and the petition on which the letters of incorporation issued are the only reliable records, and they shew Pakenham as the holder of 600 shares. Upon this footing it is very clear that there was not any common stock belonging to the company at the time of Galloway's application. It is said that the company purchased 100 shares from Pakenham. But of this there is no record and there is no transfer. So that, irrespective of the question whether the company could, by assuming to become purchasers of their own shares, place themselves in a position to contract, there is a failure to shew possession of any shares that could be allotted to Galloway when he sent in his application. And the same position was maintained up to the time of the liquidation proceedings.

Other objections were raised and discussed, but it is not necessary to deal with them. For the reasons already given, as well as for those given by Anglin, J., his order should be affirmed.

The appeal is dismissed with costs.

[In Higginbotham's case and Rodman's case, the facts were similar, but not identical with those in Galloway's case. Appeals from similar orders made by ANGLIN, J., were also dismissed, for reasons given by MOSS, C.J.O., in writing.]

APRIL 23RD, 1906.

C.A.

WALLACE v. TEMISKAMING AND NORTHERN ONTARIO R. W. COMMISSION.

Contract—Supply of Railway Material—Payment — Condition Precedent — Certificate of Railway Commission's Engineer—Interference by Commission with Engineer—Fraud—Hindering Performance of Condition.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., at the trial, withdrawing the case from the jury at the close of plaintiff's case, and dismissing the action with costs.

The action was brought to recover the price of a quantity of railway ties supplied by plaintiff to defendants under a written contract dated 19th November, 1904, whereby plaintiff agreed to deliver 225,000 ties on defendants' right of way, the ties to be made from sound timber, of good merchantable quality, and in strict compliance in all respects with the specifications made part of the agreement, said ties to be delivered and piled completely ready for inspection as follows:—At least 100,000 on or before 1st March, 1905; 75,000 on or before 1st July, 1905; and the balance 50,000 on or before 1st October, 1905. Payment was to be made as follows. About 90 per cent. of the value of the ties delivered and accepted to be made monthly on the written certificate of the engineer, such certificate to be a condition precedent to the right of plaintiff to be paid the said 90 per cent. or any part thereof; the remaining 10 per cent. to be retained until the final completion of the whole work to the satisfaction of the engineer, whereupon the engineer was to give the final certificate accordingly, and such 10 per cent., or the balance payable under the contract, was to be paid within 40 days after the granting of such final certificate, which certificate, it was declared, should also be a condition precedent to the right of

plaintiff to be paid the said 10 per cent. or any part thereof. And the price agreed to be paid was for cedar ties 27 cents, for tamarac ties 29 cents, for hemlock ties 25 cents, and for Jack pine ties 29 cents. And the agreement provided that the word "engineer" should mean the chief engineer for the time being appointed by defendants having control of the work of construction of defendants' line of railway.

The specifications, so far as material, were as follows:—

"Temiskaming and Northern Ontario Railway.

"Specifications for 225,000 ties."

"1. Ties may be of cedar, tamarac, hemlock, or Jack pine. They must be made of live, straight timber, free from decay, bad knots, wind shakes, and whatever other imperfections there may be.

"2. If made from the round tree they must be sawn or hewn smooth (and free from score hacks) to uniform and parallel surfaces on two sides. Cedar and all thick bark timber must be peeled.

"3. If sawn square from large timber they must be cut through the centre of the log. No ties sawn on three sides will be accepted.

"4. Ties shall be of the following dimensions: Flatted ties must be 7 inches thick, with 7 inch face. Square ties must be 7 inches thick with 9 inch face.

"5. Ties of smaller size or of 12 inches face and over, and those having defects in manufacture or quality of material which would not render them unfit for use in side tracks, will be culled, and the Commission will accept them at half price.

"6. Ties must be exactly 8 feet long, with ends cut square, and all face measurements shall be inside the bark at the smallest end.

"7. Ties shall be delivered on the Commission's right of way, at such points as may be approved by the tie inspector, and shall be piled with even ends on one side of each pile, on a level with and not less than 8 feet long nor more than 30 feet from the track, allowing at least 3 feet between piles to permit of inspection at both ends of tie.

"8. Ties taken from the water shall be cross piled in square piles in such a manner as to permit free circulation of air around each tie.

"9. The Commission will not be responsible for any ties delivered on its property until inspected and accepted by the tie inspector. Satisfactory evidence must be furnished when required by the Commission as to land on which the ties have been cut, that the contractor had the legal right to cut and dispose of them, and that they are free from all liens and attachments.

"10. Crown dues will be paid by the Commission on all ties cut on Crown lands.

"11. The decision of the Commission's inspector as to whether the ties conform to and are delivered in accordance with the specifications shall be final."

Under this agreement plaintiff's allegation was that he delivered 199,800 tamarac ties at 29 cents, 151 ties at 27 cents, 29,251 Jack pine ties at 29 cents, and 13,722 No. 2 tamarac (culls) ties at 14½ cents (see paragraph 5 of specifications), in all of the value of $68,455.25, upon which he had been paid $54,736.55, leaving a balance due him of $13,717.70, for which sum with interest he asked for judgment.

Defendants admitted the delivery and acceptance of 126,983 tamarac ties at 29 cents, 591 cedar ties at 27 cents, 121,744 tamarac and Jack pine culls at 14½ cents, and 241 cedar culls at 13½ cents, of the total value of $54,737.55, which sum they said they had paid. They pleaded the condition precedent of the engineer's certificate, and said that in the month of June, 1905, after all the ties had been delivered, defendants' chief engineer issued his final certificate certifying to the number and value of ties as above stated for which they had fully paid.

To this defence plaintiff pleaded a replication, which, so far as material, set forth that the ties delivered in the months of November and December, 1904, and January, 1905, were all duly inspected by defendants' engineer or his agent, and marked or stamped with the name of defendants and accepted by them before 1st February, 1905, and the certificate of defendants' engineer issued to such effect, and that all the ties so delivered were duly paid for (less of

course the 10 per cent.); that as to the ties delivered during the months of February and March, 1905, when the delivery was finally completed, they were duly inspected by defendants' engineer or his agent, and accepted and marked with the name or stamp of defendants, and a certificate of defendants was issued to such effect; that a further inspection made in the month of May of the ties which had not been actually used, was not a reasonable or correct one; that the inspectors employed were incompetent; and that, in consequence thereof, the estimate of the value of said ties as set out in the statement of defence, which was made on the basis of such inspection, was incorrect; that, if any certificate required to be issued was not issued, then the issue of such certificate was waived by defendants; that defendants wrongfully prevented their engineer from certifying; that the certificate of defendants' inspectors was final; and that the defendants, if not liable under the contract, were liable to pay as upon a quantum meruit.

I. F. Hellmuth, K.C., and G. R. Geary, for plaintiff.

W. N. Tilley, for defendants.

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

GARROW, J.A.:—The facts as disclosed in the evidence appear to be as follows. The plaintiff resides at North Bay. He, with the consent of defendants' chief engineer, Mr. Russell, sublet the contract to a number of sub-contractors, the ties to be delivered at various points along the line of the railway then in course of construction. This was his fourth tie contract with defendants under Mr. Russell's inspection. The last of the ties were delivered in the month of March, although he had till the following month of October to complete. At the places where the ties were delivered, they were inspected by tie inspectors Fraser and Brougham appointed by Mr. Russell, and those that were passed were stamped with a T. and N. O. Railway stamp, and the culls were stamped as culls. And a monthly certificate, or estimate as it is called, was issued setting forth the result of the inspection in the form following, which is the November certificate.

TEMISKAMING AND NORTHERN ONTARIO RY.

Thos. Wallace Contract.

Monthly Estimate No. 1.

Shewing the work done during month of November, 1904, by Thos. Wallace, Contractor.
Under Contract No. 5.

No.	Description of Work.	Exect'd in months.	Quantities previous estimate.	Total to date.	Rates.	Amount.
					$ c.	$ c.
1	Tamarac ties	5,444	0	5,444	.29	1,578 76
2	Hemlock ties.....	.....	.....	.....	.....	.....
3	Cedar ties....	94	0	94	.27	25 38
4	.....	.....	.....	.....	.....	.....
5	.....	.....	.....	.....	.....	.....
6	Switch ties.....	.....	.....	.....	.....	.....
7	Telegraph poles	.....	.....	.....	.....	.....
8	Fence posts	.....	.....	.....	.....	.....
9	No. 2, Tamarac.....	335	0	335	.14½	48 57
	Total value of work done.....					1,652 71
	Ten per cent. retained.....					165 27
	Balance					$1,487 44
	Previously returned.....					$1,487 44
	Amount for month November					$1,487 44

I certify the above to be correct,

W. A. Fraser, Tie Inspector.

Dated Nov. 7th. Checked and certified correct.

W. B. Russell, Chief Engineer.

Checked and found correct, H. W. P.

Certificates of similar purport signed by the tie inspector and the chief engineer were issued for the months of December, January, and February following, and upon these certificates, except the last, plaintiff was paid the full amount, less the 10 per cent. to be retained until the completion of the contract.

The trouble between the parties began in the month of March. For the ties delivered in that month the

tie inspectors prepared and issued the usual certificates in the same form as the earlier ones, but the chief engineer did not, although requested by plaintiff, join, for reasons to be presently stated, and for such delivery plaintiff did not at any time obtain the certificate of the chief engineer, nor any other certificate than the final one issued in June, 1905, referred to in the statement of defence, which was not issued by Mr. Russell, who resigned on the 15th of the previous month of May, but by his successor, appointed upon his resignation.

Mr. Russell's reasons for not signing the March certificate as given by himself were that a new commission had been appointed, two of the members of which had made a tour of inspection accompanied by Mr. Russell, and on such inspection had found fault with the ties which they saw on the ground, asked the engineer to recall his February certificate, which they afterwards refused to honour by payment, directed him to discharge the tie inspectors Fraser and Brougham, and ordered a new inspection. In giving his previous certificates Mr. Russell has always relied upon the work of the tie inspectors. He usually passed over the road about once a month, and saw the ties in a general way, but made no personal inspection himself. He had nothing to do with the subsequent inspection, which began before his resignation, and proceeded afterwards under the charge of Mr. McCarthy, the assistant engineer.

All the ties delivered by plaintiff, including the culls, appear to have been retained by defendants. Mr. Russell explained that it is the custom in tie contracts, when the quality is right, to allow a certain latitude in the matter of dimensions; that this custom had prevailed in the case of the earlier contracts with plaintiff, and in the deliveries under the contract in question; and doubtless it was the adherence to this so-called custom which brought about the discord between Mr. Russell and the Commissioners.

At the trial, after plaintiff and Mr. Russell had been examined, plaintiff closed his case, and defendants' counsel thereupon moved for a nonsuit, which was granted, upon the ground that there was no evidence of any coercion, fraud, or undue negligence practised by defendants upon Mr. Russell in order to prevent him from granting a final certificate, and that without such final certificate plaintiff's case must fail.

While the work was in progress and when it was completed, and for some weeks afterwards, Mr. Russell was defendants' chief engineer, and was therefore the proper person to grant the necessary certificate of the final completion of the work. And there can be no doubt, upon the proper construction of the contract, that such certificate was in the nature of a condition precedent, as was properly held by the Chief Justice.

Contracts containing similar provisions, in which the plaintiff has agreed to submit to the determination of an officer in the employment of the defendants, have frequently come before the Courts, indeed in large contracts that may almost be said to be now the common form. And the peculiar, almost sinister, circumstance that the quasi-judge is in the employment of the defendants, has never yet in itself been held to be sufficient to relieve the plaintiff from the terms of his contract deliberately entered into. But while he may be said to have agreed to the risk of the natural bias created by the situation—see per Bowen, L.J., in Jackson v. Barry R. Co., [1892] 1 Ch. 238, at p. 246—he is entitled to have, at the hands of the official, good faith, and the expression of his own honest opinion, and not merely that of his employers. The employer has, of course, the right to direct the attention of the certifying official—before he certifies—to alleged defects of performance, and to ask for care and diligence in the discharge of his duty, but he has no right to dictate or to in any way impose his own opinion, or to prevent or attempt to prevent the certifying official from expressing his own conscientious conclusions. And, considering the delicate situation necessarily existing between an employer and his servant, it is not, I think, going too far to say that any attempt by the employer to do so, especially if yielded to by the servant, is in the nature of a fraud, or is at all events evidence of fraud, which will, if established, relieve the plaintiff from the necessity of obtaining the certificate. And if a less harsh word than fraud is desired, it may also be put on the principle that no one can take advantage of the non-fulfilment of a condition the performance of which he has himself hindered. See per Kelly, C.B., in Roberts v. Bury Commissioners, L. R. 5 C. P. 310, at p. 326.

Here one of the issues is that defendants prevented Mr. Russell from certifying. I am, with deference, of the opinion that there was evidence proper for the jury in support of

this replication. Unfortunately, an apparently important letter from defendants to Mr. Russell, in which certain instructions were sent to him, was not produced, but, even without that, it is, I think, apparent that defendants did interfere with Mr. Russell in the discharge of his duty under the contract. Upon the completion of the delivery in March it was his duty to satisfy himself whether or not the contract had been performed as plaintiff alleged. And if, in his opinion, it had been, it was his further duty to have certified the result. He had before him the final certificates of the inspectors, upon which in all previous instances he had acted, and the inference from the evidence, so far as it proceeded, is, I think, a strong one that but for defendants' interference he would have certified to the March delivery just as he had done to the previous deliveries. If defendants' interference had been confined to requesting a re-examination of the March delivery before the certificate was granted, that would, I think, have been unobjectionable. But they did much more. They requested him to recall his February certificate, which of course he could not do. They instructed him to dismiss the tie inspectors Fraser and Brougham, and they ordered a re-inspection of the whole, carried on not under the guidance or direction of Mr. Russell himself, but of his deputy, thus seriously reflecting upon his management of the matter, and in effect ignoring him. He may not have been explicitly ordered not to certify, but these circumstances did prevent him—or at least from them, and the other circumstances, including his speedy resignation from the service, a jury might well infer that he had in effect been prevented—from discharging his duty under the contract.

There should, under the circumstances, in my opinion, be a new trial, and defendants should pay the costs of the last trial, and also of this appeal.

I have not thought it necessary to finally deal with the question discussed before us at some length of whether the monthly estimates certified to by Mr. Russell were or were not final as to the quantities mentioned in them. Usually progress estimates are not final: Thasis Sulphur Co. v. McElroy, 3 App. Cas. 1040; Murray v. The Queen, 26 S. C. R. 203. But something must depend upon the subject matter. Where it is a house, a ship, a railway, or a similar work, the final value of which must depend not upon a partial but a total completion according to the contract, it seems quite

reasonable to so regard them. But where the contract is for the delivery and the inspection as delivered of a number of specific articles, each one complete or incomplete in itself, and having a fixed specific price, the rule might well be different.

In Murray v. The Queen, supra, at p. 214, it was held that where in the course of the performance of a large work under a contract, certain specified extra work had been classified and a price fixed and the money paid, such a determination is final—and, in the absence of fraud, cannot be reviewed by the engineer who made it or by his successor.

The contract there in question contained a provision requiring certificates in substantially similar terms to those contained in the contract now in question. And the principle referred to seems wide enough to embrace the case of the monthly certificates for the ties delivered and accepted, at least down to and including that for the month of February. But it is, I think, better perhaps that this question should be finally determined after all the evidence has been heard. What I have said indicates my present view, for what it is worth, on the evidence as it stands.

APRIL 23RD, 1906.

C.A.

RENWICK v. GALT, PRESTON, AND HESPELER STREET R. W. CO.

Damages—Action under Fatal Accidents Act—Loss of Child—Right of Mother to Recover while Father Living—Quantum of Damages—Excess—New Trial.

Appeal by defendants from order of a Divisional Court, 6 O. W. R. 413, 11 O. L. R. 158, dismissing motion by defendants to set aside a verdict and judgment for plaintiff for $3,000 damages in an action by a mother under the Fatal Accidents Act for damages for the death of her daughter caused, as alleged, by the negligent operation of defendants' railway. The questions raised by the appeal were whether

plaintiff had properly any interest or expectation of benefit in the life of her daughter, and if so, whether the damages allowed were not excessive.

E. E. A. DuVernet and R. H. Greer, for defendants.

G. Lynch-Staunton, K.C., and M. A. Secord, Galt, for plaintiff.

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

OSLER, J.A.:—A point was urged on the argument of this appeal which, so far as I am aware, has not hitherto been taken in any action under the Fatal Accidents Act here or in England, namely, that, living the father, the mother of the deceased is not a person for whose benefit the action can be brought.

In some States of the American Union, where there is legislation of a similar character to ours, that is undoubtedly so, but the decisions turn upon the precise language of the particular Act where the benefit is given to one parent, and the father, if living, is preferred, or is given to the mother only when the father is dead. The language of our Act is plain: "Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death has been caused by the wrongful act," etc.: sec. 3; and by sec. 1 it is declared that the word "parent" shall include father, mother, grandfather, grandmother, stepfather, and stepmother; and sec. 3 also provides that damages may be given proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit the action has been brought. Damages are not given in such cases for injury to the feelings of the parents, or other relatives, nor are they given merely in reference to the loss of a legal right, as, for example, the loss of the father's right, such as it is, to the services of the child, though this may form an element where it exists. They depend on the family relationship and the probability of its continuance, and the pecuniary advantages likely to arise therefrom are the basis of the claim; the reasonable expectation, in short, as has often been said, of pecuniary benefit, as of right or otherwise, from the continuance of the life. The mother is put on precisely the same plane in this respect as the father, grandfather, and grandmother.

In Dalton v. South Eastern R. W. Co., 4 C. B. N. S. 296, the action was brought by the father as administrator of the deceased son for the benefit of himself and the mother, and damages were assessed for each without objection, and it can hardly be thought that so obvious a point would have been passed over by the Court and the eminent counsel engaged, had it been thought that there was anything in it. See also Pennsylvania R. Co. v. Zebe and wife, 37 Pa. St. 420, and Pennsylvania R. Co. v. Adams, 55 Pa. St. 499; Cooley on Torts, p. 269.

There was ample evidence that the accident had been caused by the negligence of defendants, and I need say no more upon that branch of the case. The objection chiefly pressed was that the damages were excessive. The jury awarded nothing to the father, but gave the mother $3,000, and their verdict has been sustained by a Divisional Court, Meredith, J., dissenting. I must say, speaking with all respect, that unless the parties can agree upon an abatement, there ought, in my opinion, to be a new trial. I derive no sort of assistance from the fact that in Courts on the other side of the line verdicts of juries for as large or nearly as large sums, in circumstances less favourable to the parent, have been upheld. Such verdicts, one may say without fear of contradiction, are based not upon evidence of probable pecuniary loss and damage, to which in our law the right of recovery is restricted, but upon the natural and uncontrolled feeling of sympathy with the agony and grief of mind of the parent for the loss of a beloved child. I allude more specially to cases of verdicts ranging from $2,000 to $3,000 for the deaths of "bright," "healthy," "sprightly," infants of 5 to 11 years of age. In the very nature of such cases the evidence of the pecuniary loss to the plaintiff must, under ordinary circumstances, be of the slightest description. I agree that, as it is impossible to compute it with accuracy, a margin for the play of imagination or for the exercise of the honest opinion of jurors, if that expression be preferred, must or may be conceded. Damages, as the Master of the Rolls said in a recent case, are not a matter of nice mathematical adjustment, and juries are not supposed to measure them on strictly mathematical lines, but have to say what men of ordinary sense and business knowledge would fix upon as the money compensation for the damage sustained. In the ordinary business of life and conduct of affairs, I should

think that every one must recognize that in such cases as I have referred to the verdicts would under our Act be simply extravagant and not based upon any justifiable estimate of the parent's probable pecuniary loss. As the child grows older, the probability of prolonged life more assured, and its future conduct in its relations with its parents more plausibly to be conjectured, there may be room for a more liberal estimate of the pecuniary value to them of its life, though in the ordinary course of events there is not in their case, as has been pointed out by Moss, C.J.O., in Rombough v. Balch, 27 A. R. 32, 44, the same expectation of pecuniary benefit from the continuation of a child's life as in the case of widow and children suing in respect of the death of the husband and father.

In the case before us I am quite unable to find upon the evidence anything to justify the sum which the jury have assessed as the pecuniary damage to the mother for the death of this poor school girl of 17 years of age. Bright, active, healthy, and intelligent, as she is said to have been—qualities all pointing to the probability of her own early settlement in life—on what plausible ground could the jury have reached the conclusion that she was likely for the rest of their joint lives to have contributed in money or services to the mother to the value of $210, or even $100 per annum, for the former is what is meant by a verdict of $3,000? Such a verdict is not supported by any evidence that I can find in the case, or by anything which can be predicated upon what people in their situation in life usually do. Every Judge who has passed upon the case has said that the verdict is larger than he would himself have given, and where I cannot find the evidence to support it, I must for myself come to the conclusion that 12 sensible jurors could not reasonably have given it. I think it was manifestly a sympathetic verdict, arrived at upon considerations which should have had no place in their minds. In a similar case before us this term, where the present and prospective pecuniary value of a daughter's life was actually larger and more clearly proved than in the present case, the jury awarded the mother $1,500 and the father $500. Had the jury awarded the former sum to the mother in this case, I think that their verdict, though larger than it should have been, would have approached more nearly the bounds of reason than it now does. If the parties

can agree upon that sum ($1,500), I would dismiss the appeal with costs. If not, I think it should be allowed with costs, the costs of the last trial and of the appeal, as we directed in the Lewis case, to be costs in the cause. I refer to the case of Collier v. Michigan Central R. W. Co., 27 A. R. 630; Green v. New York and Ottawa R. W. Co., ib. 32; and other cases referred to in the judgment of Meredith, J., in the Court below, 11 O. L. R. at p. 168.

CARTWRIGHT, MASTER. APRIL 24TH, 1906.

CHAMBERS.

RYSDALE v. WABASH R. W. CO.

Pleading—Statement of Claim — Animal Killed on Railway Track—Railway Act.

Apart from the description of the parties and the prayer for relief, the statement of claim was as follows:—

1. On or about the 15th October, 1905, a horse, the property of the plaintiff, got upon the property of the defendant company in the township of Stamford, in the county of Welland, and was killed by one of the defendants' trains.

The defendants moved to strike out the statement or to be allowed to examine plaintiff for discovery before delivery of statement of defence, alleging that the statement of claim disclosed no reasonable ground of action.

H. E. Rose, for defendants.

R. McKay, for plaintiff.

THE MASTER:—The only material in support of the motion is an affidavit of defendants' solicitor, which merely says: "It is submitted that the said statement of claim discloses no reasonable cause of action." If this is the ground of attack, the matter must be dealt with by a Judge of the High Court: see Knapp v. Carley, 7 O. L. R. 409, 3 O. W. R. 187. But the motion was argued as if the objection was that the statement of claim was embarrassing because it did not set out the facts with sufficient fulness to enable the defendants to know what case was to be made against them.

It was said in answer that the pleader has exactly followed the language of the Dominion Railway Act, 3 Edw. VII. ch. 58, sec. 237 (cl. 4).

The law is now that if animals at large get on the property of a railway company, and are killed or injured by a train (unless where the highway crosses the track), the railway company are liable prima facie.

All, therefore, that a plaintiff need allege and prove is that his animal was killed by a train at some part of the track which was the property of the railway company. To escape liability defendants must bring themselves within the subsequent words of cl. 4 of sec. 237. This section was considered in the case of Arthur v. Central Ontario R. W. Co., ante 527.

In that case the judgment of the County Court Judge was affirmed by a Divisional Court, and I am informed by Mr. W. E. Middleton, who was counsel for defendants in that appeal, that the Court entirely agreed with the construction placed on the statute by the judgment below.

It therefore follows that the statement of claim is sufficient for a recovery by plaintiff unless displaced by the defence at the trial.

The motion will, therefore, be dismissed, with costs to plaintiff in any event, and the statement of defence should be at once delivered so that the trial may be had at Welland on 7th May.

APRIL 25TH, 1906.

DIVISIONAL COURT.

RE MCDERMOTT v. GRAND TRUNK R. W. CO.

Division Courts—Trial of Plaint by Jury—Motion for Nonsuit — Reservation till after Verdict — Jurisdiction of Judge—Indorsement of Verdict and Costs on Record—Inadvertence — Judgment — Execution — Stay — Prohibition.

Appeal by plaintiff from order of MABEE, J., ante 602, dismissing motion for prohibition.

C. W. Plaxton, Barrie, for plaintiff.

W. A. Boys, Barrie, for defendants.

THE COURT (MULOCK, C.J., MAGEE, J., CLUTE, J.), dismissed the appeal without costs.

CARTWRIGHT, MASTER. APRIL 27TH, 1906.

CHAMBERS.

PIGGOTT v. FRENCH.

Default Judgment — Motion to Set aside — Irregularity in Service of Process—Waiver—Delay in Moving—Dismissal of Motion—Costs.

Motion by defendant French to set aside a default judgment entered in April, 1905, which directed a sale of lands.

The facts appear in the reports of appeals in the same action, 6 O. W. R. 398, 877.

C. A. Moss, for defendant French.

F. E. Hodgins, K.C., for plaintiffs.

THE MASTER:—The proceedings are attacked on many grounds. The first is, that, although both defendants were served out of the jurisdiction, and were stated by plaintiffs' solicitors to be American citizens, yet no writ of summons for service out of the jurisdiction was issued. The writ issued was one for service in this province, and an order was obtained for service of notice of such writ on defendants.

This seems to come within the principle of Hewitson v. Fabre, 21 Q. B. D. 6. There defendant was by mistake thought to be a British subject, and was accordingly served in France with the form of writ proper for such a case. Defendant did not appear; but when proceedings were taken against him in France on the default judgment, he moved to set the proceedings aside, and succeeded. Field, J., said that defendant had applied soon enough, and that the proceedings were void ab initio.

There can be no doubt in the present case that if application had been made promptly, the proceedings here would have been similarly dealt with.

There were many other serious defects, which were not disputed at the argument.

The answer to the motion was: (1) that it was really not that of defendant at all, as it appeared on the motion made on 5th February that one Hudson had then acquired the interests of both plaintiffs and defendants in the action; and

(2) that in any event defendant French was now estopped from attacking the judgment. . . .

[Quotation from opinion of Wills, J., in Hewitson v. Fabre, supra.]

Now, it appears from the material that this very defendant, in July last, made or supported a motion to set aside the sale to Allen, and the sale was set aside by the local Judge. It is true that neither defendant appeared on the reference, but it was said that defendant French was represented in the appeals from the order of the local Judge, and this was not denied. Indeed it appears on the notice of appeal from the order of the local Judge.

This seems to be a sufficient ground for refusing, at this late stage, to set aside the proceedings. In all cases of this kind action should be taken promptly and according to the principle of Rule 358.

Here there is no affidavit from defendant French, nor any explanation given of the action taken on her behalf before the present motion was made, and when all the information was within the knowledge of all parties and of their solicitors.

The motion is, therefore, dismissed as being brought too late and not supported by any affidavit from the defendant herself excusing or explaining the delay.

Had these proceedings been taken in proper time . . . they would have been successful, in my judgment. The defects in the proceedings were so numerous and so serious as to invite attack, and therefore it does not seem right to give any costs, though the motion is dismissed. . . .

In June last a motion was made by defendant Dailey to set aside the judgment for sale and be allowed to defend, but was afterwards dismissed with costs by consent.

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

TRIAL.

POOL v. HURON AND ERIE LOAN AND SAVINGS CO.

Trust—Enforcement—Cheque Delivered on Condition—Non-fulfilment—Recovery of Amount of Cheque—Evidence.

Action to recover $2,153.05 paid by plaintiff to defendants upon an alleged trust or condition which was not fulfilled by defendants.

J. C. Elliott, Glencoe, and D. A. McDonald, Glencoe, for plaintiff.

F. P. Betts, London, for defendants.

FALCONBRIDGE, C.J.:—. . . The statement of claim alleges that on or about 11th March, 1905, plaintiff, by his solicitor, paid to defendants . . . $2,153.05 in trust to procure the delivery to plaintiff within a reasonable time thereafter of a good and sufficient conveyance of certain lands situate in the village of Glencoe. The cheque was left with defendants by Mr. Alexander Stuart, and the only direct evidence as to what was said when the cheque was handed in is that of Mr. Stuart and of Mr. Henry W. Givens, accountant of defendants.

Mr. Stuart's evidence is very clear and pointed. He says that he told Mr. Givens that it was a cheque sent to him, Stuart, by Mr. Moss, a solicitor at Glencoe, for Mr. Pool, and that he, Stuart, was instructed to give it to them on delivery of a deed of property in Glencoe to be signed by defendants and one C. J. Mills. Stuart further said that he told Givens he was acting a little beyond his instructions in handing the cheque in, but he would leave it with them (defendants) on condition that they would get the deed and deliver it—told them he gave it to them conditionally on getting the deed.

This evidence is not flatly contradicted by Mr. Givens. He says in cross-examination that his recollection is not vivid enough to make him sure, apart from the fact that he did not make any note or memorandum of any stipulation regarding the cheque, because he says it was the practice of the office to have such a stipulation put in writing or to make a special note of it.

I therefore find this issue in favour of plaintiff.

I refer further to a letter from the manager of defendants to C. J. Mills of 13th May, 1905, which commences as follows: "Dear Sir: Re Pool and Hurdle property. I have your favour of the 12th instant herein. While it may be that you are in a perfectly good position to insist on Mr. Pool completing the purchase with you, we must return the cheque to Mr. Alexander Stuart, of this city, if he insists upon it. He handed in the cheque to us on condition that he was to receive the deed, and, of course, we must either give him the deed or hand him back the money."

It is true that the word "trust" was not used, but the cheque was left on the condition that the deed should be delivered, and that condition was not complied with, in a reasonable time, and never in its entirety, for when the cheque was offered on 20th May, defendants assumed to annex the term of Mr. Mills's right to recover from plaintiff any balance of purchase money, interest, taxes, or rent, or otherwise, owing to Mills. On 10th May Stuart had formally made the demand which he had before made verbally for the redelivery of the cheque.

I think, therefore, that plaintiff must succeed upon this branch of the case, and it is unnecessary to go into other matters which were argued.

An application was made by defendants for permission to put in a copy of the letter from W. D. Moss to Stuart and Gunn dated 14th March, 1905. In view of Mr. Moss's affidavit that changes were made in the letter as originally written, before it was given in to Stuart, and that in the letter-press copy it is impossible to read the letter containing these changes, and he is unable to tell what these changes were, and unable to tell what the letter written to Mr. Stuart contained, I do not admit the copy put forward as evidence; but I assume that the copy as put forward is in a form as favourable to defendants as it could be, and it would not, if it were in evidence, affect my judgment.

There will, therefore, be judgment for plaintiff for $2,153.05, with interest thereon from 11th March, 1905, and costs of action.

APRIL 28TH, 1906.

DIVISIONAL COURT.

MASSEY-HARRIS CO. v. DE LAVAL SEPARATOR CO.

Discovery—Examination of Officer of Defendant Company—Libel—Privilege—Names of Persons to whom Impeached Document Sent—Sources of Information.

Appeal by defendants from order of MABEE, J., ante 59, requiring defendants' manager to attend at his own expense

and to answer certain questions which he had refused to answer upon his examination for discovery.

The appeal was heard by MEREDITH, C.J., BRITTON, J., TEETZEL, J.

C. S. MacInnes, for defendants.

Grayson Smith, for plaintiffs.

MEREDITH, C.J.:—The action is for libel, and defendants plead, among other defences, that of qualified privilege.

Two questions are raised by the appeal. The first is as to the right of plaintiffs to discovery of the sources of the information, belief in the truth of which defendants plead by their defence of qualified privilege.

Whatever differences of opinion there may at one time have been as to the right of a plaintiff in an action of libel, where the defence of qualified privilege is set up, to discovery of the source of the information on which defendant alleges that he relied in making the statement for which he is sought to be made liable, it is now settled that plaintiff has that right: Elliott v. Garrett, [1902] 1 K. B. 871; White v. Credit Assn., [1905] 1 K. B. 653; Plymouth Mutual Co. v. Traders' Publishing Assn., 22 Times L. R. 266.

The first ground of appeal therefore fails.

The second question is as to the right of plaintiffs to discovery of the names and addresses of the persons to whom the alleged libel was published.

Prima facie, at all events, plaintiffs are entitled to the discovery sought. The inquiry they desire to pursue is undoubtedly relevant to the issues in the action, or some of them, and on the question of damages. The Judge from whose order the appeal is brought was of opinion that requiring the answers to be given was not oppressive to defendants, and that the information sought was not desired by plaintiffs for any purpose outside of the action, and in that opinion I agree. There is, therefore, no reason why defendants should not be required to give the information which is sought to be obtained.

Although Parnell v. Walter, 24 Q. B. D. 441, was disapproved of in Whittaker v. Scarborough Post, 12 Times L. R.

488, the reasons for the holding in the latter case that plaintiff was not entitled to discovery as to the extent of the circulation of defendants' newspaper, appear to me to be applicable only to actions for libel published in a newspaper, and not to such a case as this, where the number and class of persons to whom the alleged libel was published may be most important, not merely on the question of damages, but also on the question whether defendants are entitled to succeed on their defence of qualified privilege, for it may be that the information sought may disclose the fact that the alleged libel was published to persons to whom defendants were not justified in communicating it, even though the occasion of its publication to some of them may be protected under the defence set up.

The second ground of appeal, therefore, also fails, and the appeal must be dismissed, and the costs of it will be to plaintiffs in any event of the action.

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

TEETZEL, J., also concurred.