THE

ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE COURT OF APPEAL AND IN THE HIGH COURT OF JUSTICE FOR ONTARIO, AND IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM SEPTEMBER, 1912, TO SEPTEMBER, 1913.

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HIGH COURT OF JUSTICE.

FALCONBRIDGE, C.J.K.B. SEPTEMBER 4TH, 1912.

WALKER AND WEBB v. MACDONALD.

GRAHAM v. MACDONALD.

Principal and Agent—Agent's Commission on Sale of Land—Liability—Indemnity by Purchaser—Third Party—Costs—Liability of Vendor for two Commissions.

Actions by land agents for commission on the sale of properties of the defendants to G. J. Foy Limited, brought in as third parties.

The plaintiff Walker and Webb and the plaintiff Graham each claimed a commission on the same sale.

W. E. Raney, K.C., and H. E. Irwin, K.C., for the plaintiffs Walker and Webb.

D. Inglis Grant, for the plaintiff Graham.

G. F. Shepley, K.C., and G. W. Mason, for the defendants.

E. J. Hearn, K.C., and R. J. Maclennan, for the third parties.

FALCONBRIDGE, C.J.:—The plaintiff Graham is entitled to the commission. There will be judgment for him for $1,750 and costs.

The plaintiffs Walker and Webb are not so entitled. Their action is dismissed with costs.

As to the third parties (G. J. Foy Limited), R. T. Blachford was a most unsatisfactory witness, both in demeanour and judged by the other ordinary tests of credibility. I hesitate to brand him as deliberately untruthful. He was apparently a sick man, and perhaps his recollection was at fault. But I prefer to accept the evidence of Macdonald and Glanville, wherever he contradicts them or either of them.

Macdonald had shewn him Graham's card, and Blachford expressly repudiated Graham. Yet when he ascertained (if he did not know it all along) that Graham was, to put the case mildly, busying himself about the matter, it never occurred to him, as a proper thing to do, to tell Macdonald. He assured the defendants that he came to close the deal himself, that no one but Williams was in any position to look for commission, and that he would look after Williams. The clause in exhibit 5, "No agent introduced buyer and seller," was read over to him, and he well knew the object of its insertion. He must be taken to have intended the vendees to act on it and on his silence as to what he knew about the action of those who now claim commissions.

The vendors acted on these representations and reduced their price from $72,000 to $70,000.

Therefore, the third parties, G. J. Foy Limited, are bound to make this good to the defendants, and the defendants will have judgment against the third parties for $1,750, plus the plaintiff Graham's costs, plus the defendants' costs in the Graham suit, and costs of making G. J. Foy Limited third parties and of the trial. In other words, the defendants are entitled to complete indemnity as to Graham, and to their own costs.

The same result would follow as to the third parties if Walker and Webb were adjudged entitled to the commission, instead of Graham.

It behooves the man who has property for sale, to walk and talk warily.

It was suggested in this case that the defendants would be liable for two commissions. See Burton v. Hughes, 1 Times L.R. 207; Paton v. Price (Co. C. York), 21 O.W.R. 753.

LENNOX, J. SEPTEMBER 10TH, 1912.

NIGRO v. DONATI.

Master and Servant—Injury to Servant—Negligence of Foreman—Person Intrusted with Superintendence—Workmen's Compensation for Injuries Act, sec. 3, sub-secs. 2, 3—Damages—Money Paid for Relief of Workman—Deduction.

Action by a workman employed by the defendant for $2,600 damages for injuries sustained by the plaintiff, owing, as alleged, to the negligence of the defendant or his foreman.

A. E. Cole, for the plaintiff.
F. H. Keefer, K.C., for the defendant.

LENNOX, J.:—It is not denied that it was an explosion of dynamite that caused the injury complained of in this action. This is the contention of the plaintiff, and the evidence for the defence affords frequent reference to hole No. 3 as being charged with dynamite—the defendant himself suggesting that it must have been a very light charge.

It is not suggested that it was accidentally charged, as by dynamite dropping into it, or accident of that kind. The five holes were drilled on the morning of the accident, and the drilling was completed only a few minutes before the explosion of this hole, No. 3. The hole in question was deliberately, or at all events intentionally, charged by some one. There was only one person who had a right to do this. This was Frank Galzarino, the foreman, who came upon the works that morning, and who was expressly and distinctly put in superintendence of the works being carried on, and particularly of the blasting operations; which included, as incidents thereof, drilling, plugging, cleaning out, loading, covering, and firing. There would be other duties in connection with the blasting, of course—these are the manifest ones. The defendant put the plaintiff under the charge of the foreman, as his assistant. He assisted in exploding the first and second holes, and the foreman then set him at work cleaning out the third hole, and watched him for at least part of the time he worked at this. The defendant came along and assisted the plaintiff at this work, and had only temporarily stepped aside, to look for or to speak to the foreman, in possession of the dynamite, and swears that no one else at the works, that morning, had dynamite. The suggestion, therefore, in argument, that the plaintiff may have charged the hole, into which he was forcing a drill with a heavy sledge, is not only without a tittle of evidence, but without a vestige of reason to support it.

I am asked to infer that the plaintiff maliciously committed this crime, and deliberately exposed himself to its results, yet, in the same breath, it is argued—and it is to all intents and purposes the sole defence set up—that I cannot possibly come to the conclusion, or, in other words, find as a fact, that Frank Galzarino put dynamite in hole No. 3, and yet remained within the danger zone. I can only find it, of course, if there is direct or circumstantial evidence to support it. Juries are doing this

thing all the time, with the approval of the Courts, on grave criminal charges. Nobody imagines that the foreman intended to do wrong or was guilty of worse than forgetfulness or negligence—in such a case criminal forgetfulness and negligence. If this accident had resulted fatally, and the foreman was charged with manslaughter, resulting from criminal negligence on his part, could I have said that the circumstances afforded no evidence for the consideration of the jury? Well, then, upon the undisputed facts and circumstances given in evidence in this case, I am not prepared to accept Galzarino's statement that he did not put dynamite in the hole in question, although it is possible that he is saying what he believes to be true; and, on the contrary, I think that the only reasonable conclusion to be reached is, and I find it as a fact, that Frank Galzarino did place dynamite in hole No. 3.

It is argued that he is a disinterested witness. So he is—in a sense—and he is an experienced man; but experienced men are forgetful and sometimes careless; and his reputation and earning power cannot be said to be unaffected by the issues in this case.

It was not contended that the defendant was not responsible for the negligence of the foreman; however, that does not relieve me from the duty of carefully considering the provisions of the Workmen's Compensation for Injuries Act; and I think it is clearly a case where the injury was caused by the negligence of a person in the service of the employer who had superintendence intrusted to him, whilst in the exercise of such superintendence: sec. 3, sub-sec. 2. It was argued that the defendant would also be liable under sub-sec. 1. I express no opinion as to this. I am, however, of opinion that the case comes within the provisions of sub-sec. 3.

Then as to the damages. They should not be extravagant. The defendant has acted well. He was not careless in the selection of his foreman; he was not negligent, so far as the evidence goes, in the carrying on of his works, and he was not ungenerous when the calamity came upon the plaintiff. There was evidence of payments, and these were argued as evidence of liability. I don't think the defendant made the contributions upon that basis; and, in every case, unless it has to be utilised to give a colour and meaning to disputed facts, I shall, as here, in the interest of humanity and decency, count contributions made for the relief of the plaintiff, not to the prejudice, but to the credit and advantage of the defendant.

I was not very favourably impressed by the plaintiff's evidence. He clearly exaggerated the result of his injuries. I am satisfied that he will be able to do some work, and earn money, though he will certainly be seriously handicapped in the struggle. I am not disposed to accept his statement of average winter earnings of $5 a day; and, in any event, this evidence is not relevant. It is not what is earned in other occupations, or even what the plaintiff was earning at the work in question, but the average earnings for three years in that occupation, or $1,500, whichever is the larger of the two sums. There is no evidence on this heading. I know that the plaintiff was getting $2.75 a day at the time. This, with steady employment, would come to more than $800 a year, but there is no evidence as to duration of employment. It is not the class of evidence contemplated in the statute, and I am not disposed to strain to assist the plaintiff upon this point.

The utmost, therefore, that the plaintiff is entitled to is $1,500. The defendant has paid towards doctors' bills and hospital expenses, $54. I think I have power to deduct this, and it ought to be deducted.

I, therefore, direct that judgment be entered for the plaintiff against the defendant for $1,446 and the costs of this action.

MULOCK, C.J.Ex.D. SEPTEMBER 11TH, 1912.

RAINY RIVER BOOM CORPORATION v. RAINY LAKE LUMBER CO.

Water and Watercourses—Floatable River—Boom Company—Services to Lumber Company in Booming Logs—Action to Recover Payment—Implied Contract—Legal Authority—Company Incorporated under Foreign State Laws—Sheer Boom in Canadian Waters—International Boundary Stream—Illegal Possession of Logs—Right to Payment for Improvements—Sorting of Logs Rendered Necessary by Unlawful Acts of Boom Company—Evidence—Onus—Right to Tolls—Unlawful Erections in River—Ashburton Treaty—Act of State Legislature—Ultra Vires—Navigation Rights.

Action to recover certain sums of money from the defendants for booming, sorting, rafting, and driving the defendants' logs down the Rainy river during the years 1906 and 1907.

G. F. Shepley, K.C., for the plaintiffs.
G. H. Watson, K.C., for the defendants.

MULOCK, C.J.:—The plaintiffs were incorporated by articles of incorporation issued under the laws of the State of Minnesota and dated the 23rd February, 1889, which articles purported to empower the plaintiffs to construct and maintain booms and other works on the Rainy river, to drive and sort logs passing through their booms, and to charge tolls for the services so rendered. Thus authorised, the plaintiffs, in or about the year 1889, constructed a portion of their works. On the 27th February, 1905, amending articles were issued declaring that the general nature of the plaintiffs' business should be, "the improvement of the Rainy river from its mouth at the Lake of the Woods to the falls of said river at International Falls . . . by cleaning, deepening . . . the channel . . . and so keeping and maintaining said river and the said improvements and works in repair as to render driving logs and floating timber thereon reasonably practicable and certain, and to drive, tow, boom, assort, hold, distribute and otherwise handle logs . . . in said river . . . and to collect tolls and charges for such services," etc.

On the 6th April, 1905, the War Department of the Government of the United States granted a permit to the plaintiffs to extend, and thereupon they did extend, their works easterly. . . . Piles were driven along the stream at places sometimes in the middle and at others near to but not in the middle of the stream, and booms connected by chains were secured in a continuous line along these piles up the stream, except where at one place towards the easterly end an opening was left for the purpose of enabling vessels to pass through. To the east of this opening was erected a sheer boom which ran in a north-easterly diagonal direction across and up the stream to the Canadian shore. At the lower or westerly end of the boom were cross booms, sorting gaps and pockets whereby logs could be held and sorted.

The defendants are a corporation incorporated under the laws of the Province of Ontario, and carrying on their lumbering business in that Province. Their saw-mills are situate in Ontario, on the northerly shore of the Rainy river, some distance below the westerly end of the boom company's works, and the logs in question were cut on Canadian limits for the purpose of being manufactured into lumber at the defendants' mills, in

. . . Ontario. In connection with their mills, the defendants had also erected a boom some two and a half miles in length along the Rainy river for the purpose of catching and securing their logs as they floated down the river. This boom was in existence and in effective condition in the years 1906 and 1907, and was then sufficient to enable the plaintiffs to separate from the logs of other persons all their own logs as they floated down the river, and to take proper care of them.

The Rainy river commences at the foot of Rainy lake, being separated therefrom by the International Falls, and flows westerly some 80 miles into the Lake of the Woods. Throughout its whole length, it is a navigable river, floatable for logs from shore to shore, and is several hundred feet wide, with a current of from two to three miles an hour, and its floatable character was not improved by the plaintiffs' works.

A number of lumber companies, including the defendants, conduct lumber operations on the upper waters contributory to the Rainy river, floating their cuts of logs down to their respective mills, situate along the river bank. Their practice was to cut logs in the winter and haul them on the ice. Then in the spring the logs mixed together and floated down the river towards the mills, each mill having certain boom accommodations of its own. One of these companies is the Rat Portage Lumber Company, who own two mills; one of them being situate higher up the river than are those of the defendants and other of the mill-owners. Their other mill is at Kenora, at the foot of the Lake of the Woods. At the westerly end of the plaintiffs' boom, it is necessary to separate the logs of the Rat Portage Lumber Company from those of the other owners operating lower down the river.

The Rat Portage Lumber Company control the plaintiffs, and it would seem that the original object for which the latter's boom was constructed was to enable the Rat Portage Lumber Company to separate their logs from those of other companies.

The Rainy river runs between the Province of Ontario and the State of Minnesota, and under the Ashburton Treaty it is established as an international river, and its thalweg constitutes the boundary line along its course between Canada and the United States.

The defendants erected their mills and booms in the year 1904, and in the years 1906 and 1907 continued lumbering operations on their limits in the vicinity of Rainy lake, watering their logs in that lake and its tributaries, in common with the

logs of other lumbermen, all of which, mixed together, floated down the lake, over the falls, and into the Rainy river. At this point, if uninterfered with, the logs would have distributed themselves over the whole river on their way down, although probably the greater proportion would have been carried by the current towards the southerly side of where is now the plaintiffs' boom, but the sheer boom caused all the logs to pass to the south of and inside the main boom, thereby preventing a substantial portion of them floating down (which they otherwise would have done) in Canadian waters along the north side of the boom. The defendants, being prepared to separate their logs from the rest, objected to the plaintiffs handling or in any way interfering with them. The plaintiffs, however, at the westerly end of their works, required to separate the logs of the Rat Portage Lumber Company from those of the other mill-owners, and did so, by allowing, during the years 1906 and 1907, all the logs except those of the Rat Portage Company to pass unsorted through the sluiceways, each company, including the defendants, separating its logs from the others as they floated down the river after having passed the westerly end of the plaintiffs' works. The Rat Portage Company's logs thus separated amounted to about one-third of the whole quantity, and the only service rendered to the defendants by the works and operations of the plaintiffs in respect of the logs of 1906 and 1907 was this separation of the Rat Portage Lumber Company's logs from the rest of the logs. . . .

The plaintiff rest their right to payment for whatever services they may have rendered to the defendants on two grounds: first, implied contract; and second, legal authority to maintain the works and to charge and collect reasonable tolls for services rendered.

As to the first ground, Mr. Shepley's argument is, that, the plaintiffs having erected their works, the defendants, by allowing their logs to be mixed with those of other owners and to pass into the plaintiffs' works, rendered a separation necessary, and thus impliedly requested the boom company to make that separation for reward. It is true that the defendant caused their logs to be deposited on the ice during the two winters in question. Other operators having acted similarly, the whole cut became mixed and required separation, but such action on the part of the defendants did not, I think, constitute an implied request to the plaintiffs to make that separation. . . . It was necessary to float the defendants' logs loose from the limits,

by the route pursued, to the Rainy river. This necessity, added to the fact that the defendants were deriving no benefit from the unauthorised interference of the plaintiffs with their logs on the way to the mill, and had forbidden the plaintiffs to interfere with them, negatived the inference of an implied contract.

Mr. Shepley argued the case as if the defendants were solely responsible for the mixing of their logs with those of other owners, and, therefore, were liable to the other owners for the cost of unmixing. Such, however, is not this case. The mixing was the result of common action. . . .

I am of opinion that the defendants are not liable to the plaintiffs on any implied contract.

The other ground on which the plaintiffs rest their claim is, that they are legally entitled to maintain their works as a whole, including the sheer boom, which is wholly within Canadian territory, and, by means of their works, to take and retain possession and control of the defendants' logs as they float down the stream, and until they are caught by the cross-booms and sorted into pockets, and to charge the company for such services. The defendants deny the right of the plaintiffs to interfere with their logs or to payment for such services.

Much the same question as is involved here came before the Circuit Court of the State of Minnesota, and was there determined adversely to the plaintiffs, and that decision is pleaded in bar to the present action. By the treaty between Great Britain and the United States of the 9th August, 1842, commonly known as the Ashburton Treaty, the Rainy river is made part of the boundary line between Canada and the United States, the treaty declaring that it "shall be free and open to the use of the subjects and citizens of both countries." The middle of the channel, or thalweg of the river, marks the line of separation between the two countries: Whatson's Elements of International Law, 4th ed., p. 297; this treaty confirming the presumption of law that the right of navigation is common to them both.

The sheer boom is a necessary and material part of the plaintiffs' works. Without it a substantial portion of the logs in question would have floated down the river on the north side of the boom. This sheer boom, however, diverted many (although what quantity cannot be determined) from their natural course into the plaintiffs' works. The sheer boom, built wholly on the Canadian side of the dividing line between the two countries, has no legal authority for its existence. No legislation of a foreign power could entitle the plaintiffs to erect or main-

tain this sheer boom and by means of it to divert the property of a Canadian citizen from Canada into the United States, and there to cause it to pass into the custody and control of a foreign corporation. Such was the practical effect of the maintenance of the sheer boom, as regards a substantial portion of the logs in question. Thus the plaintiffs illegally acquired possession of a portion of the defendants' property, removed it from Canada, and now claim compensation for services in respect thereof. If a person wrongfully takes possession of a chattel property of another, and, whilst in such possession, alters, improves, or otherwise deals with it, he is not entitled to payment for such services: Hiscox v. Greenwood (1803), 4 Esp. 174; Cheshire R.R. Co. v. Foster (1871), 51 N.H. 490; Purves v. Moltz (1867), 5 Robertson (N.Y.) 654; Silsbury v. McCoon (1844), 6 Hill (N.Y.), 425; Bryant v. Ware (1849), 30 Me. 295. . . .

The plaintiffs claim at the rate of 35c. per thousand feet, board measure, of logs of the defendants passing through their works during 1906 and 1907; but, even if they are entitled to payment at that or any other rate for such logs as if, uninterfered with, would have floated inside the plaintiffs' works, it seems to me impossible to determine the proportion not affected by the wrongful action of the plaintiffs in taking possession of a portion of the defendants' logs by means of the sheer boom. . . .

Even if the plaintiffs were otherwise entitled to recover for services in respect of logs lawfully in their possession, inasmuch as the confusion was caused by the unlawful acts of the plaintiffs, the onus is upon the plaintiffs to shew affirmatively the quantity of the defendants' logs which lawfully came into the plaintiffs' possession. For reasons already given, there is no evidence from which this can be shewn; and, therefore, the plaintiffs cannot recover: Warde v. Eyre (1615), 2 Bulstr. 323; Anon. (1594), Poph. 38.

On another ground, I think the plaintiffs' action must fail. All the works of the plaintiffs constituted one structure. It may have facilitated the floatation of logs; but, treated as a whole, it was in the river without legal authority. A bridge along a public road may be a necessity, but, if erected without legal authority, its mere construction does not authorise the person building it to exact tolls from the public who in using the bridge are still exercising their right to travel, free of tolls, along the highway. In the absence of authority to exact tolls, or in the absence of a contract, express or implied, on the part of users of

improvements on a highway, to pay tolls, the person erecting such improvements has no right to exact tolls from such users. The principle is the same whether the public way be on the water or on the land. Here, in spite of the illegal works on the river, it remained publici juris. . . .

[Reference to Tanguay v. Price (1906), 37 S.C.R. 657, 667.]

Thus far I have dealt with the question in the view that the sheer boom is an inseparable part of the plaintiffs' works; but, assuming that it is not, then the question is, can the plaintiffs recover in respect of the remainder of the works? The main boom, beginning at the west end of the gap below the sheer boom, extends westerly down the river some two and a half miles, when it reaches the catch booms, pockets, etc.

I . . . find that the easterly one half mile of this main boom is wholly within Canadian territory, . . .

This portion of the main boom, like the sheer boom, is unlawfully in the river. If it and the sheer boom had not existed, it is reasonable to suppose that many more logs would have passed down the river on the Canadian side of the boom. . . .

What I have said in respect of the legal consequence of the existence of the sheer boom applies also to the case of the unlawful half mile of main boom.

But, apart from the question whether the works of the plaintiffs, in whole or in part, are lawfully in the river, it is to be observed that the right to erect and maintain them is quite different from the right to collect tolls, which is the only issue involved in this action. The defendants are asking no relief, but simply resisting a money claim. The works may or may not improve the navigability of the river; they may or may not be lawfully there; but, so far as the defence is concerned, the sole question is, whether the plaintiffs are entitled to recover money damages in respect of the defendants' logs which passed through the works in the years 1906 and 1907.

The legislation of the State of Minnesota is the only legislative authority upon which the plaintiffs rely as authorising them to impose tolls. Had the State Legislature power to grant such authority?

Under the Ashburton Treaty, the citizens of the two countries became entitled to the free use of the river. The Legislature of the State of Minnesota has purported to deprive them of that right by granting permission to the plaintiff company to exact tolls. The undisputed evidence is, that the State Legislature had no jurisdiction so to repeal that clause in the treaty.

I, therefore, think that the provision in the plaintiffs' charter purporting to entitle them to impose tolls or other charges is ultra vires the State Legislature and null and void. The permit granted by the War Department does not assist the plaintiffs; it merely sanctions an extension of their works, subject to the condition that "the company shall not exact tolls or charges for the passage of logs or rafts or other forms of navigation."

Mr. Shepley sought to shew that this condition was void. It is not, however, necessary to determine that point; but it is sufficient to say that nothing in the permit authorises the imposition of tolls or other charges.

I, therefore, think that the plaintiffs have no legislative authority to exact tolls or other charges.

Notwithstanding the existence of the plaintiffs' works, the navigation of the river for all purposes remains free to each citizen of the two countries, unless he shall by contract, express or implied, deprive himself of such right.

The defendants have not so deprived themselves; and, therefore, the plaintiffs are not entitled to maintain this action, which is dismissed with costs.

DIVISIONAL COURT. SEPTEMBER 12TH, 1912.

HERRON v. TORONTO R.W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Causal Negligence—Ultimate Negligence—Findings of Jury—Uncertainty—New Trial.

Appeal by the plaintiff from the judgment of MEREDITH, C.J. C.P., after trial with a jury, dismissing the action with costs.

The action was to recover damages for personal injuries sustained by the plaintiff, by reason of a car of the defendants striking the wheel of a buggy in which he was driving, whereby he was thrown out and hurt.

The plaintiff's horse and buggy were standing on the north side of Dundas street, in the city of Toronto, east of Margueretta street, the horse facing west. Coming out from a shop, the plaintiff intended to drive away; he picked up the weight, put it into the buggy, and stood by the side of the buggy till a car went past east. As he picked up the weight, the horse turned his head to the car to go across; the plaintiff got into the buggy, and sat there till another car went by to the east. Then he picked up

the lines, and his horse started to cross—the last east-going car having got about 30 feet away by this time. Two cars had passed to the west during this period. When crossing, he saw a third west-bound car. When it came within four feet of his buggy, he grabbed the whip to get over, but did not succeed in escaping: the car struck the right front wheel; he was thrown out and hurt.

Three acts of negligence were alleged: (1) not sounding the gong, thereby lulling the plaintiff into a sense of security; (2) not sounding the gong when the motorman saw that the plaintiff's horse was on the track; and (3) "the motorman saw him or ought to have seen him in sufficient time to have enabled him, if he had used the appliances which he had at his command, as he ought to have used them, to have stopped the car and have avoided the collision."

After much evidence had been given and after a careful and unexceptionable charge, questions were left to the jury which they answered thus:—

"Q. 1. Was the motorman guilty of negligence? A. Yes.

"Q. 2. If so, of what negligence? A. By not applying the brakes when he first noticed plaintiff heading across the tracks.

"Q. 3. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. Yes.

"Q. 4. If he could, in what respect was he negligent? A. In not seeing he had sufficent time to cross to the north side of the tracks in safety.

"Q. 5. Was the accident caused (*a*) by the negligence of the motorman? (*b*) or by the negligence of the plaintiff? (*c*) or by the negligence of both? A. Both.

"Q. 6. Could the motorman, after he saw the plaintiff was about to drive across the tracks, by the exercise of reasonable care have avoided the accident? A. No.

"Q. 7. If he could, of what negligence was he guilty? A. In waiting until too late before applying the brakes.

"Q. 8. At what sum do you assess the plaintiff's damages? A. $800."

The learned Chief Justice was not satisfied with the answers, and the following is the official report of what then took place:—

"His Lordship: Your answer to the 6th is inconsistent with the answer to the 7th.

"Mr. Dewart (counsel for the defendants): I submit not.

"His Lordship: Plainly so. You find they are both guilty of negligence, and you find that the motorman was guilty in wait-

ing till too late before applying the brakes. Now what does that mean in connection with 6?

"Foreman of Jury: He was too near to the man in the rig to stop to avoid the accident.

"His Lordship: Then why do you say that he was negligent in waiting until too late before applying the brakes? One or other of those answers is wrong, it strikes me, or they are inconsistent with one another. Now, what is it you mean? Just state generally what idea you have in all this answer. Just state generally what you think was the position of the parties and the negligence of both.

"Foreman: According to the evidence, he had not a chance to do anything but what he did.

"His Lordship: Then you should have answered this 7th question—you should not have answered the way you did—'He was negligent in not applying the brakes'—because that means that, after he became aware that the plaintiff was in danger, he might have avoided the accident by putting on the brakes or by doing something. Is that what you mean, or do you mean the contrary?

"Foreman: We mean the contrary—that he could not have done it in the time.

"His Lordship: Then your 7th answer should be struck out. Now, which of these answers is to be taken as correct?

"Foreman: We said he could not have avoided the accident when he noticed it.

"His Lordship: Then the answer to the 7th should be struck out; because you say in effect that he could have avoided the accident if he had not waited until too late. I think you had better go back, consider it, and come back again. And make sure what you really mean.

"The jury then retired and after some time return again to the court-room.

They had struck out the answers to questions 6 and 7 altogether, but it was not noticed that they had struck out the answer to question 6. The report continues:—

"His Lordship: The only change is taking out the answer to 7. What you say in effect is, that both these people were to blame, and that the motorman, after he saw that the plaintiff was in danger, could not have stopped his car. That is the effect of it?

"The Foreman: Yes.

"His Lordship: Mr. MacGregor, I must endorse the record

dismissing this action. The jury have been rather friendly to the railway company. I cannot help it.

"Mr. MacGregor (counsel for the plaintiff) asks for a stay.

"His Lordship: I had not observed that the jury had struck out the 'No' in answer to the 6th question. But I have asked them if their idea was that the motorman after he saw the position in which the plaintiff was could not, by the exercise of reasonable care, have prevented the accident. They said that was their view. I will give you a stay."

The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ.

Alexander MacGregor, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

CLUTE, J.:— . . . It will be seen that the jury found that the motorman was guilty of negligence in not applying the brakes when he first noticed the plaintiff heading across the tracks; that the plaintiff, by the exercise of reasonable care, could have avoided the accident; and that he was negligent in not seeing that he had sufficient time to cross to the north side of the track in safety, meaning, as I take it, that he should have seen that he had not sufficient time to cross to the north in safety, and should not, therefore, have attempted it. They further say that the accident was caused by the negligence of both. . . .

The question of ultimate negligence was clearly submitted to the jury; but, as the answers now stand, the jury have not dealt with that question, unless it be that their answer to the second question was intended to deal with . . . ultimate negligence. . . .

By the answer to question 5 . . . both plaintiff and defendants were guilty of negligence. If the answer to question 2 was not intended by the jury to refer to ultimate negligence, then the jury have not dealt with that question, the answers to 6 and 7 having both been struck out on the second occasion when they retired, unless they sufficiently answered that questions on their return.

The jury, during the course of conversation, said clearly enough that the motorman could not have avoided the accident when he noticed it; that is, I take it, when he saw the plaintiff. But, on their second return, when the answers to questions 6 and 7 had been struck out, only this was said: "The only change

is in taking out the answer to 7. What you say in effect is, that both these people were to blame; that the motorman, after he saw that the plaintiff was in danger, could not have stopped his car." It does not say that the motorman could not, had he exercised reasonable diligence, have avoided the accident after it appeared quite clear that the plaintiff was about to cross in front of the car, but it only says that he could not have stopped the car after *he saw* (not might have seen) the plaintiff. Of course, if there is no evidence that ought to have been submitted to the jury that the motorman, by the exercise of reasonable diligence, ought to have seen the plaintiff's rig in time to stop the car, then the judgment should stand; but, if it appears that there is evidence which would support such finding—that is, of ultimate negligence—then that question has not been answered, and the case ought to go back for trial. It, therefore, remains to examine the evidence upon this point. It is apparent from the judgment that the trial Judge took the view that there was evidence which could properly be submitted on the question of ultimate negligence; and, in my opinion, after a careful reading of the evidence, he was right in this view. I shall not quote all the evidence bearing upon this question, but sufficient as I think to shew that there was ample evidence to support a finding, had there been one, on the question of ultimate negligence; and, as pointed out by the learned Chief Justice, the strongest evidence supporting this view was given by some of the witnesses for the defendants. . . .

[Quotations from the evidence.]

From these extracts it appears that there is evidence by some of the witnesses that the east-bound and west-bound cars crossed each other east of Margueretta street; that, according to several of the witnesses, the plaintiff's horse and rig could be seen from two to three car lengths east of Margueretta street, when he was was in the act of crossing to the north. According to the motorman's own evidence, he actually stopped the car within about a car length, although the mechanical engineer speaks of two car lengths as necessary to stop the car going 8 miles an hour, which was about the rate at which the car in question is said to have been moving.

If the jury believed this evidence, they could well find, as they did find, that the negligence of the motorman was in not applying the brakes when he first noticed the plaintiff heading across the tracks, and this was the answer which they brought in to question 7, "In waiting until too late before applying the brakes."

The case is then reduced to this: (1) no negligence found against the defendant as to speed or not ringing the gong, which, upon the charge, were referred to as original negligence on the part of the defendants; (2) negligence on the part of the plaintiff in not seeing that he had time to cross the track; (3) ultimate negligence on the part of the motorman in not applying the brakes at an earlier stage when, according to the witnesses and his own evidence, he might have stopped the car notwithstanding the negligence of the plaintiff.

The evidence is very contradictory upon almost every point. Five of the witnesses for the plaintiff swear positively that the gong did not sound. A number of witnesses for the defendants swear that it did.

The jury not having found in favour of the plaintiff upon this issue, it must be taken that the gong did sound.

In one view of the findings, they may mean that when the motorman saw the plaintiff it was too late to stop the car.

The result of the jury's findings and of what took place at the trial with reference to their answers and questions put by the learned trial Judge, leaves uncertainty, in my opinion, as to what they meant.

I think there was evidence of ultimate negligence that could not be withheld from the jury, and that they could have given no clear and sufficient answers to the questions submitted to them.

There should, therefore, be a new trial. Costs of the former trial and of this appeal to be costs in the cause.

MULOCK, C.J., agreed with CLUTE, J.

RIDDELL, J. (dissenting), was of opinion, for reasons stated in writing, that no case was made of ultimate or causal negligence, and that the appeal should be dismissed.

New trial ordered; RIDDELL, J., *dissenting.*

MASTER IN CHAMBERS. SEPTEMBER 14TH, 1912.

BROWN v. ORDE.

Slander — Pleading — Statement of Defence—Justification — Fair Comment—Particulars.

After the decisions in this case, noted in 3 O.W.N. 1230 and 1312, the plaintiff moved to strike out paragraphs 6 and 7 of the statement of defence and the particulars furnished thereunder, as being embarrassing.

John King, K.C., for the plaintiff.
H. M. Mowat, K.C., for the defendant.

THE MASTER:—The statement of defence admits publication as alleged in the statement of claim, but denies the innuendo; says that the words complained of are not actionable without proof of special damage, and pleads qualified privilege, on the ground that when the defendant spoke the words in question it was at a meeting of ratepayers in the city of Ottawa who had a common interest with him in the matters under discussion, and that the defendant was protecting his private interest in the question of the efficiency of the administration of the affairs of the city.

Then follow paragraphs 6 and 7:—

"6. During the year which preceded the holding of the said meeting, there had been great dissatisfaction on the part of the ratepayers of the city of Ottawa with the management of the affairs of the city by the board of control and city council, and the subject of the management and control of the affairs of the city and its ratepayers had become a matter of unusual public interest and concern; and the defendant says that any words used by him on the occasion in question in this action were fair comments made in good faith and without malice in respect to the management and control of the affairs of the said city and its ratepayers as a matter of general public interest and concern.

"7. In so far as the words used by the defendant on the occasion in question consist of allegations of fact, they are true in substance and in fact; in so far as they consist of expressions of opinion, they are fair comments made in good faith and without malice upon facts which are matters of public interest and concern."

The plaintiff, on the 4th April last, filed a joinder of issue and reply; and, five days later, asked for particulars of the "specific actions of the board of control and city council referred to in paragraph 6," and "of the specific allegations of fact which are referred to in paragraph 7 and which are therein alleged to be true."

On the 10th April, particulars were given. Those under the 6th paragraph consisted of eight matters in respect of which, it was said, the ratepayers were dissatisfied, which were also those referred to in the 7th paragraph as matters of public interest and concern. Under this latter paragraph, the specific allegations said to be true were also given. These were, in effect, that the plaintiff was not as competent to be a controller as Mr. Davidson had been, he having been a very successful man of great ability and of municipal and business experience, whereas the plaintiff had been conspicuously unsuccessful in business matters of his own and in those of others intrusted to him.

The ground of the motion is, that the defendant (if I rightly apprehend counsel's argument) should have pleaded a justification of the innuendo and set out facts on which he relies as to this, and that he is attempting to evade this by the course adopted, as he has distinctly said in paragraph 7 of his particulars that he has not made nor does he make any charges of misconduct against the plaintiff as a member of the board of control or of the council.

The cases cited which are most in point are the following: Crow's Nest Pass Coal Co. v. Bell (1902), 4 O.L.R. 660; Digby v. Financial News, [1907] 1 K.B. 502; Hunt v. Star Newspaper, [1908] 2 K.B. 309; Peter Walkers v. Hodgson, [1909] 1 K.B. 239.

The last is the one nearest to the present. This seems to shew that the defendant cannot be required to change his pleading, if he is prepared to rely on the plea of fair comment, and hopes to shew that the facts given in his particulars are substantially true, and that the comments made by him and based upon those true facts were fair and such as, in the opinion of a jury, might reasonably have been made (p. 251); also (at p. 257) it was said by Kennedy, L.J., quoting Lord Atkinson's judgment in Dakhyl v. Labouchere, [1908] 2 K.B., at p. 329: "A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from those facts."

It, therefore, follows that the motion must be dismissed with costs to the defendant in the cause only, the point being one of some difficulty. The plaintiff may have leave to amend, if it is thought that this will be of any service.

DIVISIONAL COURT. SEPTEMBER 14TH, 1912.

KINSMAN v. KINSMAN.

Contract—Promissory Notes — Fraud—Counterclaim—Repayment of Money Paid for Shares in Company—Evidence—Conflict of Oral Testimony—Effect of Correspondence—Appeal—Reversal of Findings of Fact of Trial Judge.

Appeal by the plaintiff Emily S. Kinsman from the judgment of RIDDELL, J., 3 O.W.N. 966, in favour of the defendant Maria L. Kinsman on her counterclaim.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and KELLY, JJ.

I. F. Hellmuth, K.C., and W. M. McClemont, for the appellant.

A. Weir, for the respondent.

MEREDITH, C.J.:—The action was brought by the appellant and E. Palmer Kinsman against the respondent and her husband, Homer F. Kinsman, for the delivery up and cancellation of a promissory note, dated the 2nd January, 1911, made by the appellant and E. Palmer Kinsman in favour of the respondent, and the delivery up and cancellation of another promissory note for $1,000, bearing the same date, made by the appellant and her husband in favour of the respondent, or the cancellation of the appellant's signature to it, on the ground that they had been obtained by the respondent, through her husband as her agent, by fraud.

The defendants pleaded as a defence to the action a denial of the fraud alleged, and that the promissory notes were given in pursuance of an agreement entered into between the appellant and the respondent, that, in consideration of the respondent subscribing for $3,500 of the capital stock of the R. E. Kinsman Lumber Company Limited, if she at any time desired to get her

money back for the stock, the appellant would take the stock from her and pay her the face value of it; and the respondent and her husband, by way of counterclaim, repeat the allegations of their statement of defence, and claim against the appellant the $3,500 on her undertaking and agreement to take the shares and pay for them.

By the judgment pronounced at the trial it was ordered and adjudged that the note for $2,500 should be delivered over to the plaintiffs in the action to be cancelled, and that the signature of the appellant on the note for $1,000 should be cancelled, but that it should "remain as far as the signature of R. E. Kinsman thereon is concerned," and that in all other respects the action should be dismissed; and it was further ordered and adjudged that the respondent should recover on her counterclaim against the appellant $3,500; and it is from the judgment on the counterclaim that the appeal is brought.

There was a direct conflict of testimony as to the agreement alleged to have been made by the appellant which forms the subject-matter of the counterclaim; and, if the case turned upon the oral testimony only, and the learned Judge had reached his conclusion as to the credibility of the witnesses after seeing and hearing all the witnesses, his finding could not properly be disturbed.

I am, with great respect, of the opinion that the documentary evidence adduced at the trial, and that put in by leave on the hearing of the appeal, is quite inconsistent with the existence of an agreement by the appellant to take the shares off the respondent's hands at face value or on any other terms, and makes it clear, I think, that any agreement on the subject that was made, if any was made, was an agreement by the husband of the appellant and by him alone. . . .

[Summary of the oral evidence given on behalf of the respondent.]

The alleged agreement to take back and pay for the stock, as well as the conversations deposed to by the respondent, were categorically denied by the appellant and her husband.

Even if there were no correspondence to throw light upon the transaction, and nothing but the oral testimony to guide, I should have hesitated long before coming to the conclusion that the agreement which the respondent sets up was proved. The evidence on the part of the respondent is . . . met by directly contrary evidence on the part of the appellant; and, in my judgment, a very clear case should be made by the respondent

in order to fasten upon the appellant the liability which is sought to be imposed upon her, without a scrap of writing to support the statements of the respondent and her husband as to the making of the somewhat unusual agreement which the appellant is alleged to have made.

The testimony of a party seeking to fasten such a liability on another, as to what were the terms of the agreement alleged to have been made, should at least be clear and specific; and in that respect the testimony of the respondent is wanting, and, in my opinion, unsatisfactory. . . .

The correspondence, in my opinion, makes it clear on which side the truth lies. . . .

[Summary of the correspondence.]

The testimony of the respondent and her husband is discredited by their own letters; and it is, to my mind, out of the question that, against the denials of the appellant and her husband, and in the face of these letters, it should be determined that the respondent has satisfied the onus of establishing the agreement which she sets up in her counterclaim.

Almost any one of the letters . . . is sufficient to turn the scale in favour of the appellant; but the cumulative effect of the whole correspondence is, in my opinion, to lead irresistibly to the conclusion that the case attempted to be made by the respondent is disproved.

I am, for these reasons, of opinion that the judgment directed to be entered on the counterclaim should be set aside, and that judgment should be entered dismissing it with costs, and that the respondent should pay the costs of the appeal. . . .

TEETZEL, J., concurred, for reasons briefly stated in writing.

KELLY, J., also concurred, for the reasons given by MEREDITH, C.J.

Appeal allowed.

QUEBEC BANK v. SOVEREIGN BANK OF CANADA (No. 1)—BRITTON, J.—SEPT. 11.

Contract—Guaranty — Debt of Insolvent Company—Correspondence — Liability — Bank Act—Securities—Payment for Timber.]—Action for recovery by the plaintiffs from the defendants of the price (agreed on, as alleged) of 3,934 cords of spruce at $6 per cord, delivered by the plaintiffs to the Imperial

Paper Mills of Canada Limited, during the months of July, August, and September, 1907. BRITTON, J., in a written opinion, made a full statement of the circumstances in which the agreement was arrived at and of the other facts and circumstances of the case, and set out the correspondence between the parties. The defences pleaded were: (1) that the agreement relied on by the plaintiffs was merely a guarantee of the defendants that they would pay a debt to be incurred by the receivers and managers of the Imperial Paper Mills Company, and that no such debt had been incurred; (2) that, as against any such debt or liability by the receivers and managers, they had, and the defendants in this action had, the right to contend that the securities which were taken by the plaintiffs from the company were inoperative by reason of a trust deed by the company to secure certain debenture-holders, and also that these securities were invalid by reason of non-compliance with the Bank Act; and (3) that, of the logs actually delivered by the plaintiffs to the company, 3,000 cords at least were the property of the defendants, and not of the plaintiffs. Upon considering the plaintiffs' claim and these defences, and upon his view of the facts, the learned Judge pronounced in favour of the plaintiffs for the recovery of $20,932.45, with costs. F. E. Hodgins, K.C., and D. T. Symons, K.C., for the plaintiffs. J. Bicknell, K.C., and W. J. Boland, for the defendants.

INGLIS v. RICHARDSON—MASTER IN CHAMBERS—SEPT. 12.

Discovery—Examination of Plaintiff—Sale of Wheat—Destruction by Fire—Loss, by whom Borne—Property Passing—Scope of Examination—Relevancy of Questions—Former Dealings between Parties.]—Motion by the defendants for an order requiring the plaintiff to attend for re-examination for discovery and answer questions which he refused to answer upon the original examination. The plaintiff bought from the defendants and paid for 4,000 bushels of wheat, of which only 1,000 bushels were delivered. The plaintiff received from the defendants orders on the agent of the Canadian Pacific Railway Company at Owen Sound to deliver the 4,000 bushels to the plaintiff, out of the defendants' wheat in the railway company's elevator; but only 1,000 bushels had been delivered when the elevator was burnt and all the defendants' wheat was destroyed.

The plaintiff sued for the price paid by him for 3,000 bushels. The point for determination was, whether the loss was to be borne by the plaintiff or the defendants—whether the property had passed to the plaintiff or was still in the defendants. The plaintiff declined to answer questions as to former dealings with the defendants, and as to whether he paid storage or any other charges to the railway company for storing the grain or otherwise, and other questions bearing on the usual course of dealing. In their statement of defence, the defendants said that the sales out of which the action arose were made according to the usual and ordinary practice followed by them in their business dealings with the plaintiff—setting out the practice correctly, as was admitted by the plaintiff. The Master referred to Benjamin on Sale, 5th Eng. ed., pp. 310, 338, 339, and said that the defendants should be allowed to have discovery from the plaintiff of all facts which *might* (not necessarily which *must*) assist their contention that the property had passed to the plaintiff before the fire. It would seem useful to know, *e.g.*, whether the plaintiff paid storage; whether he delivered the defendants' orders to the agent at Owen Sound or kept them; whether he had any insurance on the wheat; whether he had pledged it; and other similar matters. It seemed to be a case in which the principle of Con. Rule 312 should be followed, and that the scope of discovery should not be narrowed on either side, so, as far as practicable, "to secure the giving of judgment according to the very right and justice of the case." Order made directing that the plaintiff attend at his own expense for re-examination and answer questions as indicated. Costs to the defendants in the cause. W. N. Tilley, for the defendants. C. A. Moss, for the plaintiff.
