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TEETZEL, J. DECEMBER 9TH, 1904.

CHAMBERS.

WHITESELL v. REECE.

Costs—Scale of—Jurisdiction of County Court—Trespass to Land—Amount Involved—Title to Land.

Appeal by defendants from taxation of plaintiffs' costs by local officer at St. Thomas.

Plaintiffs were owners of the remainder in a farm valued at $1,500, and defendant Reece was life tenant thereof, and defendant Payne a purchaser from her of timber on the farm. The action was for an injunction and damages for cutting and removing the timber. The trial Judge found for plaintiffs, and assessed the damages at $400, to be paid into Court and paid out to plaintiffs on death of defendant Reece, who was to have the interest in the meantime. This judgment was varied by a Divisional Court (5 O. L. R. 356, 2 O. W. R. 160), by directing that defendants should at once pay to plaintiffs $180.

Plaintiffs' costs were taxed on the High Court scale.

W. J. Tremeear, for defendants, contended that Rule 1132 applied, and that on the judgment as entered plaintiffs were entitled to County Court costs only with set-off by defendants of High Court costs.

C. A. Moss, for plaintiffs, contra.

TEETZEL, J.—I think, notwithstanding that the judgment as drawn up awards plaintiffs only $180, that it is quite clear, in the light of the judgment delivered by the Court, that the subject matter involved was the whole $400, and therefore that the action would not have been maintainable

in the County Court under sub-sec. 13 of sec. 23 of the County Courts Act.

I am also of opinion that the County Court would have no jurisdiction by reason of the statement of defence, in paragraph 4 of which it is alleged that the lands were subject to a mortgage under which $200 per annum was payable to one Jane Scealey during her life, and that defendant Reece had paid in all upon the mortgage $1,600 to Jane Scealey, and claimed to be subrogated to the rights of the latter . . ; and in paragraph 10 defendant Payne alleged that he was the bona fide purchaser for value of the timber bought by him, with no notice of plaintiffs' adverse claim.

I think that the effect of these defences is to raise the question of title to an interest in land of a greater value than $200, and therefore the action would not be maintainable in a County Court by virtue of sub-sec. 1 of sec. 22 of the Act.

. . .

Appeal dismissed with costs.

IDINGTON, J. DECEMBER 12TH, 1904.

TRIAL.

COLEMAN v. ECONOMICAL MUTUAL FIRE INS. CO.

Fire Insurance—Interim Receipt—Immaterial Variation in Policy — Prior Insurance not Assented to — Insurance in Plaintiff's Name—Mortgagee—Agent—Ratification.

Action to recover $2,000 upon a policy of insurance issued by defendants insuring a house in Toronto against fire.

A. J. Russell Snow, for plaintiff.

William Davidson, for defendants.

IDINGTON, J.—Plaintiff sues upon a policy of fire insurance dated 10th February, 1902, which was issued in pursuance of an interim receipt dated 28th January, 1902, providing for an insurance to the extent of $2,000, subject to the terms and conditions contained in the policies of the company issued at the date of the receipt.

The policy sued upon, being the only one issued, was delivered to plaintiff about a month later. It differs somewhat from the form put in evidence as that used on the date in question, but in no resepct as to the condition which raises the issue here. I think all that can be said in regard to the departure from the form then in use is, that it was an obvious

error to have used the later form, and nothing turns upon the error.

Should plaintiff rest her case, as she did at the trial, on this receipt alone, then the policy she would be entitled to have considered would be one having all the statutory conditions with variations then used by this company.

The defence is rested upon No. 8 of the statutory conditions. That condition provides that the company shall be free from liability for loss "if there is any prior insurance in any other company, unless the company's assent thereto appears" on or indorsed on the policy.

This contract is so plain that it requires nothing in this case but to ascertain whether or not the insured had a prior insurance. Nothing was said to the agent of defendants as to a prior insurance. There was no written application. There is nothing to complicate the case, as often has occurred when the question of prior insurance has been raised, by reason of representation or want of it. The prior insurance in question here was one of $2,000 in the Commercial Union Assurance Company, by virtue of a policy dated 22nd January, 1898, for the term of three years, and renewed by payments and receipts so as to have it kept in force in plaintiff's favour at the time of the fire. She is the person that the policy refers to as having paid the premium, and named as the assured.

The loss is made payable to George Gooderham, who held a mortgage on the property. It is said that he was the person who effected this insurance, and that he did it as a mortgagee, without consulting plaintiff.

The facts are, that the mortgage is dated 14th August, 1888, for $3,500, signed by plaintiff and her husband, who are called in the instrument the mortgagors, though she is shewn upon the face of it to have been the registered owner under the Land Titles Act, and both covenant with the mortgagee that they will insure the buildings to the extent of their insurable value. The husband admits that he paid the premiums on such insurance, when charged up in the account of the mortgagee, with interest. The principal was also reduced by such payments. These payments may or may not have been made during the currency of the last renewal of the particular policy referred to as issued by the Commercial Union. I infer . . . that the premium on the first issuing in 1898 of the policy was thus paid. The wife intrusted all that sort of business to the husband as her agent. It is clear, I think, that he did what he pleased in regard to payments on the mortgage and the insurances, and she was

satisfied that he should do so. It was he who effected this insurance now in question. It would seem as if all that she could possibly have had a chance of saying in respect of the contention that this Commercial Union insurance was not to be held as hers was swept away by her adoption of it in proving the claim under it, as if hers, and receiving the proceeds and passing them over to the mortgagee.

This is clearly such a ratification as to constitute all that had gone before as hers—as if done by her—and her husband's acts as her acts. The essence of ratification is that it relates back to the original making of the contract and confirms it. . . .

[Reference to Hagedorn v. Oliverson, 2 M. & S. 485; Smith v. Thomson, 13 East 274; Luccina v. Crawford, 2 B. & P. N. R. 269; Williams v. North China Ins. Co., 1 C. P. D. 757; Dafoe v. Johnston, 7 C. P. 55, 59; St. George's Church v. Sun Ins Co., 55 N. W. Repr. 909.]

I find, therefore, that there was a prior insurance within the meaning of statutory condition No. 8.

I think the variation in condition No. 33 or 35, according to the form of policy looked at, does not affect the statutory condition No. 8, but is supplementary to Nos. 8 and 9 and intended where these have been, or rather No. 8 has been, complied with, to limit the company's liability to its proper proportion of the whole of the insurance supposed to exist, even if part of this total may turn out to have been invalid.

Action dismissed with costs.

ANGLIN, J. DECEMBER 12TH, 1904.

TRIAL.

KENT v. MUNROE.

Bank—Insolvency—Winding-up—Claim on Promissory Note Maturing after Order—Set-off—Deposit in Bank to Credit of Indorser—Note Made by Treasurer and Indorsed by Reeve of Municipality for Municipal Purposes—Personal Liability—Rectification of Instrument.

Action by the liquidators of the insolvent Banque Ville Marie against the treasurer and reeve of the township of Roxborough upon a promissory note, dated 21st April, 1899, at four months, for $333.05, made by "Alexander Munroe, treasurer township of Roxborough," payable to the order of "D. H. McDiarmid, reeve of Roxborough," and indorsed "D. H. McDiarmid, reeve of Roxborough."

J. Leitch, K.C., and J. A. C. Cameron, Cornwall, for plaintiffs.

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

ANGLIN, J.—The municipality of Roxborough did their banking business with the Avonmore branch of La Banque Ville Marie, the municipal funds being deposited to the credit of an account intituled "Alex. Munroe, treasurer of Roxborough, Moose Creek."

By by-law No. 10, passed on 20th April, 1899, the municipal council of Roxborough purported to authorize the treasurer and reeve "to borrow from the Ville Marie Bank such money as may be required for present use in connection with the drainage works to be completed in the Fraser creek." Money being immediately required for preliminary survey work, the note in question was discounted with the Avonmore branch on 24th April, and its proceeds, $325, placed to the credit of the account above mentioned. . . . The $325 appears to have been paid out on 27th April for survey work on the Fraser creek drainage scheme. The notice of presentation of the petition to wind up the bank was given on 9th August, and the winding-up order was made on 10th August, 1899. The balance then standing to the credit of the Alex. Munroe account was $823.23. The note in question matured on 24th August, 1899, and was duly protested for non-payment. Three dividends of 5 per cent. each have been declared by the liquidators with the approval of the Court, on 20th June, 1900, 4th March, 1901, and 24th April, 1902, respectively. Upon the account of the township in the name of Munroe the three dividends amounted to $123.48, which is still in the hands of the liquidators. Defendant Munroe does not appear to have had any personal account with the bank. Defendant McDiarmid, however, had such an account. It is in evidence that the liquidators hold a sum of $82.25, representing the three dividends upon an account standing in his name, the balance to the credit of which at the date of the suspension . . . appears to have been $548.34. To these moneys it is admitted that McDiarmid is beneficially entitled.

The evidence of the manager of the Avonmore branch of the bank in 1899 is, in effect, that the loan on the note in question was regarded by him as a loan to the municipal corporation; that defendants affixed their signatures to the note in their official capacities, and solely to evidence the liability

of the municipal corporation; that there was no idea or intention of either Munroe or McDiarmid incurring any personal liability; and that the proceeds of the note were passed to the credit of what was deemed the township account. . . .

There can be no doubt that such was the true position of this matter, and had there been no suspension of the bank . . . this note at maturity would have been charged up by the bank to the account of the municipality standing in Munroe's name, and of this the municipality would not have been in a position to complain: Bridgewater Cheese Co. v. Murphy, 23 A. R. 66, 26 S. C. R. 443; Armstrong v. West Garafraxa, 44 U. C. R. 515; Molsons Bank v. Town of Brockville, 31 C. P. 174.

But, the bank having gone into liquidation, it is now sought to treat the liability upon this note as a personal debt of the reeve and treasurer (though the municipality, through its counsel at the trial of this action, expressed its willingness to recognize the obligation as its own), principally for the purpose of defeating a right asserted on behalf of defendants to set off, pro tanto, against the claim of the liquidators upon the note, the balance standing to the credit of the municipality in the name of Munroe. Upon the record no right of set-off is claimed in respect of the balance which stood to the credit of defendant McDiarmid. . . .

The borrowing of money in the manner and for the purpose for which it was borrowed is apparently not authorized by the Municipal Act. But, if sued upon the consideration, the municipality would probably have great difficulty in maintaining a defence; yet their liability for money lent, if found, would not suffice to relieve defendants from personal liability on the note. Is there such personal liability?

There being no ambiguity in the form of the note, nothing to indicate that the municipality was intended to be a party to it, I am unable to bring this case within such authorities as Fairchild v. Ferguson, 21 S. C. R. 484, Linders v. Melrose, 2 H. & N. 293, and Alexander v. Sizer, L. R. 4 Ex. 102. The stringent rule excluding parol testimony of intention upon questions of construction applies, and precludes my giving effect to the very clear evidence of the real purpose for which the note was drawn, by holding it to be what the parties thought it, rather than what in fact it is.

Neither is the way open to order any rectification of the instrument to make it conform to what was clearly the intent of all parties. Mutual mistake is fully made out. The parties used a form the legal effect of which they misunderstood. The obstacle to reformation presented by the fact

that this was a mistake of law, formidable though it be, might, perhaps, in view of the "unquestionable and flagrant" character of the mistake, be overcome: Snell v. Ins. Co., 98 U. S. R. 85; Story's Eq. Jur., 2nd Eng. ed., pp. 83, 85. But a difficulty, which is, I fear, insurmountable, arises from the fact that a rectification of this note so as to constitute it an obligation of the municipality would in fact make of it a new contract, and that of a body not a party to the instrument being dealt with, and not liable upon it. Nor is any such relief sought.

I am, therefore, constrained to find that defendants are personally liable upon the note.

Notwithstanding the circumstances of this case, in which (In re Central Bank and Yorke, 15 O. R. at p. 630) "there is inherently a persuasive equity to set off one against the other," because the liability on the note and the credit upon the deposit may be regarded as "substantially but the different sides of the same transaction," I agree that the indebtedness of the bank for moneys of the municipality, which it held to the credit of the Munroe account, cannot be set off against the personal liability of these defendants upon the note in suit.

No such difficulty exists, however, in regard to the balance of $548.34 which stood to the credit of defendant McDiarmid. Though no set-off in respect of this deposit is claimed in the statement of defence, in order, if possible, to work out a measure of substantial justice to defendants, I shall, without any hesitation, propria sponte, allow any amendment of pleading proper to raise this defence.

It, therefore, becomes necessary to deal with Mr. Leitch's contention that because the note in suit matured after the bank had gone into liquidation, no set-off can be claimed against it in respect of a balance standing to the credit of the deposit account of a party sued by the liquidators upon such note . . . Vanier v. Kent, Q. R. 11 K. B. 373, in which, under identical circumstances, a Quebec depositor was held to have no right of set-off. I have no doubt that such is not the law in Ontario. . . .

[Reference to Macfarlane v. Norris, 2 B. & S. 783; Mason v. Macdonald, 45 U. C. R. at p. 120; sec. 57 of the Dominion Winding-up Act.]

This promissory note was, at the time of the commencement of the winding-up, a claim accruing due to the bank, debitum in præsenti solvendum in futuro, at all events as to the liability of the maker. In a proceeding upon that claim —if the business of the bank were not being wound up—the

right of the depositor when sued on the note to claim set-off would be indisputable under English law: Anderson's Case, L. R. 3 Eq. 337. The statute in terms preserves that right in cases to which it applies. . . . [Reference to Sovereign Life Assurance Co. v. Dodd, [1892] 2 Q. B. at p. 579; Ontario Bank v. Routhier, 32 O. R. 67; Berry v. Brett, 6 Bosworth (N.Y.) 627.

But it may be argued that the liability of the indorser, because conditional upon non-payment by the maker at maturity and the giving of due notice of dishonour, was not, at the time of the commencement of the winding-up, a debt due or accruing due to the bank within the meaning of sec. 57 of the Winding-up Act, and that, therefore, the indorser when sued has no right of set-off. In Vanier v. Kent, Mr. Justice Wurtele says of this section: "What this clause means, and what appears to have been intended, is that any right which any party having dealings with the bank may have had to claim compensation (set-off) is not taken away by the effect of the winding-up under the Act; but the right to be enforced must be one which would have existed if the bank had not been placed under the operation of the Act. The section maintains an existing right, but it does not create a new one." Such being its object and purview, neither should this section be held to deprive a defendant of any right of set-off, which under the lex fori he would have had against the bank, if solvent and itself the plaintiff in this action. Though perhaps the inchoate liability of an indorser before maturity is not within the language of sec. 57, I decline to construe that section as so exhaustive and so prohibitive of all claims of set-off, which it does not in terms declare to exist, as to prevent this Court giving effect to a claim of set-off so eminently just and equitable as that which I propose to allow the defendant McDiarmid to set up in regard to the balance to the credit of his deposit account. His liability existed potentially at the time of the commencement of the winding-up; it does not arise out of any subsequent transaction, and the many authorities denying the right of set-off in such cases may on that ground be distinguished.

Upon the defendants exercising the privilege accorded to them of amending their defence, judgment may be entered allowing them the set-off which I have permitted them to plead, declaring the claim of plaintiffs satisfied thereby, and the right of defendant McDiarmid to rank upon the estate of the bank in the hands of the liquidators in respect of the balance of his claim upon his deposit account, and dismissing this action.

In view of the fact that the set-off to which I have given effect was not pleaded, and that to allow it an amendment is made without any request of defendants at this stage of the case, there will be no order as to the costs of this action.

Should defendants not amend as indicated within one month, there must be judgment for plaintiffs with costs.

ANGLIN, J. DECEMBER 13TH, 1904.

CHAMBERS.

GOODWIN v. GRAVES.

Libel—Pleading—Privilege—Justification — Denial of Innuendo—Motion to Strike out Defences.

Appeal by plaintiff from order of Master in Chambers, ante 449, dismissing plaintiff's motion to strike out certain paragraphs of the defence in an action for libel.

I. F. Hellmuth, K.C., for plaintiff.

S. B. Woods, for defendant.

ANGLIN, J., allowed the appeal in part and ordered that the 4th paragraph of the defence be struck out, with leave to defendant to amend. Costs of motion and appeal to plaintiff in the cause.

ANGLIN, J. DECEMBER 14TH, 1904.

CHAMBERS.

RE BRAND.

Will—Construction—Devise—Estate Tail—"Heirs of Body" "Heirs and Assigns"—"In Fee Simple."

Motion by executors for order declaring construction of will. Testator devised his real estate to his executors, their heirs and assigns, to have and to hold the same "to the use of Nancy G. Skinner . . . for and during the period of her natural life, and at her decease to the use of the heirs of her body begotten, and their heirs and assigns, in fee simple forever;" on her death without issue a gift over in fee.

R. T. Harding, Stratford, for executors and for Nancy G. Skinner and three adult children.

F. W. Harcourt, for infants.

ANGLIN, J.—It can not be said that, by any explanatory context, the testator has made it clear that in employing the words "heirs of the body" he intended to use them in any other than their ordinary legal sense. The addition of the words of inheritance "their heirs and assigns" does not alter the legal significance of the limitation to which they are appended: Mills v. Seward, 1 J. & H. 733. The further words "in fee simple" add nothing to the legal effect of the words "heirs and assigns," and, following them, must be regarded as purely supererogatory. By the insertion of this unnecessary phrase the testator does not convey an intention that the words "heirs of the body" are to be taken as words of purchase. Neither is such an intention expressed in or fairly deducible from the fact that he uses the words "heirs of her body" in disposing of his residuary personalty, the income of which he had directed his executors to pay to Nancy G. Skinner for life. Devising estates of the same quality, the testator, by the operation of the rule in Shelley's case, must be held to have conferred upon Nancy G. Skinner an estate tail in the lands in question. Reference to Van Grutten v. Foxwell, [1897] A. C. 658; In re Cleator, 10 O. R. 326; Evans v. Evans, [1892] 2 Ch. 173.

Costs to all parties out of the estate.

ANGLIN, J. DECEMBER 14TH, 1904.

CHAMBERS.

RE HANMER.

Will—Construction—Codicil—Bequest of Life Interest with Power of Appointment by Will—Bequest of Corpus to Legatee in Default.

Motion by Louis E. Hanmer for order declaring the construction of a codicil to the will of Clark Hanmer, whereby his trustees were directed to retain and invest the sum of $10,000 and to pay the income thereof to the testator's son, the applicant, during his natural life, and, upon his death, to pay the corpus to such persons as he should by his last will direct.

S. B. Woods, for applicant.

T. J. Robertson, Newmarket, for executors.

ANGLIN, J.—This codicil, taken by itself, gives Louis merely a life interest in the income, with a power of appointment by will, in default of the exercise of which the testator would be intestate as to the disposition of the corpus after Louis's death.

While an unlimited gift of income carries to its donee the corpus as well, no authority can be found holding that a gift of income for life has this effect. Nor does that superadded power of appointment, which can never be exercised in his own favour, increase in any wise the interest of the donee of this power in the fund which is its subject.

Though the notice of motion asks specifically for the construction of the codicil, yet in general terms it refers to both will and codicil. By clause (e) of his will the testator had devised the rest and residue of his property to Louis. The corpus of the $10,000, of which the income by the codicil is given to Louis, would not, under the scheme of the will as originally framed, have been residuary estate. By a preceding clause, (d), which the codicil revokes, Louis E. Hanmer was given the entire principal of his father's estate, except a sum set aside to produce an annuity for his mother; the testator by this codicil revokes the gift to his son of the principal of his estate; by the same instrument he expressly confirms, inter alia, the residuary bequest to him, which, the testator being otherwise intestate as to the corpus of the $10,000 (except that he gives his son a power of appointment by will over it), therefore, carries that corpus. I cannot conceive that the testator so intended, yet he has in fact given the corpus of the fund to his son in default of his exercising the power of appointment. The authorities seem uniform that such provisions constitute an absolute gift entitling the legatee to have the fund paid over. The cases are collected in Theobald on Wills, 5th ed., p. 429. Costs to both parties out of the fund.

ANGLIN, J. DECEMBER 14TH, 1904.

WEEKLY COURT.

WENDOVER v. NICHOLSON.

Administration—Estate of Deceased Person—Moneys in Hands of Son—Gift — Corroboration — Limitation of Actions—Request or Direction — Trustee — Reference — Report — Judgment—Irregularity—Execution—Costs.

Appeal by defendant Edward Nicholson from report of local Master at Bracebridge and motion by plaintiff for judgment on the report.

R. U. McPherson, for appellant.

O. M. Arnold, Bracebridge, for plaintiff.

ANGLIN, J.—The Master charged the appellant with $300 received by him from his father. Defendant denied

liability, setting up that the money was a gift, or if not, that the Statute of Limitations barred plaintiff's claim. Defendant's evidence that his father made him a gift of this $300 was wholly uncorroborated. There was some doubt as to when the money came into defendant's custody, whether, as he averred, in 1889, or, as plaintiff said, in 1896. This action was begun in 1898. . . . Assuming that this money has been in Edward Nicholson's hands since 1889, he is not entitled to retain it. If he is an express trustee, which he may without any violent presumption be held to be, still retaining this money he cannot set up the statute. If not, having failed to establish a gift to himself, he must be held to have received the money for safe-keeping for his father, to be dealt with as he might request or direct. No request having been made and no direction given, the statute never ran in the son's favour: In re Tidd, [1893] 3 Ch. 154. The appeal upon this branch fails.

The Master also charged the appellant with $412 received by him in 1895. . . . For want of corroboration appellant failed to establish his contention that there was a gift to him of these moneys. The appellant's liability to a charge of $399 on account of the Clark mortgage was admitted before the Master. Upon the material it cannot be found that the Master erred in fixing $331 as the amount with which the appellant should be credited in respect of his claim for services performed and goods furnished.

Appeal dismissed with costs.

Plaintiff moved to confirm a judgment which she procured to be irregularly entered upon the Master's report after defendant's appeal had been launched. This cannot be done, but plaintiff is now entitled to judgment upon the report in the usual form. She must pay to defendant all costs to which he has been put in endeavouring to protect himself against the irregular judgment and subsequent steps taken to enforce it. These costs will, after taxation, be set off pro tanto against plaintiff's judgment for debt and costs. The execution must go with the judgment on which it was founded. Two-thirds of costs of reference must be paid by Edward Nicholson. No costs of motion to confirm report.

IDINGTON, J. DECEMBER 15TH, 1904.

TRIAL.

SHEPPARD PUBLISHING CO. v. HARKINS.

Master and Servant — Contract — Servant to Engage in no other Business—Breach of Contract—Account of Profits —Damages—Costs—Scale of—Set-off—Apportionment.

Action against a person who had been in the employment of plaintiffs as advertising manager for an account and damages for breach of contract.

A. B. Aylesworth, K.C., and W. J. Elliott, for plaintiffs.

W. R. Riddell, K.C., and W. T. J. Lee, for defendant.

IDINGTON, J.—Plaintiffs are an incorporated company of printers and publishers. . . . Defendant had been employed by plaintiffs in several minor positions. . . . In March, 1889, after he had, in the beginning of that year, been appointed by plaintiffs as their advertising manager, defendant desired to have his contract reduced to writing. Plaintiffs' general manager, Mr. Sheppard, assented to this, and they together talked over the terms thus agreed to be reduced to writing. Mr. Sheppard promised, as the result of this, to write a letter, which the defendant could accept, and he (Sheppard) says he did so immediately . . and handed the letter . . to defendant, and received from defendant an unconditional acceptance by letter now lost. Defendant says nothing to vary this story, save in the important particular that, after he received Mr. Sheppard's letter, he pointed out that the exclusive employment terms were too rigid, and the power to terminate the agreement, as the letter provides, by a three months' notice, was not satisfactory, and thereupon the letter was withdrawn, and in the course of a day or so another . . was submitted, duly signed by the company . . and this second letter is the one to which he (defendant) replied by the unconditional acceptance. . . .

I accept Mr. Sheppard's version of the story as to the letters. I find only one letter from plaintiffs and an unconditional acceptance of it by defendant's reply. That one letter from plaintiffs is to be found copied in the letter book of plaintiffs, and is as follows:

"Toronto, March 29, 1889.

"Mr. John A. Harkins, Toronto.

"Dear Sir.—In order to effect a definite understanding as to your services and the terms on which we understand you to be working, we hand you this letter, to which we expect

a written acceptance. During 1889 you are to receive $15 a week and 5 per cent. commission on all business you personally bring into the office in the way of commercially good contracts or cash advertisements. If during 1889 your business amounts to $5,000 in good contracts and cash advertisements, for the three years following you are to receive $15 per week and 5 per cent. on all the advertising business done by the papers published by and under the management of the Sheppard Publishing Co., this not to include business in papers published by us by contract for other publishers. You are to agree to devote your entire time and attention to the advertising interests of the company, and to engage in no other business during the period covered by this agreement. This agreement can be cancelled by either party giving 3 months' notice.

"The Sheppard Publishing Co., Limited,
"E. E. Sheppard, managing director."

. . .

Defendant continued till the expiration of the 4 years' term provided for in this letter before any change was made in the conditions of his service. And after the expiration of the 4 years, on two or three occasions there were changes made in the way of increasing or decreasing defendant's compensation, but no other change of terms in any way was ever spoken of.

I think that continued service, in such circumstances, must be taken to have been subject to such terms in the original contract as were not inconsistent with the modifications agreed upon by the parties, or necessarily to be implied from changes made by the lapse of time, or in the conditions upon which in fact the parties continued their old relations. I think one of the terms of the original contract that stood thus unchanged was that which the letter thus expresses: "You are to agree to devote your entire time and attention to the advertising interests of the company and to engage in no other business." . . . See Taylor on Evidence, sec. 196 et seq., and cases cited there. . . .

Plaintiffs allege that defendant entered upon several business projects which conflicted with his discharge of duty under this contract for the exclusive service which he bound himself thereby to give plaintiffs. It may be that this contention is quite right. But plaintiffs go further and claim to have an account of the profits made by defendant out of these ventures and to have defendant ordered in each case to pay over such profits to them.

I asked plaintiffs' counsel for authority for such a claim, where arising out of circumstances such as these . . , but they were unable to furnish me with any beyond the law as laid down in several text books. For example, Bowstead's Law of Agency, p. 140 . . . says: "No agent is permitted to acquire any personal benefit in the course or by means of his agency without the knowledge and consent of the principal." This definition of the class of cases in which the breach of the servant's duty or agreement entitles the master to an account of profits is almost identical with that given in Wright's Law of Principal and Agent, 2nd ed., p. 187, and Evans, p. 287, to which I was referred. The law thus laid down cannot be questioned, but I fail to see how it can be applied to the instances of alleged breach of duty or agreement in question here. Not one of them can fairly be said to have arisen in the course of defendant's agency, or by means thereof to have given defendant a profit.

Defendant, upon the request of Mr. Bain, a bookseller, advanced money to aid in the publication of a directory known as "Toronto Elite Directory," in which were inserted advertisements that quite probably formed the most profitable part of the venture. These were not got, except in two cases, by defendant's intervention or soliciting. A man was engaged, on defendant's recommendation, for the special purpose of soliciting such advertising.

The only relation that this transaction had to the course of defendant's agency was the fact that the friendship of Mr. Bain may have sprung from defendant's calling upon him from time to time to procure advertisements for plaintiffs' "Saturday Night," and the further fact that the money advanced him was probably part of the fruits of defendant's earnings in the agency. The money was defendant's own, and the friendship his asset also.

The advertising that defendant was required, by the course of his agency, to look after, was only, as things then were, for "Saturday Night;" no other publication is known to have been carried on by plaintiffs at that time.

That defendant was to be compensated for his advances of money and trouble in looking after the collection of accounts got in connection with the financing of the directory project, by a half share of the profits, instead of, as might have been, a high rate of interest, can surely make no difference. Can it be said that if a high rate of interest beyond the usual profits arising from lending at interest had been in such a venture received by defendant, he must ac-

count? Such a claim can only be sustained upon the principle that prevailed in the days of serfdom. . .

[Reference to Smith on Master and Servant, 5th ed., p. 132.]

It seems to be rather a bold venture in this realm of law to ask the Court to produce such concrete results as plaintiffs seek for here, based only upon an ancient and almost forgotten speculative theory. The expansion of the common law has not extended thus far.

Words such as "entire time and attention" must be read with limitations. . . . I think they cannot be given a wider meaning than was given the like words and phrases in . . . Dean v. McDowell, 8 Ch. D. 348, followed in Mitchell v. Lister, 21 O. R. 318, and relied upon in Jones v. Linde British Refrigeration Co., 2 O. L. R. 428.

The kind of advertising defendant was to look after was such as was available and suitable for the "Saturday Night." newspaper. Whether the advertising now in question, as going into the "Elite Directory," might or might not in some cases have found its way into "Saturday Night," if the "Elite" had never existed, must be purely speculative. It was not got in the course of defendant's agency or by reason of it. I fail to find any law to support a claim for an account in cases beyond this line in the course of the agency.

It seems, therefore, as if plaintiffs are driven to rely upon the breach of contract and the damages proximately flowing therefrom. What is true of the "Elite" is much more plainly true of each of the other ventures in which defendant put his money. I cannot, therefore, find any ground for giving relief by way of directing defendant to account for the profits of any of these alleged causes of complaint.

Besides this way of looking at the case, covering all the claims, I think defendant has as to the matter of the posters and the album a complete defence on the ground of plaintiffs' acquiescence. There is enough in the admissions of plaintiffs' manager, the knowledge of plaintiffs' secretary, and the uncontradicted evidence of defendant as to knowledge in both manager and secretary, to support this defence, so far as it relates to these two matters. And I may add that, generally speaking in regard to these two items, I think that when defendant's evidence conflicts with that of either the manager or the secretary, that of defendant is more likely to be correct. . . . On the point of acquiescence see Smith v. Redford, 19 Gr. 274, 278.

Defendant was, I think, in the case of the Press Publishing Co., so engaged with its affairs as to be liable for a breach

of his contract with plaintiffs. Plaintiffs are entitled to at least nominal damages for that breach.

The same may be said of the "Elite" in regard to the collecting of accounts due by defendant, to the extent of which his account book produced is some evidence. That and the two advertisements he got form a breach. To this defendant is entitled to set up the Statute of Limitations, but upon terms. The parties have come down to trial upon the issue of account or no account. The pleadings, however, make claim for damages and make it wide enough to entitle plaintiffs to judgment for breach of defendant's contract, and I therefore conclude that judgment must be entered for plaintiffs in respect of these breaches arising out of the "Elite" and the Press Publishing Co., for $5 damages with costs upon the County Court scale.

This will not result in imposing more burthen upon defendant than if I provided for his amending and pleading the Statute of Limitations, which, if he prefer it, I would let him do, upon payment of costs, which would be upon the higher scale, of all the proceedings incidental to the "Elite" item of plaintiffs' claim, from the date of the filing of the defence to the end of the trial.

As the case in this result was one, though possibly within the jurisdiction of the Division Court, that might properly have been brought in the County Court, but need not have been brought in this Court, I shall not prevent defendant setting off the difference between his High Court costs and what the County Court costs might have been, had the suit been brought for and confined to the two matters for and in respect of which I find plaintiffs entitled to recover damages.

But, as I dismiss all other claims made by plaintiffs, save as stated, all costs beyond these properly taxable in accordance with my findings in respect of damages for these two causes of action, and incidental to the proceedings in respect of them, to and at the trial hereof, must be borne by the respective parties who incurred them. . . .

[Reference to Woodyatt's Law of Agency, p. 43 et seq., and cases cited there; Morrison v. Thompson, L. R. 9 Q. B. 480; Massey v. Davis, 2 Ves. Jr.; De Bussche v. Alt, 8 Ch. D. 286; Kirkham v. Peel, 43 L. T. 171; Foster v. Stewart, 3 M. & S. 191; Hill v. Allen, 1 Ves. 83; Williamson v. Hine, [1891] 1 Ch. 390; Yates v. Finn, 13 Ch. D. 839; Eversley on Domestic Relations, p. 881; Story on Agency; Makepeace v. Jackson, 4 Taunt. 770.]

TEETZEL, J. DECEMBER 15TH, 1904.

TRIAL.

McDOWELL v. MACKLEM.

Company—Shares — Offer to Sell — Acceptance — Attempted Withdrawal—Promissory Note—Liability.

Action on a promissory note for $1,500, payable 30 days after date, given by defendant in payment for 2,000 shares in the stock of the National Oil Co., a foreign corporation, with head office at Lima, Ohio.

J. L. Counsell, Hamilton, for plaintiff.

W. M. McClemont, Hamilton, for defendant.

TEETZEL, J.—Plaintiff, as indorsee, would, upon the undisputed facts, be subject to any defences which would be maintained in an action by the payees (the National Oil Company).

Defendant signed a memorandum addressed to the National Oil Co. in these words:

"Hamilton, May 4, 1904.

"Gentlemen,—Herewith find enclosed $1,500, for which send me 2,000 shares of National Oil Company's stock, at the rate of 75 cents per share, par value $1, fully paid, and non-assessable," and delivered the same, together with the note sued on, to one Stewart, who was a sub-agent of the company under plaintiff, who was the general agent of the company for the sale of its shares.

Stewart canvassed defendant for the sale of the shares, and gave him, among other literature, a circular signed by the company, containing an offer to sell the shares after 1st May at 75 cents per share of the par value of $1, and I find that Stewart was further authorized to offer the shares to defendant at that price, and he was also authorized to accept defendant's note instead of cash for the purchase money.

Defendant pleaded certain misrepresentations by Stewart, but at the trial I found that no misrepresentations had in fact been made.

The defence chiefly relied upon was that three days after signing the memorandum and giving his note, and, as he alleges, before his application for the stock had been accepted by the company, and before the stock applied for had been allotted to him, defendant wrote the National Oil Company withdrawing his application for stock, and demanding the return of his note.

The stock in question formed part of a large block of stock which had already been issued by the company, and stood in the name of a trustee for the company, and upon sales being made blocks of this stock would be transferred and new certificates issued to the purchasers.

From the certificate issued to defendant, which he refused to accept, it would appear that it was not in fact issued until some days after his notice of withdrawal, which was dated 7th May, and in these words:

"I hereby withdraw my application in your company for stock. Please do not issue any stock to me. Kindly return my note."

In my opinion, the effect of the transaction between defendant and Stewart was an offer by the company in its circular and repeated by Stewart, its agent, to sell the stock to defendant, and an acceptance thereof by defendant, and that such offer and acceptance closed the bargain, so that neither the company nor defendant could, without the consent of the other, withdraw therefrom.

In other words, defendant's memorandum was not an application for shares or a unilateral proposal to buy or subscribe for same, subject to be accepted by the company, and the shares to be allotted by the directors, and the case is not, therefore, in my opinion, within Pellatt's Case, L. R. 2 Ch. 527, or Nasmith v. Manning, 5 S. C. R. 417, and other authorities cited by Mr. McClemont, but it comes within such cases as Jackson v. Turquand, L. R. 4 H. L. 305, and Nelson Coke and Gas Co. v. Pellatt, 4 O. L. R. 481, 1 O. W. R. 395, and cases there cited.

There should therefore be judgment for plaintiff for $1,500, and interest from 6th June, 1904, and costs.

MacMahon, J. DECEMBER 15TH, 1904.

TRIAL.

GUELPH PAVING CO. v. TOWN OF BROCKVILLE.

Contract—Paving Work—Measurements—Certificate of Engineer.

Action to recover $1,576.28, the balance alleged to be due to plaintiffs on 13th January, 1899, on a contract dated 15th March, 1898, for the construction of granolithic sidewalks in the town of Brockville.

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

J. A. Hutcheson, K.C., for defendants.

MacMahon, J.—. . . The form of tender put in by plaintiffs was prepared by defendants, and recites that the sidewalks were to be constructed under a local improvement by-law, and were to be completed in accordance with the conditions and specifications. . . .

The sidewalks were of varying widths, from 4 to 12 feet, the greater portion, however, being 5 feet in width, and were completed and paid for by defendants according to the estimates of Mr. Smellie, their engineer, who in making the measurements included the length and width of the different walks, but did not include therein the 12 vertical inches on the curb side of the walk, from which the front boards were removed, under clause 10 of the specifications, and which was required to be smoothed over with cement mortar. . . .

The words used in the tender and in clause 4 of the contract, according to which payment for pavements is to be made, are, "per superficial foot;" and "superficial," according to the Century Dictionary, means "lying in, or on, or pertaining to the superficies or surface, not penetrating below the surface. . . ."

The superficial area of a sidewalk must mean that exposed portion of it on which persons can walk, and the whole of this was included in the measurements made by the engineer for the town.

By the 4th clause of the contract payments are to be made monthly, "on the production of the engineer's certificate as the work progresses, less 20 per cent., which is to be retained till the final completion and acceptance of the work, and then to be paid on the production of the engineer's certificate of the completion of the work." . . .

The engineer for the town, by measuring the full surface widths of the different sidewalks by their lengths, was giving to plaintiffs all they were entitled to be paid for under the specifications and express terms of the contract. But, even had he been in error as to his mode of measuring the work, there being no fraud, plaintiffs would be bound by his certificate: Sharpe v. San Paulo R. W. Co., L. R. 8 Ch. 597, at pp. 612-3; Jarvis v. Dalrymple, 11 U. C. R. 393.

Action dismissed with costs.

DECEMBER 15TH, 1904.

DIVISIONAL COURT.

REID v. SNOBELEN.

Administration Bond—Liability of Sureties for Administrator —Money in Hands of Administrator — Dual Capacity— Guardian of Infants — Termination of Period of Administration—Passing Accounts before Surrogate Judge— Estoppel.

Appeal by plaintiff from judgment of BRITTON, J., 3 O. W. R. 656, dismissing action.

J. H. Moss, for appellant.

R. M. Thompson, Blenheim, for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.—I entirely agree with the conclusion to which my brother Britton came, and with the reasons assigned by him for reaching that conclusion. . . .

Whatever might be the effect of what was done (in the accounting before the Surrogate Judge by Rufus Earl) in an action between the appellant and Rufus Earl . . . it is clear, I think, that the sureties for Earl as administrator (the respondents), assuming that what was done amounted to an adjudication by the Surrogate Judge that Earl had in his hands as administrator $315.73 which he was liable as administrator to pay to the appellant, are not bound by that adjudication. . . . [Reference to Zimmerman v. Kemp, 30 O. R. 465.]

Appeal dismissed with costs.

DECEMBER 15TH, 1904.

DIVISIONAL COURT.

ANDERSON v. CITY OF TORONTO.

Way—Non-repair — Injury to Person — Cause of Injury— Finding of Trial Judge—Appeal.

Appeal by plaintiff from judgment of TEETZEL, J., dismissing without costs an action (tried without a jury) brought to recover damages for injuries sustained by plaintiff

by a fall upon a sidewalk on Carlaw avenue, in the city of Toronto, which plaintiff alleged was out of repair and dangerous.

J. E. Jones, for plaintiff.

J. S. Fullerton, K.C., for defendants.

The judgment of the Court (BOYD, C., MEREDITH, J., MAGEE, J.), was delivered by

MEREDITH, J.—The parties present for our consideration upon this appeal but one question, and that purely a question of fact—whether the trial Judge erred in refusing to find that plaintiff's injury was caused in the manner testified to by him at the trial—in refusing to give effect to his unsupported testimony in that respect.

Obviously the trial Judge had advantages in determining that question which we have not; he saw and heard all the witnesses, and, though his reasons expressed at the trial for reaching the conclusion that plaintiff has since his injury learned to believe, contrary to the fact, that the proximate cause of that injury was a contact between his foot and the raised plank, went largely to the probabilities of the case, it by no means follows that his judgment was not affected by the demeanour of the witnesses.

The case seems to be just such an one that, had the Judge believed and given effect to plaintiff's testimony at the trial, we could not have rightly interfered; and . . there is even less ground for interference, for there is, in the circumstances to which he refers, much to support his finding.

Immediately after the accident plaintiff gave as the cause of it the slipperiness of the walk only. No matter how much pain he may then have been suffering, that can hardly account for his not attributing it to the true cause, if it really were that which he now asserts—a violent contact between his foot and the plank impelling him forward so far that where he fell was 18 feet beyond the place of contact. It was not until the action was pretty well advanced that the cause was plainly stated as that now relied upon. It is true that it is by no means impossible that plaintiff's position upon the ground, immediately after the accident, might have been as it was, if it happened in the way he now asserts; but it is at least more probable with the happening of it as the Judge has found.

Appeal dismissed without costs.

DECEMBER 16TH, 1904.

DIVISIONAL COURT.

SAUNDERSON v. JOHNSTON.

Trial—Setting down—Close of Pleadings—Rights of Defendant—Injunction Motion—Terms of Order.

Appeal by plaintiff from order of TEETZEL, J., ante 459.

H. M. Mowat, K.C., for plaintiff.

Strachan Johnston, for defendant.

THE COURT (BOYD, C., MEREDITH, J., MAGEE, J.), after hearing the appeal, delayed the disposition of it until a pending motion by the plaintiff to postpone the trial should be disposed of by the Judge at a sittings for the trial of actions, and being certified that that motion had been refused, made no order upon the appeal except that the costs of it be paid by plaintiff to defendant.

DECEMBER 16TH, 1904.

C.A.

CROSBY v. DAWSON.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Negligence—Defect in Machinery—Proximate Cause of Accident—Knowledge of Defect—Evidence—Jury—Damages.

Appeal by defendants from judgment of BOYD, C., in favour of plaintiff, upon the findings of a jury, in an action for damages for injuries sustained by plaintiff by the alleged negligence of defendants while in their employment.

Defendants were contractors on the wheel pit and walls of the Canadian Niagara Power Co., and plaintiff was a mason and stonecutter in their employment. On 17th July, 1903, he was engaged in setting a heavy stone which had just been placed in position on the pit wall by means of the boom and cable of a stationary derrick. The boom was operated by a cable passing round a drum, and when elevated could be placed in any desired position by means of a dog placed by the hoistman in a ratchet passing round one end of the drum. When it was necessary to lower the boom the dog was removed

in the same way. If the dog was removed, the boom, which was a heavy piece of timber some 50 or 60 feet long, would fall at once by its own weight, unless the unwinding of the cable was restrained or regulated by the action of the workman in applying the power. The dog consisted of a flat piece of iron, 2 or 3 feet in length, at one end of which was the tooth which fitted into the cog or ratchet. The other end was fastened between two uprights or logs by a bolt, on which it was moved as on a pivot, the logs being part of and rising from an iron casting or base, which was bolted to the frame of the derrick. At the time of the accident the hooks at the end of the cable had been disengaged from the stone, and plaintiff had signalled the hoistman to pull up the cable out of his way. Instead of doing so slowly and with care, he applied the power with such force that the sheave or block of the cable was run up to the end of the boom, striking and jarring it so violently as to slacken the tension of the cable on the drum, and thus release the dog from the ratchet, in consequence of which the boom fell down and injured plaintiff.

This was the explanation of the accident given by the hoistman at the time of its occurrence, and the evidence at the trial pointed in the same direction.

Evidence was, however, also given that the base or plate on which the dog worked was not tightly fastened to the frame of the derrick, or had become somewhat loose on the bolt, so as to admit of some play or twist, the result of which would be that the dog, when released from one ratchet, would slide with the plate to one side and fall down altogether, instead of catching in the next, as it would do if the base were firm, and the lugs in which it worked were, as in that case they would be, in the same plane with the ratchets. The distance between the ratchets was about an inch and a half.

There was evidence that the derrick was one of the most approved kind and of the best modern construction, and, apart from the defect referred to, was in good working order.

The appeal was heard by OSLER, MACLENNAN, and MACLAREN, JJ.A.

W. Cassels, K.C., and F. W. Hill, Niagara Falls, for defendants, appellants.

F. W. Griffiths, Niagara Falls, for plaintiff.

OSLER, J.A.—Plaintiff's case must rest altogether upon secs. 3 (1) and 6 (1) of the Workmen's Compensation Act.

There is no evidence of a state of facts upon which defendants would be liable at common law or under sec. 3 (2) of the Act, the hoistman being a mere fellow-servant of plaintiff, and not a person who had any superintendence intrusted to him, within the meaning of that section and sec. 2 (1).

Plaintiff contends that, though it may have been owing to the negligence of the hoistman that the dog became disengaged from the ratchet, yet the proximate cause of the fall of the boom was the defective condition and arrangement of the plate or base on which the dog worked, but for which the dog would and ought to have fallen into the next ratchet, and thus prevented the fall of the boom. Defendants answer this by saying that the machine was not constructed to meet such a contingency; that, even if in perfect order, this dog would not have fallen into the next ratchet, or if it had done so would not have held the drum, and therefore that the proximate cause of the accident must necessarily be referred to the negligence of the hoistman.

Upon the whole case there was, in my opinion, evidence which could not have been withdrawn from the jury of the defective condition of the base on which the dog was fastened, the consequence of which was that it was liable to slide or move laterally and thus to prevent the dog from falling upon the successive cogs or ratchets of the drum. There was also evidence that this is what the dog would have done had there been no such defect where its movement was not directed by the hand of the operator. If it could have been shewn that, in such circumstances, the dog could not have held the drum, but that either the dog itself or the ratchet must have been broken by the sudden incidence of the weight of the boom, the case would have been within the principle of Carnahan v. Simpson, 32 O. R. 328, and the accident could not have been attributed to the defective condition of the dog, since it would have happened even had there been no such defect. The evidence, however, falls short of this, and it was open to the jury to infer that if the dog had fallen into the ratchet the fall of the boom would have been prevented. Then there was evidence that the defect, if the jury found that it existed, had been known to Chown, defendants' inspector of works, and to West, their master mechanic, some time before the accident.

The damages, though large ($1,250), are not so large as to warrant us in setting aside the verdict and granting a new trial on this ground.

Appeal dismissed with costs.

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

MACLAREN, J.A., concurred.

DECEMBER 16TH, 1904.

C.A.

SPEERS v. GRAND TRUNK R. W. CO.

CRAIG v. GRAND TRUNK R. W. CO.

Railway—Injury to Passenger—Negligence—Action by Person Injured—Subsequent Death—Continuation by Executors—New Action by Executors for Benefit of Widow, Children, and Step-Children—Evidence as to Cause of Death—Damages—Apportionment.

Appeal by defendants from judgment of MACMAHON, J., 3 O. W. R. 69, in favour of plaintiffs.

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

A. G. MacKay, K.C., for plaintiffs.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), held that the evidence sustained the findings of the Judge that Speers did receive injuries from the collision of the train in which he was a passenger with another train, and that his death resulted therefrom; that the damages ($1,000 in the first action and $5,000 in the second) were not excessive; and were in the second action properly apportioned among the widow, children, and step-children—who were entitled to share.

Appeal dismissed with costs.

DECEMBER 16TH, 1904.

C.A.

VASSAR v. BROWN.

FINN v. BROWN.

Way—Non-repair—Injury to Travellers—Excavation—Want of Guard — Construction of Public Works — Liability of Contractors — Liability of Municipality — Negligence — Dangerous Place—Absence of Warning—Contributory Negligence.

Appeal by defendants Brown and Aylmer from judgment of MERERDITH, C.J., 3 O. W. R. 6, in favour of plaintiff Finn

for $1,400 damages, and in favour of plaintiff Vassar for $400 damages.

E. B. Edwards, K.C., for appellants.

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

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), held that the appellants were bound to take proper precautions to prevent persons from travelling along the old way; that, as there was no fence or barrier at the point of intersection to warn travellers, defendants were liable for the injuries to plaintiffs; that the trial Judge's finding that the injuries to plaintiffs were not caused by their own carelessness or intoxication was supported by the evidence; and that the damages were not excessive.

Appeal dismissed with costs.

DECEMBER 15TH, 1904.

C.A.

CITY OF TORONTO v. GRAND TRUNK R. W. CO.

Way—Highway—Dedication—Plan—Deed—User — Evidence — Railway.

Appeal by plaintiffs from judgment of MACMAHON, J., 2 O. W. R. 3, in favour of defendants.

J. S. Fullerton, K.C., for appellants.

W. Cassels, K.C., and W. Gow, for defendants.

The judgment of the Court (OSLER, MACLENNAN, MACLAREN, JJ.A.), was delivered by

MACLENNAN, J.A.—A public street called Cherry street has for a good many years crossed the track of defendants at the south-east front of the city, and, the traffic having become considerable, plaintiffs applied to the Railway Committee of the Privy Council to require defendants to erect gates to protect the public crossing the line. Upon this the question arose, which of the parties should be charged with the expense of providing and maintaining such protection, and the Railway Committee determined that the question should depend on whether the street was a lawful highway when the railway was first constructed across what is now admitted to be a lawful highway, and which was in or about the year 1858. This action was brought to determine that question. . .

The contention of plaintiffs is, that as long ago as the year 1850, if not before, the street at the place in question was dedicated as a highway by the trustees of the Toronto General Hospital, who were then the owners in fee simple of the land, and that from that time the public have used it as such. . . .

[Reference to letters patent from the Crown to the hospital trustees dated 26th April, 1819 (see 10 & 11 Vict. ch. 57), of a large tract of land bounded on the east and south by the river Don.]

The trustees subdivided this land, laying it out in building lots, with streets running generally north and south, and east and west. The most southerly of these was called Front street, and three others came to this street from the north, two of them crossing it and running to the south boundary on the Don, and another, intermediate between the other two, called in the older plans Brook street, and the later plans Cherry street, admittedly coming to Front street. The contention of defendants is that Cherry street never became a public street or highway further south than Front street, or at all events not where it now crosses their track, until after their occupation. . . .

[Reference to 9 Vict. ch. 35, sec. 33; 12 Vict. ch. 35, sec. 42; plan filed in the registry office on 25th January, 1855; plans dated October, 1847, 14th May, 1837, 17th August, 1846.]

The acts or evidence of dedication relied upon by plaintiffs are two conveyances made by the hospital trustees, the one made on 19th and registered on 31st October, 1850, of 3 lots lying to the west of the street in question, to one Jones, and the other made on 14th October and registered on 2nd November, 1853, of the lots on the east side of the same street, to one Jackson; and it is alleged that from and after the making of these deeds, if not before, that part of the street was used as a street by the public, and became in law by dedication a public street or highway. . . .

[Description of the land conveyed to Jones, as described on the plan of lots laid out by the trustees as lots 10, 11, and 12, on the south side of Front street, and (by metes and bounds) as extending "along the water's edge of the river Don in an easterly direction to the eastern limit of lot 12, being the western boundary of allowance for road as described on the plan aforesaid, thence along said boundary north 16 degrees west 7 chains 30 links more or less to the southern boundary of Front street."]

This is an unequivocal declaration by the hospital trustees, the owners in fee of the land, that there was then on the east boundary of lot 12, and adjacent thereto, extending from the river Don to the south side of Front street, a distance of 7 chains 30 links, an allowance for road, as described in the plan of lots laid out by them. No particular plan or copy of plan is specified. The declaration is, that upon the plan of lots laid out by them there is a description of an allowance for road lying along the east side of lot 12. Now at that time, apparently, the original plan was not in existence; it was worn out; but there was one plan, the McDonald plan, which did not unequivocally shew such allowance, while there were two others, the Chewett and the Howard plans, which did so. They were all copies, and I think the proper conclusion from the language of the deed is, that the original plan exhibited the allowance as described therein. This is made, as I think, irresistibly probable by the fact that even the McDonald plan shews a sufficient width for a street and a lot, both of the regulation width, at the east side of lot 12. It is also to be noted that the allowance is declared to extend to the river Don, and not merely to the marsh. . .

[Description in deed to Jackson, with reference to the same plan, of lots 13, 14, 15, 16, 17, 18, and 19, on the south side of Front street, and (by metes and bounds) as commencing at the junction of the southern boundary of Front street and a street running south of lot 13, and extending along Front street south 74 degrees west 10 chains 50 links to the place of beginning.]

By this deed the trustees convey 7 lots described on the plan of lots laid out by them on the south side of Front street, and the description commences at the north-west angle of lot 13, being at the junction of the southern boundary of Front street and a street running south of said lot. There could be no street running south of said lot, for that would be at the Don, but the description refers to a street forming the southern boundary of Front street and running south, and there is no difficulty in construing it as meaning a street running south not "of" but "along" said lot. The width of the 7 lots, 10 chains 50 links, would make each lot 1 chain 50 links, and would leave an allowance for a street west of 13, of the same width as the declared and admitted width of Cherry street on the north side of Front street.

I think this deed, like the deed to Jones, is a declaration that according to the plan there was an allowance for a road on the south side of Front street extending to the river Don

over the site in question. I think that, even if the McDonald plan was shewn to be a true copy of the original plan, reading the plan with the deeds, the latter must be regarded as declaring that a sufficient part of the lot marked on the plan lying east of lot 12 was "allowed," that is, declared to be, for a road, and that such is the meaning of the plan.

I think these two deeds were solemn declarations by the trustees of an intention that the land in question was then an allowance for a road, and, dedication being always a matter of intention, were acts of dedication.

The trustees have never since that done any act to revoke or qualify the declarations contained in these deeds, and it is admitted that the land in question is now, and has been for many years, an undoubted highway, and it is clear that it can only have become so by dedication. The sole question is, whether the dedication had become irrevocable before defendants laid their track across it.

It is in evidence that about the date of Jones's deed he was in occupation and built upon lot 12, and that between that date and 29th December, 1855, the land was conveyed by and to successive owners six different times, besides as many mortgages, in all of which deeds the allowance for road is referred to in the same terms as in the deed to Jones, and on the last mentioned date the then owner conveyed to defendants a strip across 10, 11, and 12, 30 feet wide, lying 441 feet south of Front street "along the west side of Cherry street." . . .

[Reference to other similar deeds.]

It thus appears that all parties interested in the adjacent lands from and after 19th October, 1850, including defendants, in their dealings therewith expressly recognized the existence of the allowance for a road or street extending to the Don, and across what is now the right of way of defendants. . . .

[Reference to the evidence of the use of the street by the public.]

The evidence of Cadieux, Barnes, and Ward is amply sufficient to shew a use by the public of this allowance as a road or street, for several years before defendants laid down their tracks upon it, and that that use, taken in connection with the conveyances made by the trustees of the adjacent properties in 1850 and 1853, established the street as a public street when defendants laid down their tracks.

This conclusion is strengthened very much by the recognition contained in the conveyances obtained by defendants themselves for their line.

The authorities on the subject of dedication all agree that it is a question of intention: see Glen on Highways, p. 18 et seq.; Pratt on Highways, p. 14 et seq., and the cases there cited; and the notes to Dovaston v. Payne, 2 Sm. L. C., 11th ed., p. 170 et seq. In Poole v. Huskison, 11 M. & W. at p. 830, Parke, B., says: "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an animus dedicandi, of which the user by the public is evidence and no more: and a single act of interruption by the owner is of much more weight." In Woodyer v. Haddon, 5 Taunt. 127, Chambre, J., says: "No particular time is necessary for evidence of a dedication: it is not like a grant presumed from length of time; if the act of dedication be unequivocal, it may take place immediately, for instance, if a man builds a double row of houses opening into an ancient street at each end making a street, and sells or lets the houses, that is instantly a highway."

Usually the intention has to be inferred from the acts of the owner and the public use. Here the act or evidence of dedication is unequivocal, it is by deed. From 1850, and probably for some time before, the street was opened and fenced, and used by the public.

Where the intention to dedicate is express, it was held in one case, North London R. W. Co. v. St. Mary, 27 L. T. 672, that 18 months' use by the public, after a declaration of intention, made a bridge a public highway. There by deed between a railway company and the New River Co., it was agreed that the railway company should construct a bridge across the railway, by which the river company's water pipes should be carried over the line, which said new bridge "would be devoted to the use of the public." The deed also contained a covenant by the railway company at all times to retain the possession of the bridge and road over the same and the approaches thereto (subject to the user thereof as a road by the public), in their own power and under their own control. After a use of the bridge by the public for 18 months, the railway company closed it, except as to a foot-way. The Court of Queen's Bench, Cockburn, C.J., Blackburn and Miller, JJ., held this bridge to have become a highway. Cockburn, C.J., said: "The free passage of the

public on foot and in carriage continued for 18 months, and this enjoyment (coupled with the declaration of intention) raises the presumption of a dedication to the public, which is not rebutted by anything in the case."

In the present case there is what I think is the clearest evidence of an intention to dedicate, followed from the year 1850 to the present time by enjoyment by the public, without a single circumstance in all that time tending to rebut the presumption, and I think the street became a highway before the year 1856, when the railway company laid down their track across it.

I think the appeal should be allowed and that the judgment should be for the plaintiffs.

DECEMBER 16TH, 1904.

C.A.

KIRK v. CITY OF TORONTO.

Municipal Corporations — Dangerous Machine at Work in Street—Liability for Injuries to Passers-by—Use by Independent Contractors—Neglect to Use Proper Precautions.

Appeals by each of the defendants from judgment of MEREDITH, C.J., after trial without a jury, awarding plaintiff $1,200 damages. The chief question was whether defendants the corporation of the city should have been held liable to plaintiff for the accident which caused the injuries of which he complained.

The accident arose from a horse, which was being driven by one McBride along Yonge street near the intersection of St. Alban's street, becoming frightened by a steam roller engaged in the work of repairing St. Alban's street, and swerving suddenly upon plaintiff, who was passing on a bicycle.

The work of repair was being done by defendants the Dominion Paving and Construction Company, under a contract with defendants the city corporation. The roller was the property of the city, and was being used by the paving company under a provision in the contract whereby they were to be allowed the use of the roller upon requisition to the city engineer.

The appeals were heard by Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.

J. S. Fullerton, K.C., and W. C. Chisholm, for appellants the city corporation.

D. C. Ross and W. H. Irving, for appellants the paving company.

A. J. Russell Snow and C. B. Nasmith, for plaintiff.

Moss, C.J.O.—It was contended on behalf of the city that the terms under which the paving company were accorded the use of the roller amounted to a hiring by the paving company, so as to place its working and control entirely in their hands, and that the city were relieved from responsibility for any negligence while the roller was engaged in the paving company's work. Whether the hiring and user were of such a character as is sought to be ascribed to them by the city, need not be determined, though the recent case of Waldock v. Winfield, [1901] 2 K. B. 596, seems opposed to the argument on behalf of the city, for upon another principle the liability of the city seems clear.

The testimony establishes that the roller is a machine calculated to frighten horses of ordinary courage and steadiness, and of this the city's servants and employees were aware.

The work for the purposes of which the use of the roller was committed to the paving company was being done on a public street near to Yonge street, along which there is constant traffic, with horses and vehicles, passing the corner of St. Alban's street. It was shewn that at other times and on other occasions horses had been frightened by and had shied at the roller when in motion, and it must have been obvious to every one who had to do with it that it could not be used where it was being used on the day of the accident, with safety to the traffic on Yonge street, unless some precautions were taken. That this was felt by those in charge is shewn by the fact that the witness Cutbush testifies that it was part of his duty to precede the roller on its trips towards Yonge street and to make some signal, as by holding up his hand, to warn drivers and horsemen on Yonge street of its approach. The evidence fully supports the findings of the learned Chief Justice that proper precautions were not taken on the occasion in question. But it is argued for the city that the work was being done by the paving company as independent contractors, and that it was owing to their negli-

gence that the accident happened. But the work that was being done was being done for the city, and the contract contemplated and necessitated the use of the roller in the performance of the work.

The place where the work was to be done and the means by and the manner in which it was to be performed, made it incumbent on the city, if it had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller. That being so, it is clear that the city could not denude itself of this obligation by intrusting the work to a contractor. In Penny v. Wimbledon Urban District Council, [1898] 2 Q. B. 212, the rule was stated by Bruce, J., as follows: "When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if the precautions are not taken he cannot escape liability by seeking to throw the blame on the contractor." The rule thus stated was expressly affirmed by the Court of Appeal when the case was in review before it: [1899] 2 Q. B. 72.

And in The Snark, [1900] P. 105, the Court of Appeal again repeated and enforced the same view. In that case A. L. Smith, L.J., after quoting the passage given below, said (p. 110): "I subscribe to every word of this passage as being the law, and in my judgment this present case falls within the decision of Penny v. Wimbledon Urban District Council and the reasons of that decision." Here the city placed the performance of the work in the hands of contractors and furnished them with this dangerous machine as part of the means by which it was to be performed. The operation of the machine was likely to be attended with danger to the public. The obligation still rested on the city to see that proper precautions were taken.

If there is any difference between the cases referred to and the case at bar it is not in favour of the city, for under our law there is, if anything, a higher obligation on the part of a municipal body to protect the public in the use of highways than under the law in England.

On behalf of the paving company it was urged that they were not liable because the use of the roller was not unlawful; that they were authorized to do the work and to employ the roller as one of the means by which it was to be per-

formed. But in using the roller they were bound equally with the city to take notice that it was likely to cause danger to the public. And their failure to take proper precautions to prevent the danger occasioned the accident which caused the plaintiff's injuries.

The appeal must be dismissed with costs.

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

MACLENNAN, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, C.J. DECEMBER 17TH, 1904.

WEEKLY COURT.

PIRUNG v. DAWSON.

Judgment—Compromise of Action—Enforcement by Order of Court — Forum — Jurisdiction of Master in Chambers—Practice—Motion to Court.

Appeal by plaintiffs from order of Master in Chambers dismissing application for order allowing plaintiffs to enter judgment against defendant for $160, the amount which the parties had agreed should be paid by defendant in settlement of the action, together with the costs of the motion. Plaintiffs also made a substantive motion for the order which the Master had refused.

The appeal and motion were heard by MEREDITH, C.J., in Chambers, on 25th November, 1904.

A. R. Clute, for appellants.

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

MEREDITH, C.J.—It is, I think, reasonably clear that since the Judicature Act the Court has jurisdiction to enforce in the action a compromise of it to which the parties have agreed: Daniell's Chancery Practice, 7th ed., p. 16; Seton on Judgments, p. 2284; Snow's Annual Practice, 1904, vol. 2, p. 342, and cases cited, especially Alliance Pure White Lead Syndicate Limited v. MacIvor's Patents Limited, 7 Times L. R. 599. . . .

The Master in Chambers was, however, right, I think, in holding that he had no jurisdiction to make the order which he was asked to make; and the proper practice in such cases as this, where the motion is one for judgment, and analogous, therefore, to a motion for judgment on the pleadings, is, in my opinion, to apply to a Judge in Court for such order as may be necessary to enforce the compromise.

Where the compromise is to be carried out by a stay or dismissal of the action, the Master in Chambers may have jurisdiction to make the order; as to this I express no opinion; this is not a case of that kind.

It follows that, in my opinion, plaintiffs fail in their appeal. But I may, I think, treat their substantive motion as having been transferred into and heard by me in Court, and make the order for payment by defendant of the $160 to plaintiffs forthwith—and that is the order which I make.

No costs to either party of the motion before me or of the proceedings before the Master in Chambers.