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NOVA SCOTIA.

SUPREME COURT.

TRIAL.

GRAHAM, E.J. DECEMBER 2ND, 1910.

HUNT v. THE DARTMOUTH FERRY COMMISSION.

Navigation—Obstruction—Wharf—Nuisance — Abatement—Damage to Ship by Colliding with Wharf—Constitutional Law.

Action claiming damages for injuries done to plaintiff's wharf as the result of defendant's ferry steamer "Chebucto" colliding with it in a fog, and carrying away part of the wharf.

W. B. A. Ritchie, K.C., and T. R. Robertson, for plaintiff.

J. J. Ritchie, K.C., for defendant.

GRAHAM, E.J.—The defendant's ferry steamship "Chebucto" in a dense fog collided with the plaintiff's wharf, situate on the shore of Halifax Harbour, about 180 feet south of the landing dock, and this action is brought to recover damages.

The grant of the water lot on which this portion of the wharf was constructed is dated the 7th day of January, 1858. And this extension was constructed apparently in 1859. The balance of the water lot on which the market wharf is constructed was conveyed by a very much older grant from the Crown.

It is contended on the strength of Cunard v. The King, 12 Ex. (Can.) 414; 43 S. C. R. 88, on appeal, and Wood

v. Esson, 9 S. C. R. 239, that the plaintiff cannot in this case in any event recover damages because the plaintiff's wharf is a wharf in the port of Halifax, and an obstruction to navigation and a public nuisance, and therefore the defendant corporation without any special injury to it can abate that nuisance and run it down at pleasure. I submit that assuming it to be the case that it was a nuisance, the case of Dimes v. Petley, 15 Q. B. 276, is a complete answer to any such contention.

There was no special injury to the defendant. You cannot run down a wharf if you can by exercise of ordinary care avoid it, any more than you can ride over a hobbled donkey on the highway.

But apart from that view, I take issue with the contention that a wharf in the port of Halifax is ipso facto a public nuisance. Whether or not such an erection is or is not a public nuisance is a question of fact. That has been repeated so often since Hales wrote it, and in connection with this very subject, that I forbear to cite authority.

I think it is necessary to consider two things—for there is confusion in the reporter's note in Wood v. Esson, and I have reason to remember that decision.

The first question is whether the Government had (say before the Confederation in 1867) power to grant water lots without legislation other than that enabling the Crown to grant the Crown lands. If it had then, the second question, whether having obtained such a grant of the water lot in front of the grantee's premises, he can erect upon it under any circumstances a wharf to give access to that wharf of ships coming to his premises in the course of navigation. The learned Judges in Esson v. Wood, perhaps with exception of Henry, J., kept these two things distinct. I have the appeal book before me, and the Government did not in that grant profess to grant more than a simple water lot. No reference was made to what erection if any was contemplated.

For over a century, the Government have been granting water lots in Halifax Harbour, and I suppose there is not a special statute enabling it to grant water lots, and for over a century the grantees have been erecting wharves for the convenience of the public engaged in navigation. I can scarcely imagine indictments for nuisance being launched against the wharf owners of the port.

In Wood v. Esson, Esson's wharf adjoined Wood's, and Esson was adding an extension to his wharf driving in piles (within the limits of his water lot grant), but in a place which prevented ships from having access to Wood's wharf. The line of steamers coming there could not get in. So Wood, with one of the steamships, proceeded to draw these piles, and Esson brought the action.

It appears from the judgments that the learned Judges held that the piles would be an obstruction to navigation under the circumstances, and that Wood having a particular damage might abate it, as a nuisance. The judgment might have been unquestionably put on the ground that Wood had a right to abate it, because it interfered with the access from the sea to Wood's premises. And as a fact, that was all that the plea and the ground in the rule for a new trial justified.

In Lyon v. Fishmongers Company, 1 App. Cas. 671, Lord Cairns, L.C., says:

"Unquestionably the owner of a wharf on the river bank has, like every other subject in the realm, the right of navigating the river as one of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at that particular place, and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action or restrained by injunction."

And later on he quotes from Lord Hatherley's judgment in Attorney-General v. The Conservators of the Thames, 1 H. & M. 1, where he says, referring to Rose v. Groves, 5 M. & G. 613:

"As I understand the judgment in that case, it went not upon the ground of public nuisance accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with."

However, I must concede that some of the judgments do not put it upon the ground of private injury, but as a public nuisance with particular injury to Wood, and of course I do not question it. But the facts of that case are different from the facts in this one.

As to the power to grant water lots, the right in that case was not questioned.

With deference, I have no doubt myself on that subject, and some of the Ontario Judges had not in cases before them, but doubts did arise in the old provinces of Canada, and a statute was passed to settle the question.

When one finds in Nova Scotia that since 1784 (there were these grants in Esson v. Wood in the nineties), such water lots have been granted impliedly subject of course to the public right of navigation, he might almost take it for granted that it was legal to do so. Some of the wharves have stood law suits carried even to the Privy Council (The Chase. Young's Adm. Dec. page 113). I cannot distinguish between Crown lands covered with water and those not covered with water.

Strong, J., said in Wood v. Esson: "The grant to the plaintiffs by the Provincial Government in 1861 was valid and operative to pass the title to the soil of the harbour included in the grant, but although the grant was effectual for this purpose, and the plaintiffs had a valid title under it, that did not justify any erection upon the land granted having the effect of obstructing the navigation of the harbour."

In Attorney-General v. Perry, 15 U. C. C. P. 331, Richards, C.J., said: "In this country the practice has obtained in towns and cities for the Crown to grant land covered with water, and generally to the owner of the bank when adjacent to a navigable stream, and grants so made have never been cancelled for want of power in the Crown to make the grant. The right of the grantee to build wharves and warehouses for the more convenient and profitable enjoyment of the water lots so granted has never been successfully contested so far as I am aware of."

In Warin v. London Loan Co., 7 O. R. 724, Wilson, C.J., said: "The Crown in this country has long exercised the right of granting water lots. But that right being doubted, the 23 Vic. c. 2, s. 35, enacted that whereas doubts have been entertained as to the power vested in the Crown," etc.

Coming to the second question as to whether the erection is a public nuisance, in Cunard v. King, 43 S. C. R. 88, the locality in the harbour was apparently a narrow passage in this harbour called the "Narrows."

Anglin, J., says: "The circumstances in evidence, the narrowness of the channel opposite the appellant's lands, &c., make it practically certain that the Crown would refuse

an application for these rights (to erect a wharf) by the appellants or by any purchaser from them."

In effect that any such structure if built would be likely to constitute a nuisance, and therefore that the sum of $10,000 tendered by the Crown for the water lot of Cunard was sufficient compensation.

It will be unfortunate if the effect of that judgment will prevent the Crown from building into the harbour structures the building of which must have been contemplated when the water lot was expropriated, and which alone would justify its expropriation. Because the right of public navigation is superior even to the Crown's right to erect structures. But after all, it was a question of fact.

I have no hesitation in finding that this extension of the market wharf was not a public nuisance, that it did not materially interfere with the public right of navigation. In fact it was a great convenience to the public coming by the sea from other ports with produce and goods for the Halifax market.

In Booth v. Ratte, 15 App. Cas. 188, a case of grant of a water lot on the Ottawa river, near the city of Ottawa, where the grantee had constructed a wharf and boat house 140 feet in length by 40 feet in width, drawing four or four and a half feet of water at one point, the Judicial Committee say, page 192:

"No question arises in this case as to the wharf and boathouse being an obstruction to navigation, but it may be noticed that the Chancellor (of Ontario) in his judgment in the Divisional Court says, 'Here all the tendency of the evidence as to the position of the plaintiff's bank, the bay there formed at a distance of 700 feet from the main channel, the great width of the Ottawa, its ample facilities for shipping, apart from the comparatively narrow strip where the plaintiff's wharf is moored, the fact that the plaintiff has thus occupied the property in question for over twenty years, all strongly suggest that he had done nothing detrimental to river and navigation, but that on the contrary his wharf has been a benefit to the boating public; so far from being an obstruction to navigation, the maintenance of a floating wharf of that kind is in the circumstances stated by the learned Chancellor a positive convenience to those members of the public who navigate the river with small craft. As a riparian owner, the plaintiff would be at liberty to construct

such a wharf, and would be entitled to maintain an action for the injuries to it which are complained of."

It was not necessary in that case to consider the power to grant the water lot, because the Statute of Canada, 23 Vic. c. 2, s. 35, already cited, afforded a short answer and it was used.

Of course, when one comes down to English rivers and harbours, he may expect to find English Judges using extreme language to prevent interference with these highways.

It was apparently Lord Blackburn who first thought in this connection of the Amazon, and Wilson, C.J., who quoted him. He might have mentioned the St. Lawrence, or many other Canadian rivers, or the Great Lakes, or Halifax Harbour.

But even Sir George Jessel, M.R., when he undertook in Attorney-General v. Terry, 9 Ch. App. 423, to overrule in part Rex v. Russell, 6 B. & C. 566, supplied a test as to what was a public nuisance, and there he was dealing with a width of sixty feet available for navigation, of which the defendant had taken three feet, and Lord Cairns said that was a substantial interference with navigation. Sir George Jessel, however, says, quoting from the argument of Sir William Follett in Rex v. Ward, 4 A. & E. 384, as a correct statement of the law: "Erections may be made in a harbour below high-water mark, and in places where vessels might perhaps have sailed, and the question whether they are a nuisance or not will depend on this, whether upon the whole they produce public benefit; not giving the term 'public benefit' too extended a sense by applying them to the public frequenting the port."

The American view is thus stated in 29 Cyc. 344: "Piers and wharves to some extent obstruct navigation, but they are also substantial and material aids to it, for without piers and wharves at which vessels might land, navigation would cease. The question as to the legality of such structures is therefore not whether they obstruct navigation to some extent, but whether they constitute a material obstruction."

The port warden, a witness called by the defendants, said of this wharf: "It is not an interference with navigation as far as extending into the harbour is concerned."

Then the defendant's counsel put this question:—

"In respect to the navigation of this wharf; assuming in consequence of a fog, the ferry boat turns out of its course to that extent it would be an interference with navigation? A. No wharf would be that."

2. It is denied that there was negligence on the part of the "Chebucto," and in fact it is claimed that the injury was due to inevitable accident. The fog was so dense that morning that Corkum, the mate, says they did not see the market wharf until he saw it twenty feet away from the "Chebucto"; then they reversed. At that distance no manœuver could have prevented the "Chebucto" if she was moving at all from colliding with the wharf. And if that is so, she should not have been moving at all, but should have laid up for a half an hour or so until the fog abated. I refer to the case of the "Lancashire," 4 Adm. & Eccl. at page 201, cited in Marsden on Collisions, 6th ed., pages 384, 386, a case of one of the ferry boats at Liverpool, G.B. The Court held that it should have been laid up. I also refer to Smith v. St. Lawrence Tow-Boat Co., 5 P. C. 308.

And having gone out with that dense fog, and when she was likely to get out of her track in consequence of keeping out of the way of any passing ship, she should have sought her landing dock at a less rate of speed.

It appears that the "Chebucto," when she got more than half way across the harbour, heard the whistling of a steamer coming up the harbour. The distance from slip to slip is one and a quarter miles, usually accomplished in nine or ten minutes. She had crossed the other ferry boat. On hearing the whistle, she changed her course to the south and stopped her engines, letting the incoming steamer go by on the Halifax side. Then she steered a course of south south-west, going half speed ahead (about four miles an hour). She had then nothing to go by except the bell on the pier, and in a fog the direction of such a sound cannot be well judged. Then the direction was given to go slow ahead, and it would take about a quarter of a minute to get the engines down from 80 revolutions (half speed) to 40 revolutions (slow ahead). And according to the engineer, it was less than half a minute from the time that direction was given until the direction was given to the engine room to go full speed astern, i.e., when the wharf was seen. I think that after her course being changed and stopped at that point in

the harbour, with nothing to go by but the sound of the bell, it was hazardous to go ahead at half speed. The usual time for crossing full speed is nine or ten minutes; they can do it in nine; and on this occasion they struck the market wharf in eleven minutes—the first mate said ten minutes—and they lost some time in allowing the incoming steamer to pass.

Hall, the port warden, in cross-examination, says:

"A. I would not like to go ahead unless I could see 100 feet or heard something. I would like to hear something, so that I could be sure I was clear.

Q. I suppose you have noticed this phenomenon in heavy fogs, you cannot always depend on the location of sound? A. I never saw one yet who could locate sound in a fog.

Q. That requires greater caution? A. We always guard against it."

The captain attributed his getting out of the course to the set of the tide, but after his attention was called to the fact that it was exactly high tide, that feature was dropped from the case.

In the St. John, 29 Fed. Rep. 221, a decision of Brown, J., a Judge of great experience, the reporter's note is:

"A large steamer has no right to run in a dense fog near piers where boats usually tie up, except under such slow speed as to be capable of being fully stopped within the distance at which they can be seen."

And in the Nachooche, 28 Fed. Rep. 466, the Judge says: "The only rule to be extracted from the authorities by which to determine whether a given rate of speed is moderate or excessive in view of the particular circumstances of the occasion, is that such speed only is lawful as will permit the steamer seasonably and effectually to avoid a collision by slackening speed, or by stopping and reversing within the distance at which an approaching vessel can be seen."

I find that there was negligence on the part of the "Chebucto" and that the collision was due to that.

3. The question of damages is also one requiring some consideration. The sum of $100 has been paid into Court.

The "Chebucto" struck the north-east corner of the L of the market wharf extending out from the main wharf. There is no question that the extremity of the L was in a very bad condition from worm-eaten bearing piles, and the rottenness of the frame work resting on those piles, and that

the planking over that had holes, and was in places rotten. That portion had been fenced off to prevent accident to people going on the wharf. But owing to repairs on the stem of the L, the extension seaward of the main wharf (because vessels had to use the southern side of the wharf) that portion of it was in fair condition and worth repairing, and could be used probably by itself.

The effect of the steamer striking the north-eastern extremity of the L, which had no backing from the shore, was to break two or three of the bearing piles and push the L in 6 or 8 feet on top.

Mr. Weston, the manager of the plaintiff company, says: "The north-west corner had been forced back about eight feet and the top of the wharf was nearly down to the surface of the water. I could see that the planking had been sprung up from the twisting of the wharf, that some of the stringer timbers had been broken and some were bent. The effect of that was that the overhanging weight of the wharf had a pulling effect toward the north and west. The overhanging weight ultimately pulled it down."

Mr. Walker says: "I found that the broken portion of the L which projected over from the main portion of the wharf, was canted shorewards about seven or eight feet, to the best of my knowledge."

On the 25th of August the L collapsed—the collision had occurred on the 14th. The whole then had to be removed. The defendant's counsel urges that the $100 paid into Court would satisfy the damage, and that any way the falling down of the L on the 25th August was not due to the original collision. There is no proof of any intervening cause, and I think that the falling down of the wharf was due to the original collision, that this was the proximate cause of the falling.

Mr. Walker says: "The collision to my mind was the primary cause of the fall of the wharf."

Gould, called by the defendant, in cross-examination says: "I have no hesitation in saying that the wharf would have been standing to-day if it had not been touched. I do not say that the wharf would have fallen down in August, 1909, even if there had been no collision." . . . "That is the southern half; that was fairly good. The conclusion I came to was that the southern half of the wharf could be repaired, but the northern half would have to be rebuilt."

There was some confusion in estimating the cost of repairs caused by the plan used by the plaintiff on the trial. By scaling it, the portion carried away would be 89 feet front by 37 feet on one side and 44 feet on the other side. Then it was assumed that the extension of the main wharf was about half the width of the whole L, whereas it was about one-third.

I adopt the actual measurement made by Mr. Walker after it fell, when he measured it like a raft. It was 89 feet in front by 60 feet on one side and 10 feet additional on the other. Mr. Johnston, the city engineer, in making his plan, followed a much older plan, apparently one made before some addition to the structure was made. Mr. Walker could not be mistaken as to the difference between 60 and 37 feet.

I estimate the damages at the sum of four hundred and fifty-eight dollars, and I give judgment for that sum with costs.

I notice by the report of the stenographer in Neil Hall's evidence after the words "we were on the city wharf," there is an expression of opinion by myself that something was not evidence. What it was, does not appear. What I understood was that it was a conclusion of the late harbour master, but I did not rule against any testimony of Hall in respect to the conditions that he found there.

Judgment for plaintiff.

NOVA SCOTIA.

SUPREME COURT.

DECEMBER 13TH, 1910.

BOEHNER v. HIRTLE ET AL.

Trespass to Land—Title—Adverse Possession—Evidence.

V. J. Paton, K.C., for plaintiff.

D. F. Matheson, K.C., for defendants.

LAURENCE, J.:—An action of trespass to land; the land is lot No. 3, division F., plan of township of Lunenburg. It is wilderness land used only for the firewood and other lumber

on it. It was granted by the Crown, June 30, 1784, as part of a large area of land, 71,406 acres, to Nicholas Conrad and others. Prior to this in 1765, an allotment of these lands was made by commissioners appointed by the Government for this purpose, and it is recorded in this allotment book that Nicholas Conrad drew this lot 3, division F., and the grant followed in 1784 as stated above, and which grant conveys to Nicholas Conrad 724 acres, part of the 71,406 acres. The plaintiff claims his title goes back to Nicholas Conrad and the grant. The first conveyance after the grant in which title, is from one Nicholas Conrad, junior, in 1814, thirty years after the grant of lot 3, division F., to Frederick Boehner, grandfather of plaintiff. It is to be noted that the person who drew the lot in question at the "allotment," and who is named in the said grant and the allotment book is Nicholas Conrad, while in the first conveyance, 30 years thereafter, the grantor is named or described as Nicholas Conrad, junior. Further it does not appear that the 724 acres, granted to Nicholas Conrad, comprised lot 3, division F., which he is alleged to have drawn, and it must be difficult at this date to furnish evidence of this. Frederick Boehner by his will devised to his four sons lots 2, 3 and 4 of division F., and these four sons divided or portioned these three lots equally among them into four parts, Edward, father of plaintiff, taking about two-thirds of 3 and about one-fourth of 4 as his share, upon which it is alleged the trespasses were committed, and only on so much of that as was originally in lot 3, although the statement of claim describes the land trespassed on as the original lot 3 of division F. Edward, father of plaintiff, devised all his lands to his two sons John Frederick and Edward (the plaintiff). The plaintiff and his father before him for 60 years back, cut wood and hoop poles on this lot, but cleared none of it, nor was it ever fenced. The lines are fairly maintained and the bounds preserved. The defendants, however, and their ancestors have also been exercising acts of ownership (trespasses they are alleged to be by plaintiff) over this land for a like period of time—neither taking action to assert their claims, or restrain the other until now.

The defendants claim that they are owners in fee of the land alleged to be trespassed upon, and derive their title from Jacob Hirtle, (I think their great grandfather), grantee from the Crown under grant dated May 14th, 1800,

which confirms said Jacob Hirtle's title to Nos. 28, 38, 39, 40, 41, 42, 43, 44, 45, 48, 49 and 50 of the thirty acre lots in the "Oaklands" division of the township of Lunenburg, as shewn on the original plan of said township. This grant recites that these lots were "assigned to said Jacob Hirtle at the first settlement of the said township, and have been in his possession for more than twenty years past, for a description of which lots no plan is hereunto annexed, it being necessary to have reference to the original plan and surveys of the said township of Lunenburg for a more particular description of the whole premises, which together with the possession of the said Jacob Hirtle will be found sufficient to describe the same. This grant being intended to confirm the said Jacob Hirtle in his title to the several lots before mentioned, agreeable to his present possession, &c. The defendants shew a complete title from Jacob Hirtle, the original allottee and grantee down to themselves. Now the defendants testify very positively that all the acts and things done by them, and complained of by plaintiff, were done upon these lots owned by them, and they never went beyond the lines of these lots, which are apparent on the ground and have been several times run out. The difficulty seems to be that when the lines are run out on the ground these thirty acre lots granted to Jacob Hirtle or some of them, run into or overlap the 300 acre lot claimed by the plaintiff, and as laid off on the ground. The "Oakland" division, so called, consisting of 30-acre lots, and comprising four ranges or tiers of such lots, are laid off beginning at the waters of "Mahone Bay," and run back in a north and easterly direction until they in part meet or intersect the 300-acre lots in division F., and particularly lots Nos. 4, 5, and 6 of such division. Whether these 30-acre lots extend rearwards so far as to cut into lot 3, which plaintiff claims, gives rise to the difficulty in dispute in this case. Surveyor Starratt says he surveyed No. 3, division F., and also the 30-acre lots in the 4th range or tier of Oakland division; and submits a plan, W/17, indicating by dotted lines the place of trespass, and also the sub-division of lots 2, 3, and 4, among the sons of John Frederick Boehner, grandfather of plaintiff. There is a copy of a plan from the Crown Land Office produced which apparently shews only 3 ranges or tiers of lots in "Oakland division." But this cannot be, there are four ranges of these lots. Lots 46 and 47, in this 4th divi-

sion, were in March, 1777, granted to one John Hamilton (a discharged soldier), and these lots are well known to-day as the "Hamilton lots," and there is in evidence an old copy of part of the township plan under date 3 July, 1813, under the hand of Charles Morris, "Surveyor Genl.," whereon he certifies that "it is truly copied from the original plan of the township and county of Lunenburg, filed in this office and that the lots marked "X" were granted to Jacob Hirtle 14 May, 1800." Lots 50, 49, 48, 45, 44, 43, 42, 41, 40, are so marked on this plan, all in a 4th tier or range, and the original township plan shews the four tiers or ranges of 30-acre lots. In addition to the grant to Jacob Hirtle of date 14th May, 1800, he received a grant from the Crown on 20th Oct., 1775, of lots 19, 24, 25, 29, 30, 31, 33, and 37, on the 2nd and 3rd tiers or ranges of 30-acre lots in Oakland division, and also a grant on 21st Nov., 1775, of lots 8, 11, 13 and 23 in the 1st and 2nd ranges of Oakland division. From all which it is made quite clear to me that at the earliest and original division or allotment of lands in the township of Lunenburg, a number of 30-acre lots were apportioned to Jacob Hirtle in the 1st, 2nd, 3rd and 4th range or tier of such lots in Oakland division, so called, that he had gone into possession of them all, and had been in such possession twenty years before the last grant to him, May 1800, and he had improved some of them, building a saw-mill and grist-mill on one or more of them. Plaintiff and defendant have each a documentary title to the land upon which the trespass is alleged to have been committed, if in fact the Surveyor, Starratt, is correct in locating that particular land on the ground. If Starratt is mistaken, and both lot 3, division F., and lots 49, 48, &c., of the 4th range of 30-acre lots can be laid out on the ground and not overlap No. 3, then I am disposed to accept the evidence of defendants that they have never cut beyond the lines of these latter lots—their own property. The grant to Conrad and others is older than that to Jacob Hirtle under which defendants claim, and if there were no defects in his documentary title, he should recover in this action, that is apart from the legal effects of the original allotment of the lots in question to the ancestors of either party, but as already stated, the grant is to Nicholas Conrad, while the next deed, thirty years later, is from Nicholas Conrad, junior. Then if I should assume identity of these persons from identity of name and description or

address, there is the other difficulty mentioned that no evidence is given that the land granted to Nicholas Conrad includes the lot of land called No. 3, and on which it is claimed the trespass was committed. I do not think the plaintiff can recover on his possession, actual or constructive alone. He does not seem to have had any better or different possession of the locus than the defendants had—no better, no different or longer. They each used the land as his own for very many years, and only two or three years ago the dispute began, and however long his possession actual or constructive under his documentary title, it is not adverse, as defendants have during a like period occupied the land and have a complete title from the Crown.

The cases cited on the argument of this case are of no assistance and some of them are overruled.

Boutilier v. Knock, 2 Old. 77, is a case in which the grants of the township of Lunenburg of 1784, the allotment book and drawing by cards were all in evidence as in this case, but the points decided in that case do not arise in this.

I am obliged to dismiss this action.

NOVA SCOTIA.

SUPREME COURT.

DECEMBER 16TH, 1910.

STEPHENS & IRVING v. AWALT.

Contract—Goods Sold—Work and Labour Performed—Set-off—Counterclaim for Loss by Fire Caused by Plaintiffs' Negligence—Contributory Negligence.

V. J. Paton, K.C., for plaintiffs.

J. A. McLean, K.C., and J. W. Margeson, for defendant.

LAURENCE, J.:—The plaintiffs' claim is for a balance $87.19, price of sawing lumber and for 46 meals supplied to the defendant's men. There is a set-off pleaded of goods sold to plaintiffs $4.69, and a deduction of $20 claimed on sawing for lumber destroyed by fault of plaintiffs. The $4.69 is admitted. Then there is a counterclaim, setting up the loss of 5000 feet, and damage to 3000 feet more of lumber through fire, caused by the negligence of the plaintiff. I find that the

contract was to saw the lumber for $2.50 per M. Defendant to take charge of it at the mill. He did so and piled it in a place of his own selection with full knowledge of the risks and danger from fire. He was cautioned by plaintiffs as to danger from the proximity of the piles to the mill and burning edgings. I am unable to find any negligence on the part of the plaintiffs—but if there was such I do find some evidence of contributory negligence on the part of the defendant in piling his lumber in place known to him to be dangerous, and after warnings, and by leaving his lumber there after fires had already caught. There is a further counterclaim for lumber taken by plaintiff to build their cook house. The defendant claims for 1000 feet of lumber taken, and denies that he agreed to give this lumber. The burden is, I think, on plaintiffs to prove their right to take this lumber, and it is so sworn to by Irving only and denied by defendant. I allow $10 damages on this part of the counterclaim and costs.

The balance claimed by plaintiffs $87.19, must be reduced by deducting the $4.69 for goods sold to plaintiffs, and by difference in price charged for sawing oak 2740 feet —$1.37. The correctness of the tally of sawing is challenged, but I have no evidence on which I can interfere with the tally except that of Joseph Morash—a shortage of say 250 feet on what he surveyed—75 cents. This reduces the $87.19 sued for to $80.38. The allowance on counterclaim should be deducted and judgment entered for plaintiffs for $70.38, and costs. The costs to be set-off.

NOVA SCOTIA.

SUPREME COURT.

DECEMBER 16TH, 1910.

DEAN WILE v. LEVI JOUDRY.

Land—Action for Possession—Agreement to Purchase — Failure by Plaintiff to Convey — Sale of Building — Evidence.

J. A. McLean, K.C., and J. W. Margeson, for plaintiff.

V. J. Paton, K.C., for defendant.

LAURENCE, J.:—Action to recover possession of a two-acre lot of land. The plaintiff has the title to this lot. The defendant is in possession of the lot or part of it, and he has been notified to quit. The defendant claims that he is in possession under an agreement to purchase, has always been ready to pay but plaintiff has failed to convey.

The facts as stated by plaintiff are briefly, that when he purchased this land there was a house on it—standing on blocks. This house he sold to Louise Joudry, wife of defendant for $20, for which amount he gave her a receipt. The house to be moved off—but until she was ready to move, she might live in it. In this way she and her husband the defendant moved into the house and have remained there ever since—more than ten years. Some time after the defendant came to live in the house, he proposed to buy the two acres, which plaintiff was willing to sell to him for $100. He has never paid any part of this sum or offered to pay it. This is substantially the plaintiff's story as sworn to. The defendant's wife tells a different story, and the defendant one materially differing from hers. She says she bought the house for $25, which sum she paid; half an acre of the land for $20—with permission to live in the house on the land at 25 cents a year until the $20 was paid. That a Mr. Hill drew up this agreement in writing, of which there were two copies and it was signed by plaintiff and herself. The agreement is lost and Mr. Hill is dead. The defendant says he saw plaintiff about the sale of the house to his wife and plaintiff said the price would be $25—and that he would sell him half an acre of land—and later on that he would sell him or her half an acre for $20, or an acre for $40, or as much as or as little as the witness liked.

I believe the plaintiff in respect to these transactions. He denies positively any sale of the half-acre to the wife and of any sale to defendant of any part of the land, only that he was willing to sell the whole lot for $100 to defendant. I think the Joudrys were taking advantage of the old man the plaintiff.

The plaintiff is entitled to recover in this action with costs.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. DECEMBER 23RD, 1910.

THE GLACE BAY PRINTING CO. ET AL. v. HARRINGTON ET AL.

Company—Shares—Improper Issue of Stock for Controlling Meeting of Shareholders—Internal Government—Order Restraining Holders of Stock Improperly Issued from Voting.

Appeal from a restraining order granted by GRAHAM, E.J., restraining defendants from voting at a company meeting on shares alleged to have been improperly issued.

W. F. O'Connor, K.C., for plaintiff.

W. B. A. Ritchie, K.C., for defendants.

The judgment of the Court was delivered by

DRYSDALE, J.:—This is an appeal from an interim restraining order granted by GRAHAM, J., whereby the defendants are restrained until the trial of the action from using at any meeting of the company 254 shares of stock alleged to have been improperly issued by some of the directors for the express purpose of controlling a pending extraordinary meeting of the shareholders summoned or called by certain shareholders under the provisions of the Companies' Act.

The company is incorporated under the Nova Scotia Joint Stock Companies Act, and carries on a paper and printing business at Glace Bay. It appears that differences have arisen amongst the shareholders and directors as to the conduct of the business, and a number of the shareholders requested the directors to call an extraordinary meeting of the company's members for the purpose amongst others of changing the articles regulating the internal government of the company and for the removal of Douglas, one of the directors. This requisition was signed by the re-

quired number of members but the request was ignored by the directors. Thereupon the requisitionists proceeded to the call of the meeting themselves, in accordance with the provisions of the Act in such cases provided. The extraordinary meetings were called for the 1st and 17th of December, and it is alleged that on the 1st just before the first of the meetings so called, three of the directors hastily summoned a meeting of directors at a time that did not reasonably permit of the attendance of a full board, and acting not in a bona fide manner in the interests of the company, but for the express purpose of controlling the vote at such meeting, improperly issued 254 shares of stock in the company to five of the defendants, viz., 250 shares to Harrington and one share each to O'Neil, Grant, Nicholson and J. M. McNeil. The learned Judge when applied to restrained the defendants from the use of such shares at said meetings, and after a hearing continued the injunction until the trial. The first extraordinary meeting has been held, and the one called for the 17th, adjourned until the 24th. Meantime we have heard an appeal from the learned Judge's decision.

I may here mention that Douglas, one of the directors, threatened with removal, seems to have been the active man in getting the three directors together that authorised the issue of the 254 shares in question.

I think the law governing the action of directors in the issue and allotment of stock is concisely and clearly set forth in Palmer, at page 585, in the following language:—

"The duty of directors as to allotment is clear. They are bound to act in good faith in the best interests of the company for their power and discretion is fiduciary, but except where it is affirmatively shewn that they have not acted in good faith the Court will not overrule the exercise of their discretion. Primâ facie there is no objection to the directors making an allotment to themselves and their friends in preference to or to the exclusion of other persons, but if it is shewn that they have not acted in good faith, e.g., have made the allotment because the company wanted further funds, but in order to enable the directors themselves to obtain extra votes, and so carry or negative some contemplated resolution, they will commit a breach of trust."

In this case the learned Judge who heard the application concluded on the material before him that the issue of such shares was not in good faith in the interest of the com-

pany for the purpose of obtaining needed money, but was a scheme on the part of three directors representing a minority of the stock to keep Douglas in office and to defeat a proposed resolution of shareholders at the meeting to be held on the day of issue.

I have gone over all the affidavits submitted on this appeal and I see no good reason for differing from Mr. Justice Graham's conclusions. It is obvious, I think, that Douglas and the two directors that joined him in directing this issue were not in touch with the business of the company for some time past, and one cannot help being impressed with their hasty action on the first instant as a move on their part not prompted by an inquiry into the company's affairs but one prompted solely with the idea of defeating the legitimate shareholders in resolutions to be considered at the meeting called for that day. It is no light thing on the part of directors to decide on a large increase of working capital, and is usually the result of careful business enquiry, but when we consider the circumstances under which this issue of shares was directed, and find that those who directed it were immediately to use it to keep themselves in office, and altogether apart from any business investigation, the matter to my mind assumes a position that savours of a grave breach of trust.

We are not without English authority on the subject. In addition to the case referred to by the Judge appealed from, I regard the discussion and decision in Fraser v. Whalley, 2 H. & M. 10, as instructive and in point. The head-note of that case well summarises the decision and is as follows:—

"The directors of a railway company are not justified in acting on an old resolution authorising the issue of shares after the particular purpose for which the authority was given has ceased to be available. Nor in issuing shares, supposing them to have the power, for the express purpose of creating votes to influence a coming general meeting, and an injunction will be issued to restrain the issue of such shares, it not being a question of the internal management of the company but an attempt on the part of directors to prevent such management from being legitimately carried on."

It was argued before us that the shares having issued and being now held by the allottees we ought not to deprive

the holders of all the legal rights that usually attach to shareholders, but this argument carried to its logical conclusion would enable directors guilty of the most gross breaches of trust to thwart the will of shareholders, the legitimate shareholders who have the sole right to control, and I see no difference between preventing a threatened issue of stock for an improper purpose and the use of stock improperly issued and intended for improper control. I ask myself what on the face of the circumstances was the apparent object of this issue, and when I find Douglas, acting with a bare majority of his directors, bringing in four men with one share each and his solicitor with 250 shares, and this decided upon in the hasty manner indicated by all the material before us, it seems to me a case where the Chambers Judge quite properly acted promptly in preventing a very obvious abuse of directors' powers.

I think the appeal should be dismissed with costs.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. DECEMBER 23RD, 1910.

THE GLACE BAY PRINTING CO. v. HART ET AL.

Company — Improper Issue of Shares — Order Restraining Holders of such Stock from Voting—Appeal.

Appeal from the judgment of GRAHAM, E.J., and the order granted thereon, restraining defendants from voting at a company meeting on shares alleged to have been improperly issued. The judgment appealed from contained the restraining order until the trial in respect of certain shares issued after the date of the requisition calling the meeting of directors at which the issue of these with other shares issued previously was confirmed.

W. B. A. Ritchie, K.C., in support of appeal.

W. F. O'Connor, K.C., contra.

The judgment of the Court was delivered by

DRYSDALE, J.:—This is an appeal from the decision of Mr. Justice Graham restraining the defendants, Hart and Egan, from voting on certain stock in the company irregularly issued to them. This appeal was put on the ground that the resolutions passed at the meeting of 1st December ratified and approved of the issue of such shares. I agree with the Chambers Judge that the resolutions only refer to the stock indicated at the date of the requisition; in other words that such resolutions only refer to stock outstanding when the requisition was drafted.

I think this appeal must be dismissed with costs.

NOVA SCOTIA.

SUPREME COURT.

CHAMBERS.

GRAHAM, E.J. DECEMBER 31ST 1910.

THE CHINA MUTUAL INSURANCE CO. v. PICKLES.

Insurance—Marine Policies—Action by Receiver of Company in Liquidation for Premiums — Promissory Notes — Defendant's Liability for Unearned Portion of Premiums —Fraud—Insolvency—Jury Notice — Defence—Setting Aside—Costs.

Motion at Chambers to set aside the jury notice and grounds of defence.

T. S. Rogers K.C., in support of application.

W. B. A. Ritchie, K.C., contra.

GRAHAM, E.J.:—This is an action brought by the receiver of the plaintiff company in liquidation in Boston, Mass, U.S.A., against the defendant upon premium notes for marine insurance policies; two notes in October, 1907; four in November, 1907; one the 31st December, 1907; and one on the 4th January, 1908. On the 19th March, 1908, the receiver was appointed temporarily and the company was

restrained from transacting business, on the 27th March the receiver was appointed permanently. It is unnecessary to consider two of the defences set up. One setting up non-compliance with a statute of Canada not applicable in the circumstances because the company did not do any business in Canada other than ocean marine insurance, I set aside as false. That one is contained in the 6th paragraph of the statement of defence.

The other is contained in the 5th paragraph, and I do not propose to set it aside either as false in fact or as presenting no reasonable ground of defence, although the Supreme Court of Massachusetts in a similar case by the same receiver, has given a judgment in his favour. The defence as set up is that the receiver upon his appointment notified the policy holders, including the defendant, that the effect was to cancel all outstanding policies from that date, and the defendant contends that he is, therefore, discharged from payment of the premium notes thenceforward pro tanto, and has paid the balance due for earned premiums into Court.

If I dispose of this defence adversely to the defendant on this application he would have but one Court of Appeal to go to, whereas if it goes to trial he will have three Courts of Appeal, none of which, as usual paying the deepest respect to the Supreme Court of Massachusetts, will be in any way bound by its decision. I think he is entitled to those chances.

There are two other defences set up. One is fraud. That is, that the company was to its knowledge insolvent when it effected these insurances, and took these premium notes and should have disclosed that fact. There is no pretence that it made any express representation of solvency to anyone making the applications for insurance. There was just mere silence where it is alleged there was a duty to speak.

Dealing with the facts the support for this plea is that the monthly statement (required under the statute) for the month of December, 1907, made up some time in January, 1908, shews a deficiency as regards policy holders of $27,810.19.

This is the result of a requirement of the statute that in respect to marine risks a liability thereon may be computed by the State Insurance Commissioner, charging as a liability

of the company fifty per cent. of the amount of premiums written in its policies upon yearly risks, and upon risks covering more than one passage not terminated and the full amount of premiums written in policies upon all other marine risks not terminated. It will be seen that but one note was made in December, and one in January. The affidavits on the part of the plaintiff allege that it would be impossible for anyone to say that the company was as a matter of fact then insolvent, but if it was that none of the directors, nor president nor the secretary, had any knowledge thereof.

As a matter of law, I think that insolvency is one of the matters that a person making a contract is not required to speak of. Ex parte Whittaker, 10 Ch. App. 446. A bank or a company or a private individual would shorten their business career very much if they proceeded on any such principle. The defendant's counsel contended that the peculiar doctrine of concealment in connection with the effecting of marine insurance applies. That doctrine grew out of the necessities of the case. The subject of insurance might be almost anywhere, or in any condition, or be specially in danger of any of a greater number of risks the underwriter was going to insure against. She might be even lost, or on the other hand, have safely arrived in port, and it became an implied condition of the contract that there was no concealment of facts materially affecting the risk by either party. Blackburn v. Vigors, 12 A. C. 535, Lord Halsbury, and 539, Lord Watson.

But there were also many things, of which (it was nearly always the applicant who was in those times supposed to have any knowledge) the party need not speak. There were things that each ought to know, and that he "took upon himself the knowledge of."

I venture to say that there is no English case—I doubt if there is an American case—which decides that one, under that doctrine, had to disclose his condition as to solvency. Insolvency is not within the reason of the doctrine. It is not more peculiar to underwriting than to any other contract. It does not touch any particular insurance or subject of insurance more than anything else. The underwriters' business is at home for inspection. It is just one of those ordinary happenings in business that a business man must inquire about and judge of for himself, and his means of

acquiring knowledge are just as open as they are in connection with any other contract. If he takes the cheapest insurance he must risk sometimes insolvency, but he cannot say "You did not tell me that you were on that day unable to meet your liabilities. I shall not pay the premium note, although my ship has arrived safely, and, moreover, all your premium notes of that period are invalid."

There is another defence contained in the 7th paragraph. This company, a mutual company, was organized in Boston in 1853. The statute required it to have $200,000 subscribed and paid in in cash or notes, for there was no share capital. These were really premium notes or cash paid in for premiums to be taken up in insurance. These notes were given and the company started business in proper order.

A subsequent statute (whether it was applicable or not to this company, it was apparently acted upon by it) contemplated the making of this necessarily fluctuating fund, and liable even to the statute of limitations, a more permanent security. It provided that the subscription notes as they matured, should be paid in or other notes substituted so that the amount of the original fund should not be reduced; that the subscription notes might be cancelled whenever the net profits were sufficient to replace the same, and such profits should be invested to be held as the permanent fund in place of the notes. I will call this the guarantee fund. It appears that the company made large profits, and those notes were cancelled under the provisions of the statute out of net profits. But apparently that guaranty fund, as far as the evidence shews, has been partially absorbed and is not now intact. There was a shrinkage of securities for one thing. The defence, in short, is that this impairment of the guaranty fund had happened before these policies of the defendant were effected, and that it was an illegality on the part of the company to effect these insurances and to take the premium notes, and so on. But the statute further provided that if a company became liable for losses to a sum beyond the amount of its cash fund, legal investments, premium notes received for risks terminated, subscription notes, then the president and directors knowing the condition of the company are made personally liable for losses on insurance effected while the condition existed. I dare say there were other remedies. But it is clear that

it was not ultra vires for the company in that condition to do this business, nor was the act prohibited.

To a receiver of the company collecting its assets for the creditors any such irregularity of the directors or officers is irrelevant and not a defence.

While I am of opinion that the matter of these paragraphs does not constitute a defence in either case, and some allegations are false, striking these out under this rule on the ground that they present no reasonable answer is another thing.

In as much as the case has to go to trial upon the defence raised in the 5th paragraph I think it would be better to allow defences raised in the 3rd and in the 7th paragraphs, which I have just dealt with, to go with it. But subject to this, that the jury notice must be struck out. The application asks for this. I have said enough to shew that they involve questions fit only to be tried without a jury. These questions would be very embarrassing to a jury and to a Judge trying it with a jury. The question of fraud or fraudulent concealment is peculiarly one for a Judge, and in England is generally tried by a Judge in the Chancery Division, the appropriate Court for that subject.

Then the questions under the laws of Massachusetts (which at this trial must be dealt with as questions of fact) arising under both the 5th and 7th paragraphs of the defence, and which may produce conflicting evidence because there is always variety in the decisions of the different States, make it unreasonable to have a jury trial.

Our provision is somewhat similar to that prevailing in Ontario and there a Judge has a discretion to strike out a jury notice under this provision. I refer to Peoples' Assn. v. Stanley, 4 Ont. L. R. 90; Whyte v. British American, 38 C. L. J. 165.

In my opinion in our practice it is more convenient for a Judge at Chambers to deal with the jury notice than for a Judge to do so at the trial; certainly more convenient for the parties, their counsel and witnesses.

The application striking out the 6th paragraph and the jury notice is granted, and as to the other matters is refused. The costs of both parties will abide the event.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. JANUARY 14TH, 1911.

PRATT v. BALCOM ET AL.

Will—Construction—Instrument Operating in Lifetime of Testator—Intention—Grant of Life Estate—Charge upon Lands.

Appeal from the judgment of LONGLEY, J., in favour of plaintiff in action claiming a declaration that land conveyed to defendants was charged with the payment of certain moneys to plaintiff and others.

W. E. Roscoe, K.C., in support of appeal.

J. J. Ritchie, K.C., contra.

DRYSDALE, J.:—The questions submitted here arise under a deed dated 16th June, 1884, and made between one W. D. Balcom of the one part and his two sons Edgar O. and Charles B. of the other part. I use the word "deed" advisedly, because although it was argued before us that the document in question was a will, and not a deed, I am clearly of opinion that the learned trial Judge was right in holding that the instrument was in fact a deed and intended to operate as a deed in the lifetime of the parties thereto. It on its face vested the property therein described in the grantee, provided a life estate only for the grantors, and subject to such life estate and the payment of certain moneys to other children of the grantor, seems plainly on its face to be intended as a then present conveyance of the property.

The only other question raised by this appeal was whether or not the moneys directed to be paid to the plaintiff, Jessie L. Pratt, and the other children of the grantors, was a charge upon the property conveyed by said deed. Defendants' counsel submitted that the transaction indicated a sale of the whole property mentioned in the conveyance, and that the moneys directed to be paid the other children formed the consideration, and that the only remedy was by enforcing an unpaid vendor's lien at the suit of the administrator of the grantor. I do not think this contention is well founded. I think it is a very plain transaction, and discloses a deed of gift by a father and mother of all their property to two sons,

subject to a life estate in the grantors, and subject also to the payment of certain moneys to the other children of the grantors. And I think the grantees take the property, and by the deed expressly agree to take it, subject to such life estate and to such payments. It was strenuously argued that there were no express words in the deed making the moneys payable a charge upon the property conveyed, and no language from which a charge would be inferred, and that the real estate passed free from any charge. I think that either under a deed or will, whether moneys are charged upon land is always a question of intention to be gathered from the instrument, and that here we have a case of an intention that the two sons, the grantees, shall take all the property of their parents, but subject to certain payments to be made by them out of the property so taken to their brothers and sisters. This to my mind is a very plain case, where all the property taken is held to be charged with such payments. It was conceded in the argument and properly conceded, that in case of a will giving real and personal property, with a direction to pay a sum of money out of the property so given, the real estate is held to be charged with such legacy. Here we have a gift of all the real and personal property of the grantors, with an express statement that it is the intention of the parties (all the parties) to the deed, that the grantors shall have a life interest and that the grantees shall pay certain moneys called in the deed legacies. Shall pay out of what? Surely out of the property conveyed. And if this is the reasonable reading of the document, I am of opinion it is a very plain case of a charge upon all such property. We are not without authority that seems to me much in point. When legacies are a charge on the real estate is very fully discussed by Chief Baron Abinger in Nyssen v. Gretton, 2 Y. & C. 222. There the Chief Baron says:

"It is in each case a question of intention. Whether the testator so intended depends on particular expressions appearing in the will, and the Judge determines the point according to the language of the will, not according to any rule of law, but as he would construe the intention of the party from any other document laid before him."

Then the Chief Baron gives a number of examples, amongst others the following:

"If a man left legacies generally, and then left his real and personal property to an individual, it would not from

thence be inferred that he meant to charge them on the real estate. But if he left legacies and devised his real and personal property to his executors, and directed his executor to see the legacies paid, you would infer from that direction given to the person to whom he left all the real estate, that he meant to charge them on the real estate. Again, where a testator gives his real and personal estate to one individual subject to legacies, that makes the real as well as the personal estate a fund for the payment of those legacies."

In the case before us, reading the deed as I do as one of gift of all the property real and personal, subject to a provision that the management or use for life of the property conveyed shall be in the grantor, and subject to the payments stipulated, I think it is one directly within the authority just quoted.

Other cases are, I think, also in point, viz., Gallemore v. Gill, 8 DeG., McN. & G. 570, and Preston v. Preston, 2 Jur. N. S. 1040.

In the former, the will vested in the trustees, the residue of the personal estate and the whole of the freehold and leasehold estates. A codicil directed the payment of a legacy, and it was held the presumption was that it was out of the funds vested in the trustees, that the payment directed by the codicil was to be made and the legacy accordingly held a charge. In the latter case, there was a devise to a son of the real estate, and also the residue of the testator's effects, with a direction that a certain sum should be paid to a grandson. There Sir J. Stuart, V.-C., thought nothing taken under the will was free from the obligation to pay the legacy, and states that it had been repeatedly decided that where there was a mandatory direction that the executor, who was also a devisee, of the real estate, should pay a sum of money, everything which he took under the will was subject to such direction.

These authorities I regard as helpful, but I think here I ought to and do base my opinion upon the simple question whether under the transaction disclosed, we have a case shewing the intention of the parties to convey on the one hand, and receive on the other, the grantors' property, and thereout pay certain moneys to the brother and sisters of the grantees. It is a question of intention, and in my opinion this intention is clear. I am of opinion such a transaction creates a charge in respect to all such moneys, and I think the appeal should be dismissed with costs.

NOVA SCOTIA.

SUPREME COURT.

CHAMBERS.

GRAHAM, E.J. JANUARY 7TH, 1911.

WEBBER v. GAFFIN.

Cause of Action for Assault — Assignment before Trial — Validity — Garnishee — Maintenance — Distinction between Assignments before and after Action Brought.

On the 25th November, 1910, Abraham Fried recovered judgment against Lewis Webber, in an action claiming damages for assault, and on the following day, under garnishee process, all debts due or accruing from Webber to Fried were attached to respond a judgment against the latter. Fried had previously assigned to defendant, in consideration of moneys advanced, all moneys which he might recover in the action against Webber, and this was an issue to determine the party entitled to the proceeds of the judgment.

Jas. Terrell, for plaintiff.

J. J. Ritchie, K.C., for defendant.

GRAHAM, E.J.:—It appears that Abraham Fried had a judgment against Lewis Webber for $147 damages for assault and battery. Judgment was entered on the 24th November, 1910. Just on the eve of the trial of this action, two or three days before, he (Fried) executed the following assignment to Annie Gaffin:

"I hereby assign and transfer to Annie Gaffin of Halifax, all moneys coming to me and which I may recover in suit brought by me against Lewis Webber of Halifax, for damages, in the Supreme Court, to reimburse her for moneys advanced by her to me during the time I was unable to work.

(Sgd.) Abraham Fried.

"Halifax, November 14th, 1910."

On the 25th November, 1910, under the garnishee provisions of the Rules, "all debts owing or accruing due" from Lewis Webber to Fried were attached to answer a judgment against Fried. There is an issue before me to determine the rights of these rival claimants.

I ought to say that I am disposed to credit the fact that the advances, chiefly of cash, were made by Annie Gaffin to Fried during his illness and the amounts. But while the subject of the assignment of a right of action is in its infancy, and this case really ought to be discussed in a Court of Appeal, I think I am safe in following the dicta against its assignability. In 4 Halsbury's Laws of England, 402, it is said:

"A bare right of litigation, such as a mere right to damages for a wrongful action, is not assignable."

He refers to Dawson v. Great Northern, &c., Railway (1905), 1 K. B. at 270, Sterling, L.J., and Fitzroy v. Cave (1905), 2 K. B. at 371, Cozens Hardy, L.J., and other cases.

In May v. Lane, 64 L. J. Q. B. 237, Rigby, L.J., puts the very case of damages arising out of an assault. There is no difference I think between the case of an action already brought but which has not become a judgment and a right of action before an action has been brought. I refer to 1 Halsbury, p. 52, where it is said:

"There cannot be maintenance in the strict sense of the term until the action is commenced."

In King v. Victoria Insurance Co. (1896), A. C. 256, the Judicial Committee avoided "discussing a question not free from difficulty."

I will have to give judgment for Webber with costs, and hold that Annie Gaffin is not entitled to the money under the assignment.

NOVA SCOTIA.

SUPREME COURT.

TRIAL—COLCHESTER.

GRAHAM, E.J. JANUARY 7TH, 1911.

LORRAINE v. NORRIE.

Action for Damages for Injury to Land Caused by Obstruction Erected in River—Riparian Rights—Counterclaim —Trespass and Assault—Evidence.

Action claiming damages for erecting obstructions on a stream and for overflowing plaintiffs' land and counterclaim for trespass and assault.

W. B. A. Ritchie, K.C., and H. McKenzie, K.C., for plaintiff.

J. J. Ritchie, K.C., and S. D. McLellan, K.C., for defendant.

GRAHAM, E.J.:—There is an action and a counterclaim. The plaintiffs and the defendant own land on opposite sides of the North river in Colchester county, not quite a mile above tide-water. Part of the land of each on the river is low in places and in times of freshets the water overflows the banks. At low water there appears to be a very considerable area of dry beach on both sides but at different points. This overflowing will account for the erection of the wing-dams by the defendant and the breakwater by the plaintiff.

The plaintiffs' breakwater on the west side of the river running longitudinally along the bank and consisting of trees, logs, brush and stones, was built as far back as 1875. The spur which retreats back from the river at right angles, or nearly so, joining the upper end of the breakwater, was constructed some years later but more than twenty years before action, as the plaintiff Percy Lorraine proves. The other plaintiff, honestly enough, was confused about the date.

The breakwater is now 160 chains along the bank and the spur 75 links.

Now these structures as originally erected or kept up are not as I understand it complained of in this case. Probably the statute has given the plaintiff a prescriptive right to them. Garrett on Nuisances, p. 111. But in August or September, 1908, after a freshet in July of that year, the plaintiff repaired them and, it is claimed, raised them over the original height. The next previous repairing had been done in 1902. This alleged raising was after the defendant on his side had constructed his upper wing-dam, nearly opposite but slightly above on the river.

This upper wing-dam of trees, brush and stone was constructed in the autumn of 1906. It ran from the defendant's bank into the bed of the river at nearly right angles, its course being s. 84 degrees w., and the river s. 18 degrees w., a distance of 1.68 chains, having between its outer end and the plaintiff's bank on the other side a distance of 75 links for the water of the river.

Later the defendant constructed on his side below at a distance of 1.82 chains, at the base from the other wing-dam what is called the lower or second wing-dam. The first half was constructed in September, 1908, and the outer half in March, 1909. It extends in length a distance of five chains, but it starts diagonally into the river bed and at its outer end is 1.80 chains from the bank leaving but fifty links from the other bank for the water of the river. It is of the same material as the other. It, if not the upper one as well, is even at low water submerged at the outer end. All of the witnesses agree that a wing-dam constructed at an oblique angle to the current, as this one was, better adapted to reflect the current of the river and divert it against the opposite bank than a wing-dam at right angles to the current. It was, however, pointed out that in course of time in the latter case, a similar action is in time produced owing to the right angle of the obstruction becoming an oblique angle through it being filled up with the deposits of gravel. These wing-dams not only deflect the current, but the volume and velocity of the water is greatly increased at their outward ends. There is thus caused scouring, and when the water escapes the confines of the wing-dam, part of it eddies around the ends and gravel is deposited in the back water below the dams. The level of the water is raised on the other side. In course of time much gravel has lodged between these two wing dams and this has a tendency to force the water over against the plaintiff's land.

The weight of evidence shews that the current has scoured beneath the foundations of the plaintiff's breakwater, and this is due to the upper wing-dam now assisted in my opinion by the lower one. The theory put forward by one of the defendant's engineers that this was due to another obstacle in the river, namely some wood from a bank lining of McKay's that has drifted away and stranded on the gravel now lodged above the upper wing-dam, may have caused the change of current and scouring, is I think untenable. The scouring was also produced before the wood went adrift and lodged there. That happened the winter before the trial and after the action was brought. But in any event I do not think it is the single cause of the damage now produced on the plaintiff's side. The lower wing-dam is a very aggressive structure. Its effect is to deflect

the current against the opposite side and by forming a permanent channel to cut off the plaintiff's land.

I think that the construction of these wing-dams cannot be justified. Parts of them are in the bed of the river. They are not merely a protection and defence of the defendant's land. They exceed that; they are aggressive and they are materially injuring the plaintiff's land.

The defendant justifies the construction of the upper one on the theory that the current was diverted upon him by a bank lining put in on the other side by the adjoining owner McKay. But long before that, years ago, his father had placed similar but shorter structures near this on different sites, when there was no bank lining on the other side. Besides, McKay's action would not justify the defendant in injuring the plaintiffs, and as I have intimated this goes beyond defence; it is aggressive. The lower one was in my opinion put in with the following view: Not far below that point the river turns sharply from running south to running west and the defendant's bank (it is intervale) laid on this new course, has to resist the force of the current running from the north. The defendant thinks it would be expensive to keep up a bank lining along there for the protection of his intervale and that the lower wing-dam above, by diverting the current, is a cheaper and more effective thing and that is no doubt so.

But it is only done at the expense of the plaintiff's land. If the defendant succeeds in maintaining his lower wing-dam the river, I think, would cut a new channel (a short cut it is true) diagonally across the plaintiff's land instead of following the two sides. Even granting the alleged raising of the plaintiff's breakwater and spur, and that this actually affects the defendant's land, such an obstruction cannot be justified.

The Lord Chancellor (Chelmsford) in Beckett v. Morris, L. R. 1 Sc. App., p. 56, said:

"The proprietors on the banks of a river are entitled to protect their property from the invasion of the water by building a bulwark ripae minuendae causa, but even in this necessary defence of themselves they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite side of the river."

And in the case of Orr Ewing v. Colquhoun, 2 App. Cas. 847, Lord Blackburn quotes from a decree prepared by

Lord Eldon in the House of Lords in a Scotch case that "the respondent ought to be prohibited and interdicted from the further erection of any bulwark or any other opus manufactum upon the banks of the Tay, which may have the effect of diverting the stream of the river in times of flood from its accustomed course and throwing the same upon the lands of the appellant."

There is this corollary to the principle quoted from Lord Chelmsford, and it will be found in the case of Trafford v. Rex, 2 C. & J. 265 in the Exchequer Chamber. I quote from the reporter's note:

"If an aqueduct be built so as in times of flood to pen back the water of a river and cause it to overflow the lands of the adjoining proprietors, they may raise fenders to protect their lands even though the water of the river be thereby forced against and endanger the aqueduct, unless by the construction or raising of the fenders the proprietors impede what was before the erection of the aqueduct the ancient and accustomed course for the escape of the waters in time of flood."

2. This brings me to the defendant's counterclaim. And his complaint is that the plaintiff by raising his breakwater and the spur has injured him.

The plaintiffs have up the river—and there the breakwater was constructed—a fair bank. But at this point the bank and the land behind it fall away.

I think in the first place that the weight of evidence shews that the breakwater was constructed on the plaintiff's bank and that its site did not extend into the bed of the river. The fact of the river having been forced over and scouring having taken place at the ends may cause it now to appear as if it had been built into the river. Anyway I think that it has not been extended outwards through any addition or repairs. The scouring has resulted in its tipping outwards at one point owing to scouring beneath, but the plaintiffs are not responsible for that.

Then as to whether it or the spur was increased in height in 1908, or subsequently before action brought in November, 1909. That is a difficult question of fact. There was at the time of the trial and probably at the time of action, a layer of at least eighteen inches of additional material on top of the former structure. There were many witnesses who spoke of that. Most of them made it two

feet higher. The evidence on the other hand shews the tendency of the material of such a structure of brush to sag as years go by, and whether this layer made the structure really higher than the original height of the structure is another question.

If anyone looks at one of the photographs and sees the nature of the structure, at least the part longitudinal to the river, he will see how difficult it would be to make a comparison with what it was in former years. However the mere weight of the impressions of witnesses, together with the eighteen-inch layer upon it now, and allowing for some sagging, lead me to conclude that the structures—both breakwater and spur—were really higher as the result of the work in 1908.

But whether this eighteen inches of additional height has effected anything of which the defendant may complain is another question. I think the weight of evidence—I am speaking more particularly of the engineer's evidence—is that the whole structure—breakwater and spur—do not deflect the current to the opposite shore. I grant that one of the engineers called by defendant does advance that view, but the reasons he gives to support his theory that the defendant's wing-dams do not deflect the current to the plaintiff's side, would lead one to conclude that the plaintiff's structure does not deflect to the defendant's side. I really think that the other engineer called by the defendant—a person too of more experience—does not controvert the plaintiff's two engineer's views that the whole structure is not calculated to deflect the current appreciably against the defendant's side and does not do so in fact.

But coming to the additional eighteen inches on top—and in dealing with this I must refer to the effect of deflecting the current as well as the effect of raising the level of the water by restricting it on the bank with a structure and consequently causing it to rise higher or go further on the defendant's side, then there is this difficulty in the defendant's way: The evidence does not shew that either effect has resulted from this act. Taking the levels from the defendant's plan, not likely to be taken at places favourable to any view of the plaintiffs, the old brush on the breakwater was 38.00, and on the spur 40.00, and these appear to be higher than most other levels on the plan.

The evidence of Mr. Doane, the engineer, speaking from actual observation at or just after a freshet, shews that the water had at two different points above marked on plan 6, flowed over the plaintiff's bank, and a pond of water had formed on the plaintiff's land from overflow, while on the spur the indications were that the water during the freshet had not risen more than a couple of inches.

Taking the whole evidence, and there is a great deal of it, given by unscientific witnesses who are liable to be wrong in their inferences, there is nothing which leads me to conclude that the effect of this raising of the structure has produced any effect on the defendant's land.

The defendant has, I think, a difficult task to shew that in that limited period the raising of the structure to that extent has produced any sensible effect on the plaintiff's side or is from the appearances there existing calculated in the future to produce it. He has not done so and as far as I can understand it there was nothing in the plaintiff's act of raising the height calculated to produce any sensible effect there. Moreover, under Trafford v. Rex, 2 C. & J. 265, the plaintiffs were entitled to raise the height as a defence against the upper wing-dam provided they did not interfere with the course and levels of the river as it existed before the upper wing-dam was put in.

And it is, I think, reasonably clear that, before the restriction of the water by the upper wing-dam, it would rise as high as the "old brush" of the plaintiff's breakwater and spur.

3. There are the additional paragraphs in the statement of claim against Percy Lorraine, namely, the breaking and entering and the assault. The other plaintiff was not a party to it. Before the action was brought the plaintiff Percy Lorraine with his two teams and five men employed by him started across the river to abate the lower wing-dam and commenced hauling it away. The defendant although alone undertook to resist this action. Now it is possible he was the first to assault Percy Lorraine; whether it was by striking or by pushing him is not material. It also appears that he pushed another of the party so that he fell into the water. The defendant himself was assaulted in turn, and while held in a disadvantageous position by another or others, the plaintiff, Percy Lorraine, inflicted rather severe blows—one at least—upon his head, and one at least on his cheek with

the butt end of a whip handle. The defendant then started for help and the plaintiff and his men left.

I have the greatest doubt as to whether the license given by law to enter and abate the obstruction was not abused by the act for excess, and that the act was not justified, and under the doctrine of the Six Carpenters' Case, the plaintiff Percy Lorraine was not made a trespasser from the beginning.

But it appears that a previous battery may justify a wounding under some circumstances, Cockroft v. Smith, 2 Salk. 642, provided the force used is suitable in kind and reasonable in degree.

These paragraphs I shall dismiss without costs because I think that the defendant received serious illusage at the hands of Percy Lorraine.

In respect to the action there will be judgment for the plaintiffs for the sum of thirty dollars as compensation for injuries to the plaintiff's land and an injunction to remove the wing-dams, but the extent and terms of the order will have to be settled when the decree is taken. The plaintiff will have the costs of the action. The counterclaim is dismissed with costs, except in respect to those paragraphs which I have already mentioned.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. JANUARY 14TH, 1911.

GRAHAM v. BIGELOW.

Practice—Witnesses — Commission to Examine — Form of Order—Appeal from Judge's Decision Settling—Interrogatories and Viva Voce Examination—Rule and Form —Discretion of Judge—English Practice Followed.

Appeal from the judgment of RUSSELL, J., settling a form of long order for the examination of witnesses out of the province.

W. E. Roscoe, K.C., in support of appeal.

J. J. Ritchie, K.C., contra.

DRYSDALE, J.:—This is an appeal from the decision of MR. JUSTICE RUSSELL, dated 2nd August, 1910, settling the form of a long order for a commission herein.

The application was made to the learned Judge on behalf of the plaintiff on the 15th day of July, 1910, for a commission to examine witnesses resident in Ontario and Quebec, before a commissioner at the city of Belleville in Ontario. This the learned Judge granted, and on the said 15th day of July the usual short order passed directing such a commission. From this order no appeal was taken. The parties failing to agree upon the form of the long order, the said Judge was applied to and on August 2nd, 1910, after a hearing, settled the form.

It is against the form of the long order so settled that this appeal is taken and the point, and only point, raised before us by appellant's counsel was that under our rules and practice, paragraphs 2 and 3 of form 34 in appendix K. (long order for commission) could not be varied and that witnesses could not under commissions abroad issued by this Court be examined except upon interrogatories and viva voce, and that as this long order so settled provided for viva voce examination only it must be set aside. Counsel distinctly challenged the right of this Court or of any Judge thereof to direct a commission for the examination of witnesses abroad limited to interrogatories only or to viva voce examination only, and asserted that the proper practice under our rules compelled us in all cases to direct both interrogatories, and viva voce examination, upon the subject matters thereof or arising out of the answers thereto.

In view of the well settled English practice and of what I have always regarded as the settled practice of this Court, it becomes necessary to examine carefully the ground of this contention.

It is not open to argument that under the English Rules such a commission may issue and the examination of witnesses directed to take place either by interrogatories alone or by viva voce examination alone or by both. See Hume-Williams and Macklin, pages 11 to 19.

The English Order 487, that authorizes a commission abroad, is our Order 35, Rule 4. Our Order is in the exact terms of the English Order, and authorizes any Judge of this Court to make an order for the examination upon oath, &c., &c., before any person at any place of any witness or person and may empower any party to give such deposition in evidence. Then follows Rule 5 reading as follows:

"Orders for a commission to examine witnesses shall be in the Forms Nos. 33 and 34, Appendix K., and the writ of commission shall be in the Form No. 11 in Appendix J. with such variations as circumstances require."

This Rule 5 differs slightly from the English corresponding rule, viz., 488, which reads as follows:

"An order for a commission to examine witnesses shall be in the Form No. 36, in Appendix K., and the writ of commission shall be in the Form No. 13 in Appendix J., with such variations as circumstances may require."

It will be noted that the only difference between the English rule and ours is that ours prescribes forms for both short and long orders, whilst the English prescribes a form for the short order only, and it is upon this difference that the appellant herein staked his appeal, his contention being that upon an inspection of the form of long order prescribed in our rule 5 it will be found that it is drawn up to suit only a case where interrogatories and viva voce examination together are directed; that it cannot be varied or departed from; that there can be no interrogatories alone and no viva voce examination alone; and that a Judge in directing a commission is limited as to the examination he directs by the hard and fast form of the order as to the method of examination.

In view of the fact that there is no limitation as to the method of examination to be directed in the empowering rule (14), and that the rule (5) prescribing a form expressly says that the form prescribed shall be "with such variations as circumstances may require," I think that an argument based on the appendix form is manifestly unsound. It would, if followed, at once destroy many of the powers committed, and I think necessarily committed, to the Judge's discretion under the English practice, and I see no reason here for any such slavish following of the form in question under our rule as would bring about such results.

I notice the form requires two commissioners. Here one was directed and if the form must be followed there should be two. It is true this was not complained of in the appeal, but if the form must govern notwithstanding directions such a matter is quite as serious as other variations and the expense—in many cases the useless expense—of two commissioners could not be departed from.

Again a stay must always be inserted if you follow the form, although a Judge may make it an express condition of granting the order that there be no stay. I think the argument in attempting to discriminate between our practice and the well settled English practice is ill-founded and should not receive support. It is based wholly upon a form prescribed in respect to a matter that necessarily contains many things in the discretion of the Judge directing the examination of the witnesses abroad, things that in the exercise of such discretion must require variations from any set form. And when I find the rule prescribing the form expressly saying that it shall be with such variations as circumstances require, I think it does not leave the question open to serious doubt.

A question is raised, I believe, as to whether the learned Judge below exercised his discretion properly in directing viva voce examination of the witnesses under the commission herein ordered. This was not opened by appellant's counsel, but as it has to be dealt with I may say I am of opinion that the discretion was properly exercised, and that it was not a case where the ends of justice are at all likely to be served by limiting the examination of such important witnesses to interrogatories alone. The issue as stated by Mr. Justice Russell may indeed be very simple, but the importance of a very full examination of the intended witnesses on such issue on the part of both parties, especially on the part of the defendant, is to me obvious, and it is not the class of evidence which for my part I should for a moment consider ought to be limited by mere interrogatories prepared beforehand. It is the importance of the evidence to be obtained that ought to be the determining factor in directing the method of examination. The practice, to my mind, is well stated by Hume-Williams and Macklin in the following words:—

"It is clear that it is only where the evidence to be obtained is of a simple kind that the method of interrogatories alone should be adopted. Where the case is complex, or where the evidence that will be given is not known with any great degree of certainty beforehand, it is advisable to obtain an order for a viva voce examination entirely, or for a viva voce examination in addition to the examination by interrogatories. And it is always safer for the defendant to cross-examine viva voce."

In my opinion the appeal should be dismissed with costs.

The other members of the Court concurred.

NOVA SCOTIA.

SUPREME COURT.

CHAMBERS.

JANUARY 24TH, 1911.

CUMBERLAND RAILWAY AND COAL CO. v. McDOUGALL ET AL.

Labour Union—Mine Workers—Contempt—Disobedience of Order of Court Restraining Interference with Business—Attachment.

Motion for attachment for contempt.

H. Mellish, K.C., in support of motion.

W. F. O'Connor, K.C., contra.

LONGLEY, J.:—On the 23rd day of June, 1910, DRYSDALE, J., made an order in this cause in which he ordered that the defendants, with the exception of one J. D. McLellan, and all other members of the United Mine Workers of America, resident in Nova Scotia, and being members of District No. 36 of the U. M. W. A., and all members of Local Union 469 of said U. M. W. A., be restrained until final judgment from "besetting and watching the place or places where the plaintiff carries on business or of any other place or places in which any person or persons employed or about to be employed by the plaintiff or doing business or seeking to do business with or enter the employ of the plaintiff resides or works or happens to be with a view to compel by unlawful means such other person or persons to abstain from working for the plaintiff or seeking to do so or of doing any business with or entering the employ of the plaintiff, &c., and from intimidating by violence or threats of violence any person or persons, and from persistently following such person or persons in a disorderly manner through the streets, and from persuading, procuring, or inducing by unlawful means workmen to leave the employ of the plaintiff, and from conspiring or combining by unlawful means to induce workmen not to enter or remain in plaintiff's employ, and from inducing or attempting to induce by unlawful means workmen to break their contracts."

This order was submitted to review by the full Court and after argument sustained.

An application is now made to me for an attachment to issue against some of the named defendants and some of the defendants included in said order as members of the United Mine Workers of America residing in Nova Scotia and members of that organization for District No. 36, for alleged disobedience of the terms of such restraining order.

Several affidavits were submitted to me giving in detail on a certain day and at certain hours and minutes of said day acts committed by defendants which seem to be in direct violation of the express terms of said order. This application is made for an attachment against Joseph B. Moss and Milton Cameron, two named defendants in such restraining order, and against Lionel Dobar, James Price and Thomas Long, unnamed as defendants in said order, but defendants in the general terms. After careful consideration I am unable to make any distinction between the acts of those specially named and those fully included under the general terms of restraint against members of the U. M. W. of America in Nova Scotia. In my judgment all are equally bound by the order and equally liable for its wilful violation.

By the affidavit of Owen L. Morgan supported by several other affidavits it is clear that a crowd of three or four hundred striking workmen, for the most part members of the Union No. 469 of the U. M. W. A. on the 16th day of December, 1910, between three o'clock in the afternoon and half-past four patrolled in long files the main street near the entrance to the slopes worked by the plaintiff company, and continued this patrol until the men working in plaintiff's mine came to the surface and were on their way to their homes, to gain which it is necessary to cross said Main street. As soon as the men appeared on their way to their homes this crowd of striking workmen assailed them with the cry of "Scab! scab! You dirty scabs!" and "Head them off!" and as soon as the plaintiff's employees attempted to cross the street the patrol closed in upon them and began to crowd and jostle them in a violent and forcible manner, to impede their progress across the street, and thus made it necessary for the workmen to work their way through by dodging and force.

The affidavits clearly identify each of the above named defendants as a part of the crowd and actively participating

in its actions. One of them, Moss, was one of those who cried out "scab."

The affidavits submitted on the part of the accused defendants do not seem to me to meet specifically these definite charges. Moss admits that he used the word "scab," but gives a modifying effect to its meaning which, to my mind, is quite unsatisfactory. No attempt is made to deny the assembling of large masses of the strikers, that the entrance to the mine was the objective point, that insulting epithets were applied to plaintiff's workmen as they were on their way peaceably to their homes, nor that jostling and crowding took place.

In my judgment, on a reasonable interpretation of the order of Mr. Justice Drysdale, these acts were precisely those which the order was intended to prohibit, and the active, aggressive and open manner in which defendants participated in prohibited acts make it impossible for me to reach any other conclusion than that they were done in deliberate and wanton defiance of the terms of the order and constitute a plain contempt of the order of the Court. In this view I have no alternative but to direct an attachment against the said Joseph B. Moss, Milton Cameron, Thomas Long, Lionel Dobar and James Price.

I am disposed to think that defendants, if they so desire, have an appeal to the full Court from my decision in this matter.

NOVA SCOTIA.

SUPREME COURT.

MEAGHER, J. JANUARY 25TH, 1911.

TRIAL.

CHISHOLM v. THE HALIFAX TRAM CO.

Negligence—Accident to Person on Street Railway Track—Guard Rail—Improper Height of Rail — Contributory Negligence—Evidence—Damages—Quantum.

Action claiming damages for injuries received by plaintiff in consequence of the defective condition of defendants' rails.

J. J. Ritchie, K.C., for plaintiff.

H. Mellish, K.C., for defendant.

MEAGHER, J.:—The plaintiff on the 2nd of February, 1910, was driving slowly up Quinpool road in his sleigh when one of the runners came in contact with the guard rail of the defendant's track at the corner of Quinpool road and Oxford street, with sufficient force to stop the sleigh, upset it and throw him violently upon the ground fracturing the upper bone of his right arm at the shoulder joint and otherwise brusing him on the arm and chest. He suffered very severely for a considerable time from the injury and even yet, at times, it causes him pain. He never will be able to raise his right arm above the level of the shoulder or extend it towards the left beyond the (front) centre of the left arm at its junction with the shoulder. His injuries however, while he will never have the same free use of his arm as before will not interfere with his professional work except in obstetrics. The horse was cut and the harness practically destroyed, but no claim was made or alleged for these.

The accident occurred about noon. He was taken to a house near by, and half a grain of morphia administered, and after a short rest he was taken home and medical aid summoned. The next morning he was taken to the hospital and the arm set. He was confined to bed for a fortnight, but remained in the hospital until the first of March. He was unable for fully eight weeks to do any work, and during the next five he only saw a few patients at his office, but finding it fatiguing he quit work and went away to recruit. His sufferings were very great during the greatest part of the thirteen weeks and were quite considerable during the balance of that time, and for some time after, and even yet he suffers some from it especially when he raises his arm above the shoulder level.

The income from his professional earnings averaged not less than six thousand dollars per annum.

At the place of the accident the track curves from a point north of the centre of Quinpool road into Oxford street. It is quite a long curve, and of such form that a driver desirous of striking it at right angles anywhere near the centre of the road would require to turn his horse nearly

across the road with his head well to the southward before he could do so.

The north side of the roadway, east of the junction of the named streets is quite narrow, and was at that time not in use by teams owing to its lumpy and uneven condition, and while perhaps not actually unsafe was yet in such a state as to justify drivers taking the opposite side as they all did.

The plaintiff followed the usual beaten track and started to cross the curve, and when nearing the curve turned his horse towards the south so that he would as nearly as might be strike the outer side of the curve at a right angle. He was travelling quite slowly at the time; the off runner struck the guard rail and caught so sharply as to stop the sleigh and upset it and caused the injuries complained of. There was only enough snow at the time to make good sleighing, and this raised the surface at the outer side of the main rail somewhat and reduced correspondingly the height of the guard rail; made it less high than in the absence of snow. The surface of the street where the sleigh was at the time of the contact was practically level, solid and well beaten down to a width of about two sleighs, or say eight feet or so.

Contributory negligence was not imputed to the plaintiff during the trial, or on the argument at the close, some days later. There was no ground for such a contention. The only point made against the plaintiff was that he attempted to cross at a wrong angle.

It was conceded by both parties that the height of the guard rail was practically the only question necessary to be considered on the subject of negligence. I shall, therefore, summarise the evidence upon it.

The plaintiff did not measure its height, but he says when he got on his feet he looked at it and it seemed very high and sharp where he struck it, and that the snow where he crossed was at least two inches above the outer rail. The latter is too high an estimate, because, otherwise, it would have entirely overcome the height of the guard rail even taking the highest estimate or measurement given of it. He was scarcely in a condition to observe very closely then.

The plaintiff's son, a student of civil engineering, examined the rails and the surface at and near the locus two or three days after the accident and found the tread rail level with the street. He measured the guard rail in several

places and found it between two and one and three-quarters inches above the level of the tread rail; the side was worn flat and the edge very sharp. At a point ten feet from where the guard rail began it was two inches; ten feet further along it was one and three-quarter inches. The latter was quite near the point on the plan which the plaintiff fixed as the place of the accident. The witness measured thirty-five feet from his starting point and found it one and three-quarter inches. I pass by what he said about the class of rail. I have no means of testing the accuracy of his measurements.

Clarence Longard heard of the accident, and a few days afterwards saw and examined the rails there. and found the guard rail very sharp, and thought it was at least two inches above the main rail. He drove over it safely, but, knowing of the accident, used extra care.

Dr. Ross, a week after the accident, while walking his horse over the curve, was upset; he endeavoured to cross at right angles, and turned his horse to the southward for that purpose, but the runner caught on the guard rail and the sleigh upset. He was evidently mistaken in saying his nigh runner struck; that could not be unless his horse's head was pointed into Oxford street. Moreover, a witness who saw the affair said the sleigh upset to the southward, thus shewing it was the off runner struck. Dr. Ross examined the guard rail and said it was fully two inches above the main rail.

Arthur J. Dove, a driver of long experience, crossed the curve a few days before plaintiff's mishap; he approached it at about six miles an hour, and turned his horse to the southward so as to take the curve as much as possible at right angles. The off runner struck the guard rail, broke the runner itself, and bent the shoe into a V shape, beginning about eighteen inches from where the curve of the runner commenced. The force of the blow was undoubtedly great to do that. He examined the guard rail then, and found it was considerably higher than the level of the main rail, and he attributed his accident to such height.

Dr. MacAulay drove in a sleigh over the place the day after plaintiff's accident and looked at the rail there, and said the guard rail was about two inches above the other. When returning into town and driving slowly, not much if anything faster than walking, he turned his horse southward,

and approached the curve at almost right angle. Nevertheless his runner struck the guard rail first and so sharply as to upset his sleigh.

Robert Corbin saw the plaintiff's mishap and saw one Lownds upset and thrown out there the same day. He said the guard rail was higher than the outer one.

Jeffry Terrio was upset on the north side of the track, but he did not cross the curve.

James Purcell, an old section foreman of the I. C. R., was with his son, the other plaintiff, when he was upset and injured, at the same place, on the eighth of February; they were travelling from three to four miles an hour. They were upset from the same cause, and in the same manner as the others.

Harry J. Walker, a witness of fairness and intelligence, in the employ of Corbin, quite close to the locus, saw the plaintiff's sleigh before it was righted. He saw a great many sleighs upset there, seven in one day, before the plaintiff's accident within a fortnight or three weeks before, and several within a short time afterwards. He examined the rails there several times and did so after plaintiff's mishap, and said the guard rail was two to two and a half inches higher than the outer rail.

There was a beaten track at that time and all teams crossed about the same place on the curve, and that was quite near where the plaintiff indicated he crossed. He also said that teams coming towards the city kept a little to the outside so as to face towards the gutter. It was impossible for a team coming to town to drive straight over that track and avoid an accident. Those coming in kept more to the left than those going out so that they could pull to the south and approach the curve in a safer way; more at right angles. I regard this as his meaning in this particular.

Dr. Harrison was upset there about the middle of January by his runner catching in the guard rail; he examined it and saw it was about two inches above the level of the main rail; very little snow there then.

The defence called Edward Foster who visited the place about a week after the accident. He said the guard rail was one and a quarter inches above the main rail at its highest point; they measured in several places where they thought it was highest. The superintendent, Crosby, the

trackmaster, Grant, Dickson, the city engineer, Doan, and a policeman, were present.

The measurements were made by resting one end of the spirit level on the guard rail, the other was held by hand; he could not say who held it, and did not make any notes of the measurements, and did not see anyone else do so.

The policeman Tough was present and he told them to measure where he, the policeman, thought was highest, and they did so. It seems to me rather a singular proceeding for the superintendent, the trackmaster, Dixon, another official, and the city engineer, to subordinate their judgment to that of a very ordinary policeman, in selecting the places to be measured.

The policeman thought he was told to take the measurements down; at any rate he said he did so, and put them in a book which he was asked to produce. He looked for it sometime before the trial and did not find it; but the inadequacy of his search is shewn by the statement that it was probably in some of his other uniforms; just the place where an earnest searcher for it would look, that being the place apparently where he kept it. Such a search would be a very short one, as it is not probable he has very many uniforms.

Alexander Grant, the track foreman, said the guard rail in question was there from April, 1906, and was not changed until June following the accident. He was present at the measurement, and an inch and a quarter was the highest obtained. The guard rail was spiked to the sleeper and not bolted to the tread rail. Those in use by defendant are of both kinds, and that is the only difference in them. In cross-examination he said the longer the guard rail was in use the sharper it would be, but at the close of his evidence he denied he had done so.

On the tenth of February the guard rail was taken off, raised, and cleaned, and all the frozen ground under it removed, and then put back. He assisted Foster in making the measurements and held the end of the lever over the main rail and used the rule in making the measurements. Great care was necessary in making the measurements in that manner; and it would be somewhat difficult for him to hold the level perfectly still and level—watch the drop in it and at the same time take the measurement and do it with

perfect accuracy. I was none too favourably impressed with this witness.

Dixon, a much fairer witness I thought, measured the height some days after the accident, and the greatest height he found was one and a quarter inches; he did not detail his methods. The city engineer and the manager were present.

The standard guard rail is about three-quarters of an inch above the main rail; and it does not appear to be necessary, in the matter of efficiency, to be more than an inch; but the greater height renders it more effective. He did not, however, pretend to be an expert on this; but no doubt he had some knowledge and experience on the subject.

I have, in the foregoing, set forth all the material portions of the evidence on both sides, and make the following findings therefrom:—

1. That the guard rail was unnecessarily high, and that was the cause of the accident, and the defendants were negligent in having it in that condition. I have no doubt it was in excess of an inch and a quarter, probably nearly, if not quite, two inches above the other rail.

2. That the defendants had notice of its condition, but if they had not, their lack of knowledge was due to want of care on the part of their track foreman Grant. He went over the track nearly, if not every day, and if reasonably vigilant would have observed its excessive and dangerous height.

3. That the defendants had notice of accidents occurring there. I infer that. I mean they had heard of them before the plaintiff's occurred, and they should have promptly remedied the condition of the rail and reduced its height and thus rendered it reasonably safe for public travel; but

4. Whether they knew or had notice, of its unsafe state or not, before the plaintiff's accident does not, in my opinion, make any material difference. They owed the public the duty of keeping their track in a condition reasonably safe for public travel by night as well as by day, and that they did not do, so far as the curve referred to is concerned.

5. The measurements made for the defendants were really no better, or at the best very little better, than the estimates or measurements made by the plaintiff's witnesses. The defendant's measurements depended for their accuracy upon the judgment of the policeman, which may have been quite inaccurate. Dixon's measurement does

not count for much because of lack of information as to where he measured and how.

6. Considerable stress was laid upon the fact that the edge of the guard rail presented a very sharp edge to those crossing from the west and it was negligence to have it so. I cannot accept this view. I find it could not be otherwise. the friction of the wheels of necessity sharpened it, and the longer it is in use the sharper it becomes. The fact however of its being so sharp, and therefore very liable to take a strong grip of a sleigh shoe crossing it, so strong as often to impede the sleigh's progress entirely, makes it imperative in the interests of public safety when sleighs are in use, to have the guard rail as low as possible consistent with the reasonable and efficient operation of the tramway.

7. That unless a person drove with extreme care over the curve and brought both runners on the guard rail at the same instant of time, he was very liable to be upset. This at night would be practically out of the question; and even in the day time would necessitate turning the horse almost, if not altogether, directly across Quinpool road; and in order to do that the driver would require, in order to get enough room for that manœuvre, to cross at, or very close to, the apex of the curve having his horse heading across Quinpool road. There are very few drivers skilful or observant enough to accomplish that task even in day time successfully. Of course if there were much snow near the outer side of the main rail the difficulty and danger would be greatly reduced, perhaps altogether removed.

8. All the accidents spoken of in the evidence happened to sleighs coming into the city and none to those going out. The shape and condition of the guard rail only made it dangerous to those coming towards the city. I am unable to believe that the track at that point could not with ordinary skill and care be so laid and maintained as to enable sleighs driven with ordinary care and skill as the plaintiff's certainly was, and crossing it almost at any angle, except a sidewise direction, to pass in safety over that curve.

The winter was well advanced at the time of the injury, the frost had ample time to do its work; and had thrown the rail up somewhat and this was assisted in the same direction by the accumulation of earth, snow and dirt under

it. This should have been seen and remedied in due season; and would have been if ordinary care and attention had been bestowed by defendants upon their track and rails. I am persuaded they knew the effect frost, snow and dirt had upon such a rail and they should have guarded against them. Many accidents occurred there in the same way apparently as that to the plaintiff for some weeks before and some time after that event, but none was shewn to have happened after the rail was raised, the place cleaned and the same rail relaid. I think I may fairly call this circumstance in aid, in corroboration I should say, speaking accurately, of the view expressed above that the height of the rail was excessive, and beyond what was reasonable or necessary for the safe and efficient operation of defendant's cars at that point.

I should, however, have made the same finding irrespective of the circumstances referred to in the next preceding paragraph.

I do not attach any weight to, and am not entitled to do so, and the plaintiff's counsel disclaimed all intention or desire to use the fact of the removal of the rail in the following June, and the substitution of another, against the defendant; it is a fact of no moment in the case. The taking up of the rail and removal of the dirt and frozen earth beneath it stand in a different position and may be regarded. It was not introducing a change of structure. Grant, however, said he did not think that had any effect on the rail; he could not find it different; but he took no steps to ascertain that fact and I cannot avoid the conclusion that it was strange he did not. They had made measurements before, and a comparison after would have been very helpful if carefully and properly made.

If the action of the frost and the frozen dirt getting under it had not thrown the rail up and out of its normal position, there was no occasion to disturb it and clean beneath it. I have not allowed these circumstances to weigh further with me than as above mentioned. The defendants gave no evidence to shew that even an inch and a quarter, taking their own measurements, was necessary for the safe and convenient operation of their system at that point, I assume the flange of their wheels is no greater than that on the wheels of the I. C. R. So far as any evidence may be said to have been given in this case

it tended to shew that about, or a trifle over, three-quarters an inch in height of the guard rail above the main rail is sufficient. Whether that is strictly accurate or not I have no manner of doubt that even an inch and a quarter is much too great.

The plaintiff is entitled to substantial damages; his sufferings for quite a while were very great, his arm is permanently injured and its free use impaired and in one branch of his profession lessens his capacity somewhat, but to what extent is not shewn. He was disabled from earning anything of moment for about three months, his hospital expenses (admittedly) were fifteen dollars per week, while two of his medical attendants are entitled to call upon him for their services to an extent of at least about two hundred dollars.

Taking the whole case into consideration in the light of the principles governing such cases, I am of opinion he is entitled to reocver twenty-eight hundred dollars, with his costs.

In an interview with Dr. Silver when the task of setting his arm was about completed, or right afterwards, he said he did not impute any blame to the company. He had gone through nearly twenty-four hours of very great suffering and had had several heavy doses of morphine and other drugs of similar action and was not in a frame of mind to appreciate what he said very fully, perhaps not at all.*

* REPORTER'S NOTE:—Purcell v. The Halifax Tram. Co.—This was an action claiming damages for injuries received under similar circumstances to those in the above case, at the same point on defendants' line, and resulting from the same cause. In this case, also, damages were awarded to plaintiff, but in a larger amount, the injuries received being of a more serious character.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 2.

JANUARY 26TH, 1911.

JENNIE OICKLE v. JOSHUA OICKLE.

Assault—Defence of Justification—Counterclaim for Slander—Municipal Tax Collector—Right to Eject Ratepayer when Calling to Pay Rates—Trespass—Application for New Trial—Damages—Amendment—Costs.

James A. McLean, K.C., and J. W. Margeson, for plaintiff.

V. J. Paton, K.C., for defendant.

FORBES, Co.C.J.:—The plaintiff is a married woman and brings this action to recover damages from the defendant because of his assaulting and beating her in his store at Upper Branch, Lunenburg county. The defendant is a storekeeper at said village and receives and delivers the public mail at his shop, and also is a municipal tax collector and receives the public rates at his place of business. The defendant denies the assault, but admits he ordered the plaintiff out of his store and afterwards laid hands on her to put her out and says he had a right to do so and counterclaims for damages for slander by reason of plaintiff saying "he (the defendant) had cheated her last year on the rates." There is no doubt about the assault on the plaintiff having been committed by defendant. Plaintiff and her sister and Conrad prove it. Was it justified? Had defendant the right to turn a ratepayer out of his shop, she being there (as evidence shews), for purpose of tendering and paying her rates and I think the plaintiff had a perfect right to enter defendant's store, under the circumstances, at any time to pay her rates and the defendant could not turn her out, unless she committed a breach of the peace or made herself guilty of a misfeasance. The Six Carpenters' Case, I think, settles that point. I do not discuss the right of a storekeeper to pick and choose his customers as he might possibly then be on a different foot-

ing from a municipal collector. The evidence here excludes the theory of the storekeeper. Under my finding the plaintiff was not a "trespasser ab initio." The defendant says he took hold of her and tried to turn her out because she said to him "he had not billed . . her for the rates but had cheated her out of rate money last year." There is considerable conflict as to what was said at that time, but I have no difficulty in accepting the plaintiff's evidence as it is corroborated by Mrs. Hirtle and in the greater part by Mr. Conrad, the only witnesses present. The defendant lost his temper and swore at the plaintiff and ordered her out of the shop and then laid his hands roughly on plaintiff and the assault began. The words used by the plaintiff were in reply to defendant's remark, as admitted by himself, "Shut up and get out of this. I want none of your chin music in here, get out." No words of plaintiff in response to these remarks could justify an assault on his part and I am compelled to find the assault was committed without any justification on defendant's part. It was not a serious assault and probably had defendant asked Mrs. Hirtle to take the plaintiff out she would have done so or had he gently asked the plaintiff to go out she would have done so, but I cannot see the reason for defendant getting the two brooms and roughly backing the plaintiff over Conrad's legs. Under the circumstances I think $10 will compensate the plaintiff for the assault, and I find accordingly.

The defendant counterclaims for damages for trespass and for slander. Upon my findings and the evidence herein I cannot hold the plaintiff committed any trespass on defendant's property, and that defence must fail. As to the slander I am compelled to hold it not proven. In the first place the word "cheat" is claimed to have been spoken about the defendant in the way of his office, etc. The defendant alone says this word was used and the plaintiff denies the use of it and she is supported by one witness, and Conrad swears "nothing was said about cheating by plaintiff to defendant," nor were the words alleged by defendant in his counterclaim to have been spoken by plaintiff, heard by any third party, and as it is essential that there be a publication to a third party, the defendant has not established his alleged slander. Mr. Paton, K.C., after the close of the whole case and while counsel for the

plaintiff was closing, moved to amend his claim and allege the words admitted by the plaintiff and her witnesses to have been spoken. Mr. McLean, K.C., objected and asked leave to plead justification in reply and for a new trial as he was taken by surprise. I think the application is too late, as it could have been made at the close of plaintiff's case at the very latest and I refuse it, as I intimated at the time. Besides I would be compelled under the evidence to hold the language justified. The plaintiff and her husband established the error or overpayment to defendant. I am compelled to dismiss the counterclaim and to give judgment for plaintiff for $10 damages and costs. There need only be one bill of costs covering the proof of claim and the dismissal of the counterclaim.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 2.

JANUARY 26TH, 1911.

LOREN OXNER v. MOREN HATT.

Sale of Goods—Offset—Novation—Grounds for Withholding Costs on Appeal from Magistrate.

James A. McLean, K.C., and J. W. Margeson, for plaintiff.

D. Frank Matheson, K.C., for defendant.

FORBES, Co.C.J.:—The plaintiff sued the defendant in the Magistrate's Court to recover the sum of $39.21 for the price of goods sold to the defendant. The defendant pleaded an offset of above bill of $27.96, which plaintiff accepted and tried to collect, but failed to realize on, and for $2 for costs of two trips to Chester Basin. The magistrate disallowed both items of offset, but struck off $1.19 from plaintiff's claim for interest claimed and gave judgment for $38.02 for plaintiff. An appeal was taken. I think the magistrate was wrong in not allowing the defendant credit for the "due bill" of $27.96. The plaintiff got the due bill on August 20th, 1909 and kept it till

March 19th, 1910. At this time the defendant had $127.96 to his credit with the mining company whose manager gave the due bill and the mining company charged up the due bill to the defendant and failed just about the time the plaintiff returned the due bill to the defendant, as uncollectable. Besides, the plaintiff on November 15th, 1909, wrote to defendant a letter claiming a balance of $14.09 after giving credit to defendant for the amount of due bill. A complete case of novation is established and I find defendant entitled to that credit. In addition the defendant by himself and brother prove the incorrectness of two items of plaintiff's account, namely, cigars and cement amounting to 75c. and 40c., or $1.15. The other items in dispute of about $2 I cannot find in defendant's favour for want of proof to fix his price and I accept plaintiff's version as to the prices of those items. The sum of $29.11 will be deducted from the plaintiff's claim and he will get judgment for $8.19 without costs. I withhold costs from both parties as the magistrate should have given judgment for the correct amount in his Court and the defendant's appeal was justified, though he has not paid any money into Court, and because the amount is so trifling.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 2.

JANUARY 27TH, 1911.

LAURIE EISENHAUER v. JOTHAM MACKAY.

Exchange—Sale—Horse—Consideration—Warranty.

James A. McLean, K.C., and J. W. Margeson, for plaintiff.

D. Frank Matheson, K.C., for defendant.

FORBES, Co.C.J.:—The action is brought to recover the value of a pony waggon alleged to have been given plaintiff in an exchange as follows. The plaintiff agreed to give a horse in exchange for a pony and harness and waggon, and $80 cash. The plaintiff delivered to defendant his horse

and received the pony and harness and cash $80, and the waggon was in a repair shop and three days later the defendant refused delivery of the waggon alleging fraud and misrepresentation as to the qualities of the horse on plaintiff's part. The case was tried without a jury and considerable contradiction occurred between the witnesses. The whole case turns on whether the plaintiff gave a verbal warranty as to the soundness of his horse at the time of sale. The evidence shews that the parties met in plaintiff's blacksmith shop at New Germany, Lunenburg county. The defendant brought his pony to be shod and the plaintiff's horse was in an adjoining barn. Messrs. Moore and Eisenhauer Sr., were present during the first part of the talk, but were not present during the last part, when the bargain was made and during the time the alleged warranty was claimed to have been given. In fact that only proves that the defendant said "he knew the d—n horse better than they did." The defendant denies he said this and swears he only saw the horse once before in his life and that he did not recognize the horse at the time of the trade, and the plaintiff tries to prove a general knowledge of the horse by defendant, but fails in connecting any such knowledge with the defendant. And I think the subsequent conduct of defendant proves he had no knowledge of the horse's unsoundness, as it is admitted that within three days he repudiated the bargain. Besides I hold, if the plaintiff did give the warranty, as alleged by defendant, it would not be inconsistent with the remark above stated to be made by defendant, as the defendant could easily have asked for the warranty and still have said he knew the horse well. The plaintiff knew and swears he knew the horse was a windsucker and a cribber and sometimes turned or shied in harness, yet he did not tell these facts to the defendant but kept silent and relied on defendant's knowldge as previously stated. Plaintiff took defendant for a drive to test the lameness of the horse as he had a leg cut and under treatment at the time, and it was admitted by plaintiff the trade was made after the return from the drive in the shop and no one present but the plaintiff and defendant. The plaintiff says he told defendant he bought the horse for $145 while as a fact at the trial he swears he only paid $115 for him, and says he misled the defendant as it was none of his business what he paid for him.

Again the plaintiff swears he sold the pony, harness and waggon for $25 cash and a note for $45 within a day or two or before three days after the trade, and before he got possession of the waggon. This may not be undue haste as plaintiff made a profession of trading horses and I don't lay much stress on it. "Oliphant on Horses" says wind-sucking and cribbing are vices in a horse and are not such vices as the law of "Caveat Emptor" applies to if a general warranty of soundness was given. The defendant swears plaintiff several times during previous months spoke to him about buying the pony outfit, and on this day the plaintiff spoke of it again and defendant said if you've got one to suit me, a good sound horse, and plaintiff replied he had just the one. Defendant says they chaffed until later on when Moore and Eisenhauer, Sr., had left, when they went to the barn and looked at the horse and talked trade, and defendant said, "if he could get a horse that would suit and was sound and kind and would work he might trade," and the plaintiff slapped his horse and said "he was just the horse the defendant wanted," and the defendant asked what boot he wanted and plaintiff said, "Joe, I won't trade except for $80 to boot," and plaintiff offered $75. The defendant feared lameness, and the plaintiff then harnessed up the horse and drove defendant a short distance and horse shewed no lameness, and on the drive defendant asked plaintiff "if the horse had a trick of turning around in the road in harness" and plaintiff said "no," and defendant then said, "are there any more 'outs' about the horse?" and plaintiff said "no," but if that horse was not a little shy of a train he could get $175 or $180 for him," and again plaintiff said "the horse was all right except for a bruised leg and a possible shy at trains." On rebuttal plaintiff does not deny the drive nor having a conversation, but distinctly denies giving any warranty and says defendant did not use the word "outs." He denies saying the horse had not faults Plaintiff says he knew the meaning of the word "outs" as applied to a horse and it included vices, blemishes and faults and includes wind-sucking, cribbing and shying. Under the authority of Lefeunteum v. Beaudoin, 28 S. C. R. 89, which holds that in the extinction of the value of evidence "in ordinary cases the testimony of a credible witness who swears positively to a fact should receive credit in preference to that

of one who testifies to a negative." This is the headnote, and the judgment of the Court supports that conclusion.

I believe and find both plaintiff and defendant worthy of credit, but I believe the defendant's version and his evidence more credible and the details are convincing, and I hold the warranty was given by the plaintiff that the horse was sound and that the defendant repudiated the bargain and offered back the horse and plaintiff refused to take him.

Under these circumstances the plaintiff cannot recover in this action for value of the pony waggon. The defendant will recover on his counterclaim for the value of the pony which I fix at $50 and for the cash paid $80 (the (harness has on value) in all $130, less the value of the horse which I fix at $80 unless the plaintiff takes back the horse, which he may within ten days from service of the order herein on his solicitor. In which case the defendant shall have judgment for $130. Costs will follow the judgment.

NOVA SCOTIA.

SUPREME COURT.

APPEAL.

ACKERMAN v. MORRISON.

FULL COURT. FEBRUARY 4TH, 1911.

Sale of Goods—Mistake by Vendor—Goods Accepted by Vendee with Knowledge of Mistake—Implied Contract.

Appeal from the judgment of PATTERSON, Co.C.J., in favour of plaintiff in an action for goods sold and delivered.

J. B. Kenny, in support of appeal.

F. C. Milner, contra.

DRYSDALE, J.:—This is an appeal from the judgment of the County Court Judge for District No. 5. Reported 9 E. L. R. 198.

The action is for goods sold and delivered, and one point only arises before us. It seems that the defendant ordered some apples from one Graham through a broker in St. John. Graham as well as the plaintiff had apples stored with a storage company in St. John and by mistake the defendant's order was filled by a shipment of the plaintiff's goods, and in due course the plaintiff's invoice was sent to the defendant shewing the shipment and price. On discovering that the apples had been sent by plaintiff the defendant informed plaintiff that he had ordered the goods from Graham and objected to any dealings with plaintiff. Whereupon plaintiff requested that the goods be handed or delivered to plaintiff's agent. This the defendant refused, and afterwards according to his own admission, with full knowledge of all the circumstances, kept and used them as his own.

The learned County Court Judge has held that under such circumstances the law implies a contract between defendant and plaintiff to accept the goods and pay for them at the invoice price, and in so holding I am of opinion the learned Judge was quite right.

In Benjamin's Treatise on Sales (Chap. 3), the point is concisely covered in a few propositions as follows, viz.: 1. An offer addressed to one person cannot be accepted by another.

2. Therefore where an offer is addressed to one person and another attempts to accept it, as by supplying goods ordered, there is no contract. And if the offeror, thinking the goods were sent by the first person, consumes them, he is not bound to pay for them.

3. If in such a case the offeror discovers the facts and afterwards consumes the goods a contract to pay for them will be implied.

The facts disclosed in the case before us bring the parties in all respects within the third proposition just quoted. The defendant when he received the apples thought at first that his order had been filled by Graham. But whilst he still had the goods he became aware of the true state of affairs and with full knowledge that the plaintiff had filled the order and that the apples were the plaintiff's, and had been sent by the storage company under the mistaken belief that the plaintiff's goods had been ordered, undertook to hold, keep and use them because, as he alleges, he had made a contract with Graham for a similar quantity.

This he clearly could not do. Ever since the case of Mitchell v. Le Page, Holt's Nisi Prius, 253, I think it has not been open to question that a shipper, under the circumstances disclosed here, can recover as for goods sold and delivered, and on the ground that from defendant's conduct in accepting and using the goods after full knowledge of the real circumstances of shipment a new contract is implied. Mitchell v. Le Page was a case involving facts very similar to those disclosed here.

There an offer for hemp addressed through a broker to one firm was filled by another. After receipt of the hemp and the invoice shewing the real shippers the persons ordering conferred with the broker and although declining to make a contract with the real shippers, kept the hemp. The real shippers recovered as for goods sold and delivered. Some discussion has arisen as to the true ground upon which this decision was founded, and I accept Benjamin's view that the true ground is that a new contract is implied from defendant's conduct after he knew who the sellers were. He had the right to repudiate, but if with such knowledge he elects to keep the goods the law implies a contract to take and pay for them.

I am of opinion the appeal should be dismissed with costs.

GRAHAM, E.J., and MEAGHER, J., concurred.

RUSSELL, J.:—I arrive at the same conclusion but in a different way.

Appeal dismissed.

NOVA SCOTIA.

SUPREME COURT.

APPEAL.

FULL COURT. FEBRUARY 4TH, 1911.

HORWOOD v. NICHOLSON.

Replevin—Conversion—Ship Seized under Warrant Issued on Judgment for Seamen's Wages—Magistrate—Jurisdiction—Justification.

Appeal from the judgment of LAURENCE, J., in favour of defendant in an action of replevin to recover possession

of a vessel levied upon by defendant as a constable under a warrant issued on a judgment for seamen's wages.

W. F. O'Connor, K.C., in support of appeal.

T. R. Robertson, K.C., contra.

GRAHAM, E. J., delivered the judgment of the Court.

The plaintiff, the master of the schooner "Dorothy Duff," has brought an action for conversion and has replevied the ship from the defendant, a constable, who justifies under a warrant to levy upon the ship for services, wages and expenses under s. 190 of c. 113 of the Revised Statutes of Canada.

There were four seamen in all who took proceedings to recover their wages, but the papers printed in the appeal relate to the case of Henry Ponton who recovered judgment for $63 and some expenses and costs before a stipendiary magistrate for the county of Cape Breton.

The defendant contends that the wages had not become payable, that the magistrate had no right to treat them as payable by the month but only on the completion of the voyage at another port, and that this is a jurisdictional defect.

I think first that this question was involved in the judgment on the merits of the case and was not collateral thereto and therefore that the matter cannot be attacked in this collateral way.

The proceeding is neither an appeal from the magistrate nor even a writ of certiorari. He has found that the wages were due and payable, and we cannot, no matter how humble the Court, retry it and in effect reverse him. Nothing on the face of the warrant discloses any error of the magistrate of this sort. I refer to Britain v. Kinnaird, 1 B. & B. 432; Mould v. Williams, 5 Q. B. 469.

And secondly, I think that the warrant being good on its face protects the constable and defeats the action against him. He is not to be made liable for any error in the decision of the magistrate.

The next point taken is that the warrant is not good on its face; that it does not disclose that the magistrate was "acting in or near the place . . . at which the master is or resides:" sec. 187.

In my opinion it can be clearly inferred from the face of the instrument that the master was at that place and

that the magistrate had jurisdiction over him. There is a recital that the "Dorothy Duff," registered in Sydney in the county of Cape Breton, was then lying at North Sydney in the said county and that the said John Horwood was master. He was the defendant, and there is a recital that the parties appeared before the magistrate and were examined and heard, etc., etc., and the warrant purports to be issued at North Sydney and the stipendary magistrate purports to be a stipendiary magistrate in and for the county of Cape Breton.

It is not important but the proceedings up to that moment, as I stated, were disclosed in the information and the later proceedings shewed that the master was duly summoned and an affidavit of service was made. I think the warrant is such a warrant as protects the constable.

The rule is stated by Sedgewick, J., in Sleeth v. Hurlburt, 25 S. C. R. 628, quoting from Willes 32:—

"I am of opinion that the execution issued by the justice to the defendant, it being a proceeding over a subject-matter of which he had jurisdiction, and the execution not shewing on its face that he had not jurisdiction of the plaintiff's person, was a protection to the defendant for the ministerial acts done by him by virtue of that process."

I refer also to a judgment of this Court in Vantassel v. Trask, 27 N. S. R. 329, at pp. 336, 337, and 338, citing Savacool v. Broughton, 5 Wend. 170. I refer also to Ex parte Pardy, 1 L. M. & P. 16, and Cooley on Torts, p. 459.

The appeal must be dismissed and with costs.

NOVA SCOTIA

SUPREME COURT.

APPEAL.

FULL COURT. FEBRUARY 4TH, 1911.

LEVINE v. SEBASTIAN.

Sale of Goods—Agency—Contract with Seamen on Defendant's Ship—Guarantee—Bailment.

Appeal from the judgment of WALLACE, Co.C.J., in favour of defendant in an action for goods sold and delivered.

The goods claimed for were delivered to men employed on a steamer of which defendant was chief steward.

J. J. Ritchie, K.C., and R. H. Murray, in support of appeal.

W. E. Thompson, contra.

TOWNSHEND, C.J.:—It was chiefly contended by counsel for plaintiffs on this appeal that there had been a sale of the goods to defendant. The learned Judge has decided otherwise and I think rightly.

Taking the evidence of plaintiff and his witnesses only in my opinion, no case has been established. The sale was clearly to the firemen and at the most all that the defendant undertook to do was to pay the amount for them if they remained on the vessel after she left St. John or to return the goods. The plaintiff, in his evidence, after giving the details of the sale to the men says:—

"Then the chief steward, Sebastian, called me back and said: 'If you are willing to leave the goods with me I will send the money from St. John if they go from St. John. If they don't go I will send you the goods.' He meant if they still stayed on the ship he would send the money to me; if they didn't work on the ship he would send the goods. Then I left the goods with him."

In cross-examination he says:—

"They picked out the goods themselves. . . I made out the account. They signed their own names as being satisfied with the goods. I gave the accounts to the chief steward."

It thus appears from his own testimony that the sale was to the men and not to the defendant, and the most that can be said for plaintiff is that the defendant undertook to return the goods if he did not send the money. Assuming then this to be the agreement; the defendant could only be liable in damages for breach of his contract as bailee of the goods. But, as pointed out by the learned County Court Judge if that was the arrangement it would be impossible to recover in the present action which is for goods sold and delivered and not for damages, and no amendment was asked for.

The defendant and his witnesses, however, deny that he made any such agreement. On the contrary, he says: "I told Levine that if he liked to leave the things on board he

could do so, but at his own risk, and I wouldn't be responsible for them, and should the men remain on the steamer after the steamer cleared St. John, N.B., I would send him an order for whatever the men owed him; if they cleared out he gets nothing. So he said: "Oh, well, I will have to take the chances."

The men deserted, or all but two, at St. John, taking the goods with them.

The learned Judge makes no finding as to which story he accepts, but simply decides that so far as the evidence is before him, under the issues in the present case, plaintiff cannot recover; and as already observed, I think he was clearly right, and this appeal must be dismissed with costs.

GRAHAM, E.J., and MEAGHER, J., concurred.

DRYSDALE, J.:—I agree in dismissing the appeal. I do not think it is a case for amendment.

RUSSELL, J., dissented.

NOVA SCOTIA.

SUPREME COURT.

APPEAL.

FULL COURT. FEBRUARY 4TH, 1911.

RICHEY DOING BUSINESS AS THE TORONTO SEWER PIPE CO. v. THE CITY OF SYDNEY.

Sale of Goods—Action for Price—Contract by Correspondence—Specifications.

Appeal from the judgment of LAURENCE, J., in favour of plaintiff in an action for goods sold and delivered.

F. McDonald, in support of appeal.

H. Mellish, K.C., contra.

The judgment of the Court was delivered by

DRYSDALE, J.:—This is an appeal from the judgment of LAURENCE, J., directing recovery against defendants in respect of two shipments of sewer pipe ordered by defendants from plaintiffs, and dated August 21st and September

9th, 1909, on the basis of the fair market rate at the time of the order.

The counterclaim of the defendants is that the price should be regulated by a quotation from plaintiffs contained in a letter written by them to defendants dated July 15th, 1909.

A perusal of the correspondence makes it clear that the defendants had determined on enlarging the sewerage system of the city, and in that connection were calling for tenders for a certain quantity of pipe, such tenders to be in on or before August 4th, 1909.

The plaintiff company's attention having no doubt been called to this, correspondence was opened between plaintiffs and defendants, the opening letter being from the plaintiffs dated July 15th, 1909. The one above referred to is simply an offer to supply first class pipe of the sizes of 10, 12, 15, 20 and 24 inches at a named price for each size, coupled with a hope that the contract would be awarded to them. To this the defendants replied by asking that a sample of pipe be submitted, and a correspondence commenced. Ultimately, on July 20th, the defendants in a letter of that date notified plaintiffs of the quantity and various sizes of pipe that they wished prices for, and accompanied the same with a specification in detail as to requirements, as well as notice to the plaintiffs that tenders were to be in by August 4th, 1909. It will be noticed by an examination of defendant's letter just referred to that they were by their specifications asking for 8-inch pipe not quoted in the offer of July 15th, and were not requiring any 24-inch pipe for which a price had been quoted. On August 3rd the plaintiffs offered to supply pipe as per specifications at 2% less than the quotations of July 15th, and on August 4th named a price for the 8-inch pipe mentioned in the specification but not in the quotation of the 15th July. On August 16th, the defendants awarded the contract according to the specifications, and on that day notified plaintiffs of the placing of the order again, giving the specific sizes and quantities and stating prices to be as quoted by letter of 15th with subsequent further statements as to price and to be according to specifications previously forwarded by defendants with their letter of July 20th. By a telegram following this letter defendants also notified plaintiffs that the contract according to defendant's letter of 20th July, had been awarded plain-

tiffs and the plaintiffs at once proceeded to fill the order. No dispute arises before us as between the parties as to the filling of this contract, but it seems that later on defendants required some 24-inch pipe that they had apparently deliberately not asked the plaintiffs to tender for, and under dates of August 1st, 21st and September 9th, simply forwarded orders to plaintiffs for some pipe of such size, and in the latter order some of other sizes, and it is in respect of these orders that the dispute arises, the defendants trying to hold the plaintiffs to the price or quotation named in plaintiffs' letter of July 15th, the plaintiffs contending that the subsequent orders formed no part of the pipe tendered for; that the quotation of the 15th July was simply the beginning of negotiations that ended in a special tender for a specified quantity at special rates, and that as to these subsequent orders they are entitled to the fair rate prevailing at the time of the order.

The whole question turns on the correspondence. The learned trial Judge took the view contended for by the plaintiffs and, in my opinion, it was the sound view. One cannot read the correspondence without coming to the conclusion that the defendants, after receipt of the plaintiffs' quotation of July 15th, decided deliberately and carefully to say to them in effect that they were taking tenders for specified lots; that they did not want quotations for 24-inch pipe from them, but they did want 8-inch quotations, and in great detail asked plaintiffs to tender for specified quantities from 8 to 20-inch, and for caps, bends and junctions. This detailed request of defendants ended in a completed contract, and it does seem to me that it is not open to defendants to pick out a quotation in a letter in the beginning of the correspondence that so obviously was only a part of what was ultimately merged in a definite conclusion, and to say that that letter should be regarded as a standing offer as to prices of all pipe therein mentioned. It is apparent that pipe varies in price, and if defendants saw fit not to include the 24-inch pipe, or any other they might thereafter require in the contract concluded but to order it some time subsequently, I think they are obliged to pay the fair market price at the time of order.

I am quite in accord with the trial Judge's conclusions and I am of opinion the appeal should be dismissed with costs.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. FEBRUARY 4TH, 1911.

McDONALD v. BAXTER.

Sale of Horse—Contract—Infant—Rescission—Necessaries—Warranty—Jury—Verdict—New Trial.

Motion on behalf of plaintiff to set aside findings of the jury and for a new trial in an action claiming rescission of a contract for the sale of a horse, and repayment of the purchase money.

J. J. Power, K.C., in support of motion.

W. B. A. Ritchie, K.C., and H. W. Sangster, contra.

The judgment of the Court was delivered by

DRYSDALE, J.:—In this case the plaintiff is an infant, and the action arises out of the purchase of a horse by plaintiff from defendant in April, 1908. In or about June, 1909, the plaintiff attempted to rescind or repudiate the contract and he puts his case in two ways in this action. First, he asserts that the contract not being one for necessaries he had the right in June, 1909, to repudiate, tender back the horse in its then condition and recover back the amount which he had paid as the purchase price in April, 1908. And, secondly, or alternatively, if the contract must stand, that there was a warranty as to the horse's age and condition, and in respect to such warranty he has a right to recover in damages.

On the first branch of the case I would have thought on the plaintiff's own admissions that there was nothing to be submitted to a jury, and that the plaintiff must fail on the undisputed situation. It is clear that the horse was purchased in April, 1908, the money paid and immediate possession taken and the horse used by plaintiff for upwards of one year at the ordinary work of a farm as well as at other work, and it was not until June, 1909, when the horse was in a very different condition, that there was any attempt at repudiation. In an executed contract by an infant apart from necessaries I think it is well settled law that an infant cannot repudiate or rescind the contract if he has derived any

real advantage under it. The English cases referred to on the argument before us without exception consistently follow this rule, and applying such rule to the facts here it cannot, I think, be reasonably said that the plaintiff did not derive very material advantage from the use of the horse before the attempted repudiation, and in my opinion, on this branch of the case, there was nothing in dispute for a jury. The learned trial Judge, however, no doubt from abundant caution, submitted the following question to the jury:—

"Did McDonald derive any benefit from the use of the horse?"

And the jury answered: "Some benefit."

I think the plaintiff fails on that part of the case in which he attempts rescission.

The second branch of the question is whether there was any warranty by defendant at the time of the sale respecting the age, soundness or capacity of the horse.

On this the plaintiff and defendant were in direct conflict and the point was submitted to the jury by the learned trial Judge in the following language:—

"The plaintiff says that this bargain would not bind him even if he were a grown up man and had no shelter as an infant. That is, he says, there was a representation made to him as to the condition of this horse, when it was sold to him, as to its age, as to its working qualities and that that amounted not merely to a representation of the qualities of the animal but to a condition that the purchaser, if he found the animal was not in the condition in which he was represented, would then be in a position to throw him back on the hands of the original owner, and say it was not a sale at all. That is the way the plaintiff's counsel opened the case. Well, that would involve your asking the question,—was there such an arrangement between the plaintiff and defendant? Was the arrangement such that Baxter was saying—take this horse, try this horse, it is guaranteed to have such qualities, to be of such an age, and I undertake if you find these representations are not correct that the horse is no longer yours, and the money is no longer mine, but the horse comes back to me.

If you find that this was the case you will be at liberty to give a verdict in favour of the plaintiff. You would say,

irrespective of any question of age, irrespective of any other question you would have to say that the horse was sold under a condition and the condition was not complied with, and the bargain is rescinded and the horse goes back to the defendant and the money to McDonald.

But the man who purchases a horse under such conditions must not keep him a year and then take him back, and the moment he goes beyond a mere trial, the moment he treats the horse as his own and does with him beyond what is necessary to make a trial of the property, then the property becomes his own. It is too late for him to throw the property back upon the original owner after that. What was a condition in the inception of it becomes what is called in law a mere warranty and the purchaser must keep the horse, and if there has been a warranty then he may sue for damages as to the difference in value of the horse as warranted and the value of the horse as it actually is. The condition sinks to the level of a warranty in that case, and the purchaser has no right to throw the horse back on the hands of the original owner or vendor, but he must keep the horse and simply sue for damages he has sustained by the breach of the warranty under which the horse was sold.

In that case you will have to find whether there really was any warranty or not. You have conflicting evidence on that. Evidence of the boy on the one side and of the defendant on the other, the boy saying that the horse was warranted to him to be of a certain age, and Baxter saying he never represented the horse as being any particular age at all; he sold it to the boy only as it had been represented to him. I am simply stating what the defendant and plaintiff say in regard to this and any corroborating circumstances I am not going into for fear I should state something in favour of either party and not state something equivalent in value on the part of the other party.

If you find you are not able to believe one more than the other you will have to find against the plaintiff, because the burden of proof rests upon him. Unless you believe him and disbelieve the other man, or have no reason for believing one more than the other, why of course you will have to give the benefit of that issue to the defendant, because the burden of it is upon the plaintiff. The plaintiff says that the warranty was given and it is his business to prove

that it was given, and if the evidence is equal on both sides you will say that the plaintiff will have to fail on that issue."

And the question was put to the jury thus: "Did Baxter warrant the age, soundness and capacity of the horse, or any or either of these qualities?" to which the jury replied, "Evidence evenly balanced."

The learned trial Judge was of opinion that under this expression of the jury's opinion the plaintiff failed on the question and directed judgment to be entered for the defendant.

I think this answer must be read in the light of the learned Judge's charge. The question of warranty or no warranty depended upon a conversation between plaintiff and defendant as to which there was no evidence except that of plaintiff and defendant respectively, the plaintiff giving his version of the conversation and the defendant his, both in direct conflict on the material question. It will be noted that the Judge said: "You have conflicting evidence on the point; that of the boy on the one side, and the defendant on the other. If you find that you are not able to believe one more than the other, you will have to find against the plaintiff because the burden of proof rests upon him.—And if the evidence is equal on both sides you will say that the plaintiff will have to fail on that issue."

Considering this instruction it seems to me reasonably clear that the jury were by their answer informing the Judge that in their opinion on the question submitted the evidence was evenly balanced and he had already informed them what followed in such a case. It was not necessary for them to say more. Had they literally followed the instruction they would have added: "and the plaintiff fails on this issue." But was it necessary that they should add this to make their meaning clear? I think not and am of opinion the learned trial Judge in accepting this as a finding against the plaintiff under the charge so given was not on any uncertain ground as to the meaning of the jury. Had the Judge simply told the jury that if in their opinion the evidence on the point was equal on both sides they should say so and they had replied "Evidence evenly balanced," there could be no question, I think, then that the proper direction would be to enter judgment for defendant. It must always be borne in mind that the jury was dealing with a number of

questions; that it was no part of their duty to express themselves either for plaintiff or defendant as in a general verdict, and it sems to me in all these cases of question and answer the Court must ask itself, do the answers disclose in the light of the trial, charge and questions submitted reasonably clearly the intention of the jury, and in this case I am of opinion the answer is responsive and in a reasonably clear manner indicates the mind of the jury. That the trial Judge was right in accepting it and thereunder directing judgment for defendant.

I am of opinion the motion for a new trial fails and should be dismissed with costs.