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DIVISIONAL COURT.

HACKETT v. TORONTO R. W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Findings of Jury—Infant—Dismissal of Action.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., in favour of plaintiff, upon the findings of a jury, for the recovery of $1,225.

The action was brought on behalf of Gordon F. Hackett, an infant, by William J. Hackett, his father and next friend. On 3rd July, 1906, Gordon F. Hackett was stealing a ride on one of the cars of defendants, sitting upon the bar behind the car, which was going in an easterly direction on Gerrard street. When the boy had got to his destination, he jumped off the bar, but continued running with the car, being carried by the impetus of it. Without looking he attempted to cross the tracks towards the north part of the street, when a west-bound car, going in an opposite direction to the one he had just got off, passed the east-bound car, and in collision with it the boy lost a leg.

The following were the questions put to the jury and their answers:—

1. Was the injury to the plaintiff Gordon Hackett caused by any negligence or unlawful act of the defendants? A. Yes.

2. If so, wherein did such negligence or unlawful act consist? A. By conductor on east-bound car not being on

rear of his car, considering distance plaintiff rode, and putting same off, as he should have done. Also motorman on car causing accident not ringing gong and not having proper look-out.

3. Or was the injury to Gordon Hackett caused by reason of his own negligence? A. No, considering the speed boy acquired by getting off east-bound car and that he was going across street.

4. Or could Gordon Hackett by the exercise of reasonable care have avoided the accident?

5. What is the amount of compensation which ought to be awarded to the plaintiff Gordon Hackett, if he is entitled to recover? A. $1,000, and all his medical expenses pertaining to trial, $1,225.

H. H. Dewart, K.C., for defendants.

John MacGregor and E. A. Forster, for plaintiff.

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

MEREDITH, C.J.:—We think that no purpose would be served by taking further time to consider this case. It has been very fully discussed, and the evidence has been referred to. We think that upon the whole evidence there was nothing upon which the jury could reasonably find that the injury to the boy was caused by the negligence of defendants. There was evidence, we think, that could not have been withdrawn from the jury, of defendants' omission to perform a duty, the breach of which plaintiff alleges, and that the omission constituted negligence, but that is not enough to entitle plaintiff to recover. It must be shewn that that negligence was the effective cause of the injury to the boy.

The circumstances of the case were that the boy was a trespasser upon the property of the company; he was stealing a ride, sitting upon the bar behind the car, which was going in the opposite direction to the one which came in contact with him. Getting near to the place where he intended to go, he got off the car, and after, as he says, for a distance of 10 paces running with the car holding on to some portion of it, he started diagonally across the highway and the tracks, and while doing so a car coming in the opposite direction struck and seriously injured him.

According to the strongest testimony, as I understand it, in favour of plaintiff, he was, at the time he started to go across the track, only 10 feet away from the car that ran him down. He had then to cross the track and the devil strip, and got, it is said, upon the other track—which would probably be a distance of two and a half feet; the car was going at the rate of 7 or 8 miles an hour, and he was running fast.

Now it seems to me it would be most unjust, under such circumstances, to fasten upon the motorman a breach of duty because, in such an emergency, the boy coming out suddenly from a place where he was not expected to be, he did not see and immediately apply the proper remedy. The man had but two eyes; of course he had to keep a proper look-out, but the occurrence happened in possibly the fraction of an instant, and to say that the motorman was guilty of negligence and his employers are liable because, in circumstances such as existed in this case, he did not see the boy and did not apply the remedy, would be, I think, practically to make the defendants insurers against any accident that happens.

The plaintiff contends that the proper inference is that if the motorman had been on the look-out he would have seen the boy and have tripped the fender and so avoided the accident. I think it would be mere speculation in this case to say that the tripping of the fender would have had any such effect.

It is suggested that if the gong had been rung the boy would have been warned, and either would not have got off the drawbar, or, if he had got off, would have looked out for the car, but his own evidence is against that view. He gave his evidence very frankly, and his testimony was that the noise was such that if the gong had been rung he did not think he would have heard it; and his own evidence is that he ran so fast that he could not stop, and that he did not look.

We think, on the evidence, that if anybody was to blame it was the unfortunate boy himself, and, although it is a deplorable accident, it is one for which defendants ought not to be made liable.

It is manifest that the jury were struggling—whether against their consciences or not it is difficult to say—to find a verdict for the plaintiff upon some ground or other. It

seems an extraordinary finding that when asked as to contributory negligence they say there was no contributory negligence, in effect, because the boy was running so fast and crossing the street; the very thing that probably would be thought to amount to negligence is that which, according to the jury, excuses the negligence.

Then it is said that the principle of Lynch v. Nurdin, 1 Q. B. 29, applies, and that the boy is of such tender years that negligence is not to be attributed to him. That case has no further application than this: that where the child is of such tender years as not to appreciate the danger of what he does, contributory negligence cannot be attributed to him. That is the full extent of the doctrine of that case, and the cases that follow it. In this case, I do not think that Lynch v. Nurdin applies, because the boy was not of that type; he was a bright, intelligent boy, and it is not age but intelligence that is the test in applying the principle of that case.

I think the appeal must be allowed, and judgment must be entered dismissing the action.

BRITTON, J. MAY 18TH, 1907.

WEEKLY COURT.

CRAIG v. KINCH.

Receiver—Action Brought by Receiver in his own Name—Seizure of Property in Hands of Receiver — Injunction — Damages—Bank—Lien—Timber—Bank Act — Practice — Costs.

Motion by plaintiff to continue an injunction, and motion by defendants the Quebec Bank to validate a seizure made by them.

C. A. Masten and R. B. Henderson, for plaintiff.

D. T. Symons, for defendants the Quebec Bank.

BRITTON, J.:—By consent of parties the motion to continue injunction was to be treated as a motion for judgment.

The seizure by the Quebec Bank as against the receiver in possession of property claimed by the bank ought not to have been made. The rights of the bank were protected

and could be asserted in the suit of Diehl v. Carritt, in which suit the plaintiff was appointed receiver. The plaintiff is an officer of the Court, and as to the matters in question is subject to the Court's discretion. In that suit the plaintiff —receiver—took possession, as expressly stated in the order, "without prejudice to a certain agreement dated the 14th day of September, 1906," to which agreement the Imperial Paper Mills of Canada Limited, the Quebec Bank, and others, were parties. That agreement made express provision, amongst other things, for the advance of money by the Quebec Bank for the purchase of spruce and jack pine, to be manufactured by the paper mills company, and for the payment of certain wages of employees of said company, and that agreement specially recognized, as between all the parties thereto, any special lien or privilege that the Quebec Bank had or might have under sec. 74 of the Bank Act to certain product and property of said mill—so that the plaintiff was quite right in protecting said property for the benefit of all concerned in the suit in which he was appointed receiver, but the plaintiff had not any right of action in his own name as receiver. This point was not fully argued before me. My impression on the argument was that the plaintiff had brought this action by leave of the Court. All that I find in the material before me is that upon the examination of plaintiff he was asked, "Have you the order directing the bringing of this action?" The plaintiff did not answer, but the solicitor, Mr. Henderson, stated: "We did not get out any formal order, but we saw the Judge before we issued our writ, and got leave to bring an action, and when we issued our writ, he gave the order granting the injunction."

If leave was properly applied for, and formally given, I assume it was for the receiver to bring an action in the name of the Imperial Paper Mills Limited, and not in his own name. There is no cause of action in the plaintiff as receiver. No damage has been sustained by the plaintiff as receiver or otherwise, by reason of the seizure by the Quebec Bank, and no damage has been sustained by the company.

The Quebec Bank are now proceeding, and, as I think in the proper way, by motion in the suit of Diehl v. Carritt, for an order for possession of their property held by the receiver. That motion stands until after the report of a referee is made, as to what securities the Quebec Bank hold upon property, and specifying the property in possession

of the receiver. What has been done in this action and the seizure by the Quebec Bank should now be cleared out of the way. The action will be dismissed without costs, and the motion of the Quebec Bank to validate the seizure complained of will be dismissed without costs. The present seizure, in reference to which the action was brought, if maintained, is to be abandoned—all without prejudice to the rights of the Quebec Bank upon any securities they hold as to any property in the hands of the receiver, or as against the property of the Imperial Paper Mills Company, or as to any liens or rights or claim of said bank—and the said bank may pursue their remedies for recovery of the same as if this action had not been instituted.

I find that no damage was sustained by the Quebec Bank by reason of the injunction in favour of plaintiff, and that there will be no liability on the part of the plaintiff as receiver or otherwise upon his undertaking given upon obtaining the injunction.

The undertaking of the plaintiff given in Court on 9th January last is to stand in full force in favour of the Quebec Bank as to any logs used by the plaintiff or by the Imperial Paper Mills of Canada Limited, and in all respects.

These proceedings are not to be considered as determining or attempting to determine the rights of any of the parties under any agreement. or upon any security or anything that may be in controversy in the suit of Diehl v. Carritt.

Action and motion dismissed without costs.

CARTWRIGHT, MASTER. MAY 20TH, 1907.

CHAMBERS.

McKAY v. NIPISSING MINING CO.

Pleading—Statement of Claim—Time for Delivery—Rule 243 (b)—Several Defendants Appearing at Different Times.

Motion by two of the defendants to set aside the statement of claim as irregular under Rule 243 (b).

A. M. Stewart, for applicants.

Grayson Smith, for plaintiff.

THE MASTER:—In this case there are 9 defendants, and the motion is made by 2 of them. The only material in support is an affidavit of defendants' solicitor stating that his clients appeared on 18th December, and that the statement of claim was served on 8th May instant. This is not denied. But it was stated that there was an unavoidable delay in serving some of the other defendants, and that the statement of claim had not been delivered after the expiration of 3 months from the last appearance. The plaintiff therefore argued that he was not in any default, and that this must be proved.

It was contended on the other side that the words of the Rule were imperative, and that in every case where there is more than one defendant, each should be served with the statement of claim within 3 months of his appearance unless an order has been obtained extending the time.

The inconvenience and useless expense which would result from such a practice are obvious. In any case I think the principle of Foley v. Lee, 12 P. R. 371, applies, and the practice has always proceeded in this view.

The defendants clearly could not successfully have moved to dismiss for want of prosecution, and I do not think they are in any better position in the present attempt.

The motion seems to me useless and not supported by any evidence. There should at least have been an affidavit proving the plaintiff in default as to all the defendants. Costs must be to plaintiff in any event.

MAY 20TH, 1907.

DIVISIONAL COURT.

RE ISA MINING CO. AND FRANCEY.

Mines and Minerals — Mines Act — Application for Working Permit — Invalidity — Affidavit of Applicant — Adverse Claims—Knowledge of Applicant—Order of Mining Commissioner Cancelling Application—Want of Jurisdiction.

Appeal by the Isa Mining Company from an order of the Mining Commissioner, dated 18th December, 1906, declaring that working permit application No. 147 by the

company on the north-east quarter of the north half of lot 11 in the 1st concession of the township of Bucke, was invalid and should be cancelled, and directing that the company should pay the costs of W. B. Francey, the applicant, of the application for cancellation.

G. T. Blackstock, K.C., and G. H. Sedgewick, for the company.

J. M. Ferguson, for W. B. Francey.

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

MEREDITH, C.J.:—I agree with the Mining Commissioner that the conditions prescribed by sec. 141 (11) of the Mines Act were not complied with by the company, and that their application was therefore invalid, and should not have been received by the Mining Recorder. Clause 11 requires that the application shall be supported by evidence that the applicant has no knowledge and had never heard of any adverse claim by reason of prior discovery or otherwise. This evidence is to be furnished by the affidavit of the applicant: form 6.

The affidavit which accompanied the application was not in accordance with the requirements of the enactment, and not only did not negative the matters required to be negatived, but shewed that there were adverse claims, and the knowledge of the applicant of the existence of them.

I am of opinion, however, that the Mining Commissioner had not jurisdiction to make the order complained of. I do not find such a jurisdiction conferred on him by any provision of the Act. Section 52, upon which the Commissioner relies, has, in my opinion, no application, because the appellate jurisdiction conferred by the section is with reference to a matter upon which the Mining Recorder has adjudicated, and there was no adjudication by him as to the validity of the application, even if the Recorder had had any judicial function to perform in reference to the filing of the application or its remaining on the files, which I think he had not.

I would allow the appeal and reverse the order appealed from, but would not give costs to either party.

MAY 20TH, 1907.

DIVISIONAL COURT.

SIMPSON v. TORONTO AND YORK RADIAL R. W. CO.

Street Railway — Injury to Passenger—Negligence—Contributory Negligence—Passenger Projecting Body beyond Car —Injury from Striking Post—Question for Jury—Damages—Costs.

Appeal by defendants from judgment of MABEE, J., of 14th February, 1907, in favour of plaintiff for $500 damages, upon the findings of a jury, in an action for negligence.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

T. C. Robinette, K.C., and C. A. Moss, for defendants.

J. T. Loftus, for plaintiff.

BRITTON, J.:—Plaintiff's allegation is that on 4th September, 1905, he boarded a car of defendants at Long Branch for Toronto, and, as the car was crowded and he wished to smoke, he stood on the rear platform of the car. He leaned back over the wire gate of the car, which was quite low, and in so doing was struck by a post belonging to defendants and used by them for their trolley wire. . . .

I have reached the conclusion that upon the whole case there was evidence of negligence on the part of defendants proper to be submitted to the jury, and that the nonsuit asked for was properly refused.

Upon the evidence the jury could find that plaintiff's injury was sustained by his head coming in contact with a trolley pole. A pole placed by defendants in such close proximity to the rails upon their line of railway that a person standing upon the rear platform and projecting his head as would naturally be done, and as plaintiff says he did, for the purpose of spitting, could be injured by that pole, is dangerous, and so placing it is evidence of negligence.

Plaintiff's evidence is that the car was not crowded, nor was the rear platform crowded. Plaintiff stood upon the platform because he wished to do so. Defendants permitted this, and permitted smoking by passengers when there, and defendants did not permit smoking by passengers on some seats in the car, and they prohibited spitting upon the floor

of the car. That being the case, if the poles are so near to the cars as to be dangerous, defendants should by a wire netting or in some way so protect or warn passengers as to prevent such an accident as happened in this case.

The case was wholly for the jury unless it can be held, as a matter of law, that what plaintiff did was per se contributory negligence. I do not think it was. Leaning over the rail and looking out, extending one's head or arm or any part of the body beyond the car in motion, may be evidence of contributory negligence, and under certain circumstances would be contributory negligence.

I cannot go so far as to agree with the decision in Todd v. Old Colony and M. R. Co., 3 Allen (Mass.) 18, to which we were referred.

In Spencer v. Milwaukee, etc., R. Co., 17 Wis. 503 (Viles & Bryant's Notes), it was held not error for a Circuit Court to refuse to instruct the jury that if plaintiff was sitting with his elbow or arm projecting out of the window and sustained the injury complained of by reason of that fact, he could not recover. . . .

[Reference to Francis v. New York Steam Co., 1 N. Y. St. Repr. 261; Holbrook v. Utica and Schenectady R. Co., 12 N. Y. 244.]

The defendants were, no doubt, taken at a disadvantage by plaintiff having changed the location of the accident from that given by him upon his examination for discovery, but that was rather a ground for postponement of the trial than ground for a new trial.

As to damages, no doubt the jury estimated them very liberally as against these defendants, but the amount cannot be considered so unreasonable or so excessive as to afford ground for a new trial as of right.

In view of the fact of the place of accident not having been correctly stated by plaintiff in his examination for discovery, and the amount of the damages being large for the injury actually sustained, I think the appeal should be dismissed without costs.

FALCONBRIDGE, C.J.:—There is only one point in the case, viz., whether a passenger is disentitled to recover by reason of contributory negligence for an injury caused through having any part of his body projected beyond the outside edge of the structure of the car in which he is being conveyed.

The point has not arisen in England or in Ontario. The authorities in the United States are in conflict.

My brother Riddell has carefully exploited the leading American cases. After collating and considering these, the only matter which has weighed on my mind to "give us pause" is the dictum of Mr. Beven (Negligence, 2nd ed., vol. 2, p. 1204) that "in England . . . there is no reason to doubt that the Massachusetts rule would be adopted." It is with great diffidence that one ventures to dissent from the opinion of so eminent an authority. But we have all come to the conclusion that the Massachusetts rule ought not to be adopted here, and that the question is one for the jury.

The appeal will be dismissed, but without costs for the reasons given by my brother Britton.

RIDDELL, J., arrived at the same conclusion. In his written opinion he referred to the following authorities: Elliott on Railways, sec. 1633; Todd v. Old Colony and M. R. Co., 80 Am. Dec. 49, 3 Allen 18; Beven on Negligence, 2nd ed., p. 1204; Bridges v. Jackson Electric R. Co., 38 So. Repr. 788, 39 Am. & Eng. R. R. Cas. 512; Favre v. Louisville and N. R. Co., 16 S. W. Repr. 370, 91 Ky. 541; Huber v. Cedar Rapids and M. C. R. Co., 35 Am. & Eng. R. R. Cas. N. S. 768, 100 N. W. Repr. 478; I. and C. R. Co. v. Rutherford, 29 Ind. 82; Pittsville and C. R. Co. v. Andrews, 39 Md. 329; Spencer v. Milwaukee, etc., R. Co., 17 Wis. 487 (503); Christensten v. Metropolitan Street R. Co., 137 Fed. Repr. 708, 41 Am. & Eng. R. R. Cas. 1250; Keith v. Ottawa and New York R. W. Co., 5 O. L. R. 116; Fitzpatrick v. Casselman, 29 U. C. R. 5; Regina v. Frick, 16 C. P. 379; Dougherty v. Williams, 32 U. C. R. 215; Scougall v. Stapleton, 12 O. R. 206.

TEETZEL, J. MAY 22ND, 1907.

CHAMBERS.

REX v. HARRISON.

Criminal Law — Habeas Corpus — Conviction by Court of Record.

Motion for discharge of prisoner on the return of a habeas corpus.

F. W. Griffiths, Niagara Falls, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

TEETZEL, J.:—I think the prisoner should be remanded to gaol for sentence, on the ground that the writ should not have been issued in the first instance, because it would appear that the writ is not properly issuable, under the Act respecting habeas corpus, R. S. O. 1897 ch. 83, sec. 1, where the prisoner is in custody by virtue of a conviction or order of a court of record: Regina v. St. Denis, 8 P. R. 16; Regina v. Murray, 28 O. R. 549.

In this case the prisoner is in custody under a conviction of the County Judge's Criminal Court for the county of York, which is constituted a court of record by R. S. O. 1897 ch. 57.

The case of The Queen v. Smith, 3 Can. Crim. Cas. 467, cited by counsel for the prisoner, was a judgment upon a case reserved by the trial Judge for the opinion of the Court, and is of no assistance to me on what appears to be a fatal objection to the writ in the first instance. It appears to me that the prisoner's only remedy would be by way of review on a reserved case, and I understand this relief has already been refused to him.

BOYD, C. MAY 22ND, 1907.

TRIAL.

PARKER v. TAIN.

Ejectment—Mesne Profits—Defence — Claim of Ownership—Trust — Statute of Frauds — Voluntary Conveyance — Improvements—Costs.

Action to recover possession of land and for mesne profits.

W. J. Tremeear, for plaintiff.

W. Proudfoot, K.C., for defendants.

BOYD, C.:—This litigation is of most lamentable character, deplorable in every aspect. Nothing can be done in the way of legal relief for the most suffering litigant—nor

do I see any way in which the Court can work out satisfactory results. The claim of the girl (one of the defendants) who was betrayed, beguiled, and deserted, to be declared the owner of the house as against her betrayer (one of the defendants) and his mother (the plaintiff), cannot be established in view of the Statute of Frauds. There is no writing whatever to base a trust, and the conveyance to the mother, even if voluntary, would oust that claim. On the other hand, I do not see my way clear to hold that the deed to the mother was of an entirely voluntary character. I am inclined to think that some money passed; how much is in doubt; but the onus is on the girl to establish fraud as against creditors. The transfer to the mother does not appear to have been to protect the property as against the son's creditors. (None are shewn to have existed at the date of the deed.) The transaction was rather to propitiate the mother and get rid of the importunity of the betrayed girl, who had become distasteful to the author of all this misery. The man was acting with double intent—to make his mother safe and satisfied and to keep the girl quiet by letting her enjoy the possession and rents of the house. I do not think she should be called upon to give an account of them, as she has disbursed much out of them and has also turned her personal service and labour into money for the payment of the mortgage and the improvement of the house. She cannot longer keep possession and must now give way to the legal title of the mother. Judgment will be for delivery of possession by the defendant Hindes, and the defendant Tain must henceforth pay rent of that part of the house he holds, under the lease sanctioned by Hugh Parker, to the plaintiff, Mrs. Parker, and yield up possession of the rooms not included in that lease.

The judgment will be without costs to any one unless the mother wishes to claim her costs against the son, who is responsible for all the mischief of this unsatisfactory litigation.

CARTWRIGHT, MASTER. MAY 23RD, 1907.

CHAMBERS.

FLORENCE MINING CO. v. COBALT LAKE MINING CO.

Trial—Postponement—Action to Recover Possession of Mining Lands—Act of Provincial Legislature Passed Pendente Lite Validating Title of Defendants—Petition for Disallowance—Grounds for Postponement.

Motion by plaintiffs to stay the trial of this action, wherein they sought to recover 20 acres of land covered by the waters of Cobalt lake.

J. M. Clark, K.C., for plaintiffs.

Britton Osler, for defendants.

THE MASTER:—The whole of the land covered by the water of Cobalt lake was on 20th or 21st December, 1906, sold to certain persons by the Ontario Government for $1,085,000, which has all been paid, and on 27th December the said land was conveyed to the defendant company for $3,635,000, and a patent was issued to them.

The present action was begun on 29th December, 1906. The statement of defence was delivered on 6th February, 1907, and nothing has since been done in the way of going to trial.

On 20th April, 1907, an Act was passed by the Ontario legislature, 7 Edw. VII. ch. 15, which, after reciting that it was desirable that no question should be raised as to the right of the Crown to sell Cobalt lake and Kerr lake and the lands covered by the waters thereof, and that the title of the purchasers should be confirmed, enacted and declared that "the said lands and all mining rights therein and thereto are declared to be vested in the said purchasers respectively as and from the dates of the said sales absolutely freed from all claims and demands of every nature whatsoever in respect of or arising from any discovery, location," etc.

Plaintiffs, within a few days of the passing of this Act, petitioned the Governor-General in council to exercise the authority in these matters vested in him by the B. N. A.

Act and disallow the Act of the provincial legislature, on the grounds that it confiscates their vested rights, that it intercepts their pending action; that it is not a legislative Act authorized by the B. N. A. Act; and (besides other grounds) that it was passed on erroneous assumptions and allegations as to the facts; and finally that it is a violation of the provisions of Magna Charta that no one's property shall be taken from him except by due process of law. . . .

The principal authorities referred to were: judgment of Lord Watson in Dobie v. Temporalities Board, 7 App. Cas. 136, 151; Reynolds v. Attorney-General for Nova Scotia, [1896] A. C. 240, 27 N. S. R. 184; and the judgment of Lord Herschell in Attorney-General for Canada v. Attorneys-General for the Provinces, [1898] A. C. 700, 718.

It was strongly contended that the prima facie probability or even possibility of the Act complained of being disallowed was a reason why the trial should be postponed until the decision of the Governor-General should be given, or the year within which the right of disallowance must be exercised has expired.

The present case is one in which the plaintiffs have practically tied the defendants' hands and nullified the patents issued to them and confirmed expressly by the Act of last session. On the general principle no delay should be allowed, as shewn by such cases as Finnegan v. Keenan, 7 P. R. 385, and McTaggart v. Toothe, 10 P. R. 261. It is, therefore, indisputable that the onus is emphatically on plaintiffs to make out a case for postponement. In my opinion, no such ground is shewn.

It is no part of my duty to speculate as to what the Governor-General may do. If any expression of opinion is allowable, it would seem unlikely that such an Act would have been passed by the Ontario legislature unless it had been considered that it was well within their power, and that all necessary provision was made for compensation by sec. 2, which expressly enacts that "all discoveries and claims, if any, made or arising prior to such sales shall be dealt with by the Lieutenant-Governor in council as he may think fit."

The statement of defence denies the allegations of prior discovery by Green, through whom plaintiffs claim. It also alleges that the Attorney-General for this province is a necessary party to the action, which is not properly consti-

tuted without him. There is also a denial of any transfer from Green to plaintiffs of any right or claim he had.

These are questions which must be decided even if the Act should be disallowed. The decision on these points may be adverse to plaintiffs, so that the Act may never come into question at all.

After consideration, it seems more equitable that the action should proceed to trial, leaving it to the trial Judge to deal with the matter as may seem best when it comes before him.

An opinion may, perhaps, be hazarded that on the facts of this case the Governor-General in council might prefer that the question between the parties should go to trial, as, if the plaintiffs fail on the facts, it would be unnecessary to consider the propriety of disallowance.

The motion will, therefore, be dismissed with costs in the cause.

CARTWRIGHT, MASTER. MAY 23RD, 1907.

CHAMBERS.

TINSLEY v. TORONTO R. W. CO.

Discovery—Examination of Servants of Defendant Company —Examination of Conductor — Application for Leave to Examine Motorman — Special Grounds — Admissions— Evidence.

Motion by plaintiff for an order permitting him to examine for discovery a motorman in the service of defendants after the examination of the conductor of the same car, in an action for damages for personal injuries occasioned to plaintiff by the alleged negligence of these men in the operation of the car.

J. H. Denton, for plaintiff.

D. L. McCarthy, for defendants.

THE MASTER:—The conductor states by necessary implication that the motorman was more or less under the influence of liquor, and, in his opinion, which he communicated to his superior, Greene, it was questionable whether

he was fit to handle the car by which plaintiff was admittedly injured very seriously. . . . It was stated that what was desired was to get an admission from the motorman that he was under the influence of liquor at the time of the accident.

This, however, does not seem any sufficient reason for making the order asked. Nothing said either by the conductor or the motorman can be given in evidence against defendants. The condition of the motorman must be proved affirmatively if it is a fact material to plaintiff's case. His admissions would not be sufficient. If he were called as a witness, what he said on examination for discovery might be made use of on cross-examination or to discredit him if he were called by plaintiff and proved hostile.

But, in view of what the conductor has said as to his own opinion, as shewn by his conversations with Greene and Patton about the motorman's condition and what he told him as to having had liquor that night (or early morning), coupled with counsel's own statement of the information he has, it does not seem that any advantage would be gained by allowing the examination of the motorman, when his evidence could not be used against the company.

Motion dismissed; costs to defendants in the cause.

MAY 23RD, 1907.

DIVISIONAL COURT.

BARTRAM v. WAGNER.

Executor—Action for Account of Documents and Property of Testator—Right of Action—Evidence—Fiduciary Relationship—Trover.

Appeal by plaintiff from judgment of MEREDITH, C.J., 9 O. W. R. 448.

The appeal was heard by BOYD, C., ANGLIN, J., MAGEE, J.

Plaintiff in person.

E. H. Johnston, London, for defendant.

ANGLIN, J.:—Plaintiff sues as executor of Charles Augustus Oscar Van Wagner, who died on 14th October, 1904. Defendant is the widow of deceased. Plaintiff claims "an account of the private papers, personal effects, and other property of the deceased which came into the possession of the defendant."

It is not alleged that defendant stands in a fiduciary relation of any sort to plaintiff. I cannot understand upon what basis plaintiff should be entitled to a general account from her. He alleges that she came into possession of property of her deceased husband, but, except possibly by the merest scintilla of evidence, he fails to adduce any proof of this allegation. He speaks of certain pictures, curios, and books which he knew the deceased formerly had, and he thinks Mr. Wagner owned the furniture, but of this he knows nothing positively. He also refers to some jewelry which, it is said, was pawned. He further says that upon inquiry from defendant she told him that her husband had destroyed all his papers, and that he had left nothing at all. At the close of his evidence he says: "I want to get information. That is all I want. If there is nothing coming, then I will be satisfied. If there is no estate, then I want to know it. If there is any estate, then I want it as executor."

I find nothing in the evidence which could possibly serve to support a claim of trover; nothing which would establish that defendant is in the position of an executrix de son tort; nothing in fact to shew that she is in possession of any property forming part of the estate of her deceased husband.

For these reasons, as well as those given by the Chief Justice of the Common Pleas, I think this appeal fails and should be dismissed with costs. This will be without prejudice to any further action which plaintiff may be advised to bring, after proper demand and upon additional evidence, to recover possession of any property of his testator which may be in the hands of defendant.

MAGEE, J.:—I agree.

BOYD, C.:—There is some evidence in this case that the widow of the testator is in possession of some property belonging to the deceased which is detained from the executor, and as to this she is a constructive trustee for the executor proper, who may sue her as executrix de son tort, and she is

liable to be called to account for the property of the deceased in her hands: Hill v. Curtis, L. R. 1 Eq. 90, 101; see also Judicature Act, sec. 26 (5).

There was enough, though of slender extent, proved to direct an account to be taken by the Master; further directions and costs reserved. . . .

Appeal dismissed; BOYD, C., dissenting.

TEETZEL, J. MAY 25TH, 1907.

WEEKLY COURT.

TORONTO GENERAL TRUSTS CORPORATION v. HARDY.

Will—Construction—Joint Stock Companies—Dividends—Income—Revenues—Accumulation—Capital.

Motion by plaintiffs for judgment upon the pleadings in an action for the construction of the will of George T. Fulford, deceased.

E. T. Malone, K.C., for plaintiffs.

W. Nesbitt, K.C., and F. W. Harcourt, for the defendant George T. Fulford, an infant.

I. F. Hellmuth, K.C., for the other infant defendants, the grandchildren of the testator.

H. S. Osler, K.C., and Frank McCarthy, for the adult defendants.

TEETZEL, J.:—The only matter for decision is whether the dividends upon the stock in the W. T. Hanson Co. and the Fulford-Hanson Co. form part of the income of the testator's estate, within the meaning of paragraph 18 of the will, or whether such dividends form part of the revenues and income of the testator's business of dealing in proprietary medicines, to be accumulated and invested as part of the capital of his estate, under paragraph 20 of the will.

The testator was sole owner of a very large business in dealing in proprietary medicines, conducted by him personally under the trade name of "The Dr. Williams Medi-

cine Company," in Canada, and in many foreign countries, but not including the United States of America, Mexico, and South America; the business of dealing in the same proprietary medicines throughout the United States and Mexico was owned by the W. T. Hanson Co.; while the Fulford-Hanson Co. controlled the same kind of business for South America; these two were joint stock companies organized under the laws of the State of New York, and the testator owned one-half of the stock in each company.

In paragraph 4 the testator authorizes the executors to keep any investments he may have at his decease, and also authorizes them to hold any increased stock received by way of stock dividends or similar additions to his holdings.

The 3 paragraphs of the will which particularly involve the question under consideration are 5, 18, and 20, which read as follows:—

"5. I desire my executors to continue my business of dealing in proprietary medicines, employing the profits and proceeds of the business (but not the capital or income of my investments) for such purpose and employing such agents and managers as are necessary, but I direct that the said business shall be formed into a joint stock company or companies as soon as possible after my death in order to insure the permanence thereof; and I wish that the name of G. T. Fulford should form part of the name of all such companies, and I give my executors full powers to form such company or companies, including, if they shall see fit, power to allow other persons to subscribe for part of the stock and power to sell stock, but always retaining the controlling interest and capitalizing on the basis of the average yearly profits for the preceding 3 years, being 15 per cent. on the capital."

"18. I direct that as each child attains the age of 25 years his or her income from my estate is to be during the 10-year period of accumulation hereinafter provided for, his or her proportionate part of 90 per cent. of the income of my estate after all charges are paid (excluding always as hereinafter directed the income of my business), it being my intention that my children are to share equally in such income, but until each child attains the age of 25 years what would have been his or her share is to accumulate and form part of my general estate."

"20. I direct that the revenues and income from my said business, whether in the form of a joint stock company or companies or otherwise, shall not be paid over as part of the income of my estate, but that the surplus income of said business after making all proper allowances and provisions shall be accumulated from year to year and invested and form part of the capital of my estate from which the income to be paid over under this will is to be derived."

Taking the will as a whole with particular reference to these paragraphs and also to paragraph 4, it is quite clear that in the directions given to his executors the testator's intention was to draw a sharp distinction between his business of dealing in proprietary medicines, with its profits and proceeds, and the capital and income of his other investments, and the language of the will is quite appropriate to make that intention effectual.

The provisions of paragraph 5 furnish the key to what he meant by the words "income of my business" in paragraph 18, and the words "revenues and income from my said business" and "surplus income of my said business" in paragraph 20.

I think it is impossible to assume that when in paragraph 5 he expressed the desire for his executors to continue his "business of dealing in proprietary medicines, employing the profits and proceeds of the business," etc., and in directing that "the said business" should be formed into a joint stock company, he contemplated including in that desire and direction the shares held by him in the two New York corporations, and it is, I think, equally clear that he did not intend to embrace those shares as any part of his "business" in his references to the income thereof in paragraphs 18 and 20.

The judgment of the Court will therefore be that the dividends received by plaintiffs from the W. T. Hanson Co. and the Fulford-Hanson Co. form part of the income of the testator's estate, within the meaning of paragraph 18, and do not form part of the revenues and income from the proprietary medicines business of the testator to be accumulated and invested as part of the capital of his estate under the provisions of paragraph 20.

Costs of all parties out of the estate.

BRITTON, J. MAY 25TH, 1907.

WEEKLY COURT.

RE HALLIDAY AND CITY OF OTTAWA.

Municipal Corporations—Ontario Shops Regulation Act—Early Closing By-law Affecting Class of Traders—Time for Passing—Application of Members of Class—Majority—Computation—Certificate of Clerk of Municipality—Withdrawal of Names of Applicants—Quashing By-law—Costs.

Motion by one Halliday to quash a by-law passed by the council of the city of Ottawa, under and by virtue of the Ontario Shops Regulation Act, R. S. O. 1897 ch. 257, providing for the early closing by grocers of their shops in the city.

R. G. Code, Ottawa, for applicant.

T. McVeity, Ottawa, for the city corporation.

BRITTON, J.:—The by-law could be passed only upon the application of three-fourths in number of the occupiers of shops of this class within the municipality. Upon receipt of such an application it became the duty of the city council within one month to pass a by-law giving effect to it, and requiring all shops of the class specified to be closed during the period of the year and at the time and hours mentioned. In this case the application was received by the finance committee of the city, and was by that committee sent to the city clerk. This application consisted of 6 parts, and was signed in all by 145 persons. The application is not quite correct in form, as it requests the closing of the shops in question every day throughout the year at 6 o'clock, and does not in terms say "every day except Saturdays and days immediately preceding Dominion statutory holidays and the days from 20th to 31st December inclusive." These exceptions were manifestly intended by the signers, and the by-law as passed makes the exceptions. I merely mention this in passing. Nothing turns upon it now.

By statute the time of the receipt or presentation of the petition or application shall be the time when received by

the clerk. This application was received by the clerk on 1st February, 1907. Applications for such by-laws in Ottawa are dealt with under their by-law No. 829. The city clerk satisfied himself that there were, on 1st February, 178 occupant grocers in Ottawa, and that these applications . . . were signed by over three-fourths of such occupants of the class mentioned, and that all the formalities required by by-law No. 829 had been complied with, and on 15th February he so certified, and returned to the finance committee the petition with his certificate and with declarations that had been furnished to him.

The by-law in question was read a first time on 4th March, a second time on 18th March, and a third time and finally passed on 2nd April, 1907.

The objections to the by-law . . . are the following:—

First, that it was not passed within a month after presentation of the application or petition.

That time is, in my opinion, directory. The council, if they intend to act upon such a petition, should do so within the time prescribed, and, if they do not, the petitioners may have something to say about it. I do not give effect to that objection.

Second, that before the passing of this by-law certain of the petitioners had withdrawn their names, so that at the time of its passing there were not three-fourths of the occupants doing business as grocers in Ottawa in favour of it.

In the analysis I am able to make on the material before me, I find that there were only 175 of this class doing business in Ottawa. But, for the present, assume that the number is 178; three-fourths would be 134. The clerk found as signers 146, an excess of 12 over the required majority. There were in fact only 145 signers. On one sheet the number is called 54—there are only 53 in fact. The city clerk says that before this by-law got its first reading there were 57 withdrawals. If these 57 had the right to withdraw, there were left at the time the by-law got its first reading only 88 favouring it—much less than the required three-fourths. If these persons who had changed their minds had the right to do so before the council assumed to act, then there was not before the council the properly signed petition or application when the by-law was even read a first time, or when it was finally passed.

It is contrary to the letter and spirit of the law that class legislation like this should be passed unless clearly desired at the time of passing by three-fourths of those engaged in the business to be restricted. The dealers are not the only persons affected. The smaller consumers are interested. It is a matter of considerable inconvenience to such to have the grocery store closed at 6. . . . Many families depend upon the corner grocery for small and frequent supplies. The men of the house, many of them, do not get home from work until 6. The wife is, perhaps, without help, busy about the evening meal, and cannot conveniently go for her supplies until 6.30 or 7 o'clock. If some grocers are willing to keep their stores open for the convenience of such purchasers, they should be permitted to do so, unless it is the clear wish of the three-fourths of those engaged in the same business that the closing by-law should pass. This restriction upon the right of the minority must be imposed only when strictly in accordance with the statute.

I am of opinion that those seeking to withdraw from the application before the by-law was read a first time had the right to do so, and, as their desire was then properly before the council, the by-law was in fact pressed without the necessary sanction of the required majority, and so is bad and should be quashed.

That the wish of the requisite majority is the main thing is emphasized by sub-sec. 8 of sec. 44 of the Shops Regulation Act. It was made clearly to appear to the council, at the time of passing the by-law not attacked, that more than one-third in number of the occupiers of grocer shops in Ottawa were opposed to it. There were 2 petitions against it: one received on 9th March signed by 27 occupiers; one received on 11th March signed by 24; there were the withdrawals received on 1st March, 57: in all 108 opposed. One-third of the total number of occupiers is 60, so there are more by 48 than one-third of the entire number of occupiers.

In the view I take of the section under which this by-law was passed, it is not at all the same as a petition for local improvement or for drainage, where property is to be benefited by the expenditure of money, and for which property is to be assessed. In such cases there is a quasi-contract. In this case I do not think Gibson v. Township of North Easthope, 21 A. R. 504, 24 S. C. R. 707, applies.

The third objection is, that, apart from the question of withdrawals, the application itself was not sufficiently signed.

The clerk found in the business 178; three-fourths of 178 would be 134; the names on the application were 145; the clerk struck off as having signed twice and for reasons satisfactory to him 4, leaving 141. It has been shewn that, in addition to the 4, 11 names should not be there, as follows:—

Not in business as grocers when application signed	2
Not grocers at all	2
Additional names as disclosed in affidavits filed	7
	11

Taking these from the 141, only 130 will remain or 4 less than the majority number required.

If the two not in business when the application was signed were included in the 178, the result would be: total, 178; off, 2; leaving 176; three-quarters of 176 would be 132; so in that case there are 2 short of the number required.

I must assume that those not grocers at all whose names are on the application as grocers were not counted by the city clerk as part of the 178.

There was not the requisite three-fourths majority of those of the grocer class required to warrant the passing of the by-law.

It was argued that upon a motion to quash the work of the city clerk must be taken as final. I do not agree with this. The council must be satisfied that such application is signed by not less than three-fourths in number of the occupiers, etc. The application must in fact be so signed. Prima facie what the clerk did was quite sufficient to warrant the action of the council, but when affirmatively shewn, as I think it may be shewn on a motion to quash, that the requisite three-fourths did not in fact sign, then there was absence of jurisdiction, and the by-law is bad. See Robertson v. Township of North Easthope, 16 A. R. at p. 214.

The by-law must be quashed with costs, which I fix at $50. As this is in the main a contest between members of the grocer class, the city may well be relieved of a portion of the costs of this litigation.

ANGLIN, J. MAY 25TH, 1907.

CHAMBERS.

RE WILLIAMS AND ANCIENT ORDER OF UNITED WORKMEN.

Life Insurance—Benefit Society—Change of Beneficiary—Rules of Society—Wife of Member—Foreign Divorce—Validity — Estoppel — Remarriage — Claim of Second Wife—Claim of Adopted Daughter—Right to Contest.

Application by Catherine Williams for payment out of Court of the proceeds of an insurance policy on the life of the late Daniel Williams.

J. E. Jones, for Catherine Williams.

G. Grant, for Mary Jane Williams.

M. C. Cameron, for Jennie Fairbanks.

ANGLIN, J.:—The deceased, Daniel Williams, was married in 1860 to Mary Jane Williams at Springfield, Mass., and continued to reside in that State with her until January, 1886, when, because of his becoming amenable to the criminal law, he was obliged to quit Massachusetts, and came to this province, where he established his permanent residence. His wife remained in Massachusetts, and apparently thenceforward supported herself.

In October, 1890, Mary Jane Williams took proceedings in the Superior Court for the county of Worcester, in the State of Massachusetts, for divorce a vinculo, upon the ground of desertion and cruelty. Daniel Williams not appearing in this proceeding, the Court on 6th May, 1891, granted to the applicant a decree of divorce nisi, which became absolute by judgment of the Court pronounced upon 6th November, 1891.

In 1896 the deceased Daniel Williams went through a ceremony of marriage with the claimant Catherine Williams, and continued to live with her as his wife down to the time of his death.

In December, 1889, Daniel Williams became insured with the Ancient Order of United Workmen for the sum of $2,000, payable to his then wife, Mary Jane Williams, and he continued to maintain this insurance in force in her

favour until 1896, when he indorsed upon the beneficiary certificate a revocation of the direction for payment to Mary Jane Williams, and made application for a duplicate certificate to be issued for the same sum payable to "Catherine Williams (formerly Corbett), bearing the relationship to him of wife, $1,500, and to Jennie Fairbanks, daughter of Maggie Fairbanks, bearing the relationship to him of adopted child or dependent, $500." The application for change of direction stated that the first wife was dead. A duplicate certificate was issued to the applicant in accordance with this application, on 14th July, 1897. The insurance was maintained in this position until the death of Daniel Williams—his reputed wife, Catherine Williams, paying the premiums for several years before his decease, amounting in all to $347.24.

Mary Jane Williams now makes claim to the proceeds of this insurance paid into Court by the Ancient Order of United Workmen, alleging that she is the lawful widow of Daniel Williams, deceased, and that she was never lawfully divorced from him, asserting that the Massachusetts Court had no jurisdiction, because, at the time of the institution of the proceedings for divorce, the domicile of her husband was in this province, and also that there had been in fact no desertion of her by her husband, and that there was no ground for the granting of a divorce. The applicant, Catherine Williams, on the other hand, asserts that she is the lawful widow of the deceased, asserting that the divorce granted by the Massachusetts Court was valid and that she was lawfully married.

She also claims the whole of the proceeds of the policy, notwithstanding the nomination of Jennie Fairbanks as a beneficiary, asserting that such nomination is contrary to the rules and constitution of the Ancient Order of United Workmen. Jennie Fairbanks, on the other hand, claims the sum of $500 appointed to her, alleging that she was an adopted child of the deceased, Daniel Williams, and dependent upon him.

The validity for all purposes of the decree of divorce obtained by Mary J. Williams depends upon some very interesting considerations of international law. Since the decision of the Privy Council in Le Mesurier v. Le Mesurier, [1895] A. C. 517, it is recognized in all Courts administering English law that "the permanent domicile of the

spouses within the territory is necessary to give the Courts jurisdiction to divorce a vinculo, so that its decree to that effect shall, by the general law of nations, possess extra-territorial authority." For the purposes of divorce jurisdiction the domicile of the married pair is that of the husband: Warrender v. Warrender, 2 Cl. & F. 488, 528; Magurn v. Magurn, 11 A. R. 178.

In the present instance it is common ground that the domicile of the late Daniel Williams, at the time the Massachusetts divorce was obtained, was in the province of Ontario. But on behalf of Mary J. Williams it is contended that, inasmuch as, at the time the alleged desertion took place, she was domiciled with her husband in the State of Massachusetts, he would not be allowed to assert for the purposes of her suit for divorce that he had ceased to be domiciled in Massachusetts, and therefore that the Massachusetts Court had jurisdiction to pronounce a decree in her favour which would command extra-territorial recognition. In support of this proposition Mr. Jones cites the judgment of Gorell Barnes, J., in Armytage v. Armytage, [1898] P. 178, at p. 185. . . .

The statement of Gorell Barnes, J., as to jurisdiction to dissolve marriage is distinctly obiter. The jurisdiction to decree judicial separation, the equivalent of the former divorce a mensa et thoro, the English Court of Probate and Divorce inherited from the former Ecclesiastical Courts, which always possessed and exercised it.

In Le Mesurier v. Le Mesurier, at p. 531, Lord Watson says: "It is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage."

Notwithstanding the passage referred to in the judgment of Gorell Barnes, J., in Armytage v. Armytage, and its adoption by Westlake in his work on Private International Law, 4th ed., at p. 86, I cannot but think it doubtful whether a decree of divorce, granted under circumstances such as we have in this case, is entitled to recognition outside the State in the Courts of which it was obtained. But it is unnecessary in the present case to determine this interesting question, because, whatever may be the effect of the Massachusetts decree as to others, the claimant Mary J. Wil-

liams, who obtained the divorce, cannot be heard to impugn the jurisdiction which she invoked: Swaizie v. Swaizie, 31 O. R. 324, 330. Neither can she be heard to allege that the desertion, which she set up and proved to the satisfaction of the Massachusetts Court, was a mere fiction. Upon this ground the claim of Mary J. Williams must be rejected.

Nor does it seem necessary to determine whether Catherine Williams was lawfully married to the late Daniel Williams. The Ancient Order of United Workmen have not disputed their liability upon the insurance certificate. In seeking to pay the proceeds of the certificate into Court they merely asked to be relieved of the responsibility of determining to which of the clainants the money belonged. Upon the face of the policy it is made payable to Catherine Williams and Jennie Fairbanks. It would have been open to the Ancient Order of United Workmen, if so advised, to challenge the right of Catherine Williams and Jennie Fairbanks to any portion of the money, upon the ground that they were not persons to whom, under the rules and constitution of the association, the deceased could make insurance moneys payable. The Order has not seen fit to raise any such question, and I do not understand how it can be raised by Mary J. Williams. For the same reason I am of opinion that Catherine Williams cannot be heard to dispute the right of Jennie Fairbanks to the portion appointed to her, upon the ground which she puts forward, namely, that Jennie Fairbanks was not an adopted child of Daniel Williams, deceased, nor dependent upon him. The rule of the Order in force when the beneficiary certificate issued provided that a member might name as his beneficiary "his adopted daughter or adopted son if dependent upon the member, but satisfactory proof must be furnished to the Grand Lodge to establish that fact, and also that such dependency will likely exist on the maturity of the certificate." Of the existence of the facts of adoption, dependency, and probable future dependency, the Grand Lodge is constituted the sole judge, and its judgment must be formed at the time the certificate is obtained, and once so formed is conclusive upon all parties, and, in the absence of fraud, upon the Grand Lodge itself as well. Catherine Williams could not, in any event, claim under the appointment to herself more than the $1,500 apportioned to her by the deceased, and,

in my opinion, she is not in a position to contest the right of Jennie Fairbanks to the $500 appointed to her.

The order will be for payment of the costs of Catherine Williams and Jennie Fairbanks out of the sum of $1,500 appointed to Catherine Williams, and for payment of the balance of such sum of $1,500 to Catherine Williams. The sum of $500 will be retained in Court and paid with accrued interest to Jennie Fairbanks upon her attaining majority.

GORHAM, CO. C.J. APRIL 6TH, 1907.

THIRD DIVISION COURT, HALTON.

FRASER v. McGIBBON.

Innkeeper—Liability for Effects of Guest—Commencement of Relationship—Negligence—Notice—Special Place Provided for Leaving Effects.

Plaintiff claimed from defendant, an hotelkeeper, the sum of $20, being the alleged value of an overcoat, gloves, and other articles of clothing lost at defendant's hotel when plaintiff was, as he alleged, a guest, on or about 2nd October, 1906, owing to the alleged default of defendant. Defendant disputed plaintiff's claim in full.

Plaintiff in person.

W. A. F. Campbell, Georgetown, for defendant.

GORHAM, CO. C.J.:—The facts, as given in evidence, appear to be as follows. The Esquesing township agricultural fair was held on the 2nd October, 1906, at Georgetown. The plaintiff on the morning of that day travelled by railway train from Milton, his place of residence, to Georgetown, for the purpose of attending the fair. Defendant appears to have been for a number of years, and in particular on that day, proprietor of the hotel, in Georgetown, known as the Clark House, and to have therein carried on the business of an innkeeper. Plaintiff reached defendant's hotel between the hours of 9 and 10 in the morning. He says that when he entered the hotel he intended to enter his name in the hotel register, a book kept on the office counter for that purpose, but, owing to being inter-

rupted or turned from his intention by meeting some friend, failed to do so. He, shortly after his entry into the hotel, took off his overcoat, in the pockets of which were his gloves and a handkerchief, and hung it up where he had been in the habit of hanging his coat when he stopped at this hotel and where he saw others who were on that day, he says, guests at the hotel, hang their coats. He did not ask any one to take charge of his coat, nor call the attention of any one to it. Defendant on cross-examination admitted that others hung their coats where plaintiff hung his, and that he knew this. Defendant's hotel was on that day thronged, and he had, on account of the large crowd that usually gathers at his hotel on such days, provided a cloak room and a man in charge of same, who received coats, etc., from guests and gave "checks" for same. He also put up a notice or notices in the public sitting room that such a room had been provided. The notice read "check room inside." Plaintiff says he did not see this notice, nor did he know there was such a room and man in charge, and that, had he known, he would have put his coat in that room and taken a check. Defendant admits that he did not tell plaintiff there was such a room until plaintiff told him of the loss of his coat, when defendant for the first time learned that plaintiff had brought an overcoat into the hotel. There appears to be a notice at the top of each page in the hotel register book to the effect that the proprietor will not be responsible for coats, etc., unless "checked." Plaintiff says he did not see this notice and knew nothing of it. Plaintiff remained, after hanging up his coat as mentioned, about the hotel until noon, when he had dinner, for which he paid on coming from the dining-room. Then after dinner he went to the fair grounds, and in the evening returned to the hotel and had another meal, for which he also paid on leaving the dining room. He then remained about the hotel until he was ready to start for home, when he, for the first time since he had hung up his coat in the hotel, looked for it where he had hung it. It could not be found, and has never since been found. The plaintiff by this action seeks to recover $20 as damages for the loss of the coat, gloves, and handkerchief.

The law to be considered in this class of cases is very old. Some Judges and text writers find great similarities between the civil law and the common law, but at the same

time shew great dissimilarities. Others do not hesitate to say the law applicable is the "law and custom of England" without reference to the civil law—that it is peculiar to the English law. This law and custom of England—the common law—originally imposed upon an innkeeper certain liabilities to prevent him from acting in collusion with the bad characters who in old times infested the roads, and to protect wayfarers and travellers who on their journeys brought goods into the inn. The wayfaring guest had no means of knowing the neighbourhood or the character of those whom he met at the inn. It was therefore thought right to cast the duty of protecting the guests upon the host. Knowing that this is one of his duties, one of the liabilities he incurs, the innkeeper can make such charge for the entertainment of his guest as will compensate him for the risk. It may be observed that, unless the law cast upon him this burden, a dishonest innkeeper might be tempted to take advantage of a wealthy traveller. With that view the innkeeper was placed in the position of an insurer of the goods of his guest, and correlative to his liability is his right of lien upon the goods which the guest brings with him into the inn.

The innkeeper must be the keeper of a common inn, that is, one who makes it his business to entertain wayfarers, travellers, and passengers, and provide lodgings and necessaries for them, their horses and attendants, and receive compensation therefor. He must admit and entertain to the extent of his accommodation all persons of the class for whose entertainment he holds out his house and against whom no reasonable objection can be shewn. He may exclude such as are not sober, orderly, able to pay his reasonable charges, or such as ply his guests with solicitations for patronage in their business, or whose filthy condition would annoy other guests. It appears that he may limit his accommodation and entertainment to a certain class. Persons other than guests are said prima facie to have the right to enter an inn without making themselves trespassers; for there is an implied license for the public to enter, though such license is in its nature revocable and those thus entering become trespassers when they refuse to depart when requested. An innkeeper by opening his house —his inn—offers it to the use of the public as such, and thereupon the common law imposes on him certain duties

and gives him certain rights. Those duties and rights, as well as the attendant liabilities, have been changed, in some respects made heavier and in some respects made lighter, by statute. In the province of Ontario the statutes bearing directly on these duties, rights, and liabilities, are the Liquor License Act and the Act respecting innkeepers. That an innkeeper may not be licensed under the Liquor License Act does not change the character of the business of him who entertains travellers, etc. The possession of such a license does not make, nor the want of it prevent, a person from being an innkeeper at common law. It is his business alone that fixes the status of a person in this respect. A license saves the innkeeper from the liability to certain penalties imposed by the Act, but neither the possession nor the want of it will save him from liability to his guests. Here it may be noted that "inn" and "hotel" are synonymous. Ordinarily in Ontario "tavern" is also used synonymously with "inn;" in England it appears to signify a house where food and drink without lodgings may be obtained. To those who may be curious about the origin of those words and the origin of the business of hotel-keeping, I would recommend the careful reading of Cromwell v. Stephens, 2 Daly (N. Y. C. P.) 15.

It is necessary to consider who is a guest and at what point of time the relation of innkeeper or landlord and guest arises. A guest is one who resorts to and is received at an inn for the purpose of obtaining the accommodation which it purports to afford. He may be a wayfarer, traveller, or passenger who stops at or patronizes an inn as such. He may come from a distance, or live in the immediate vicinity. He comes for a more or less temporary stay, without any bargain for time, remains without one and may go when he pleases, paying only for the actual entertainment received. His stay and entertainment may be of the most transient kind. One who goes casually to an inn and eats or drinks or sleeps there, is a guest, although not a traveller: York v. Grindstone, 1 Salk. 388; Bennett v. Mellor, 5 T. R. 273; Orchard v. Bush, [1898] 2 Q. B. 284; McDonald v. Edgerton, 5 Barb. (N. Y.) 560. And a person continues a guest though he goes to view the town for any time, or to view any spectacle in the town: Gelley v. Clerk, Cro. Jac. 188; McDonald v. Edgerton, supra; or goes out and says he will

return at night: White's Case, Dyer 158 b. The liability of the innkeeper as such will continue during the temporary absence of the guest: Day v. Bather, 2 H. & C. 14. Note the following cases: Brown Hotel Co. v. Buckhardt, 13 Colo. App. 59; Grinnell v. Cook, 3 Hill (N. Y.) 485; McDaniels v. Robinson, 26 Vt. 316. If the relation of landlord and guest be once established, the presumption is that it continues until a change of that relation is shewn: Whiting v. Mills, 7 U. C. R. 450.

"It is important to ascertain when the relation of innkeeper and guest commences, in cases involving liability for the loss of or injury to the guest's effects. This is a question of fact, the solution of which generally depends on the facts of each case. It is obvious that when a person goes to an inn as a traveller or wayfarer, and the innkeeper receives him as such, the relation of landlord and guest attaches at once. The intention to avail himself of the entertainment, that is, to obtain refreshments, or lodging, or both, is material, and if the party should engage and pay for a room merely to secure a safe place for the deposit of his valuables, or without any intention of occupying it, he would not be a guest. Under some circumstances too, the relation may commence before the party actually reaches the inn:" Am. & Eng. Encyc. of Law, vol. 16, p. 520.

In the United States it has been decided that when a traveller arrives at a station, and is met by the porter of an hotel, and the traveller delivers to the porter his baggage or the check for getting the same from the railway authorities, the traveller is thereby so far constituted a guest as to render the proprietor liable for the safe-keeping or re-delivery of the baggage. The liability of the proprietor, it is said, commences from the time of the delivery of the baggage or check to the porter: Coskery v. Nagle, 20 Am. St. R. 333; Sasseen v. Clark, 37 Ga. 242; Williams v. Moore, 69 Ill. App. 618; Eden v. Drey, 75 Ill. App. 102.

In England and Ontario there being, so far as I can ascertain, no direct authority on the point as to the moment of the commencement of the relation of landlord and guest, one may, I think, infer from the reasoning in the arguments of counsel and in the judgments in the reported cases that, as the innkeeper is under an obligation at common law to receive and afford proper entertainment to every one who offers himself as a guest, if there be sufficient room for him

in the inn, and no good reason for refusing him, the relation commences the moment the person presents himself and is accepted. While the presenting of himself must be a positive act on the part of the would-be guest, the acceptance on the part of the innkeeper need not be; in fact the mere want of active objection on the part of the innkeeper to the person so presenting himself, may be taken as evidence that the innkeeper has accepted him as guest. So that, if a person goes to an inn as a wayfarer or traveller with the intention of becoming a guest, which intention may be evidenced only by the act of the person in so presenting himself, and the innkeeper does not actively object to or refuse him at once, it may well be that he, on the very moment of such presentation and non-objection, becomes the accepted guest of the landlord at his inn, and then the relation of landlord and guest, with all its rights and liabilities, is instantly established between them.

The relation of innkeeper and guest havng been established, it becomes the duty of the innkeeper to keep such goods as the guest brings with him into the inn safely night and day. And this although the guest does not deliver his goods to the innkeeper or his servant, nor acquaint him with them: Calye's Case, 8 Coke 32, 1 Sm. L. C., 10th ed., p. 115. This, it has been said, is necessary for the protection of those resorting to the inn, from the negligence and dishonest practices of innkeepers and their servants: Holder v. Solby, 8 C. B. N. S. 254. As will appear hereafter, it is not necessary at common law that the guest's goods should be in the special keeping of the innkeeper, it is generally sufficient that they are within the inn under his implied care, and as soon as the goods are brought into the inn, though there is no actual delivery of the goods, nor any notice of them given to the innkeeper, this custody begins. If he desires to avoid liability for their loss or injury he must give the guest direct notice. Hanging up a coat in the place allotted for that purpose is placing it infra hospitium, that is, in charge of the innkeeper and under the protection of the inn, though it is done in the absence of the landlord and his servants: Orchard v. Bush, [1898] 2 Q. B. 284; Norcross v. Norcross, 53 Me. 163.

In Orchard v. Bush the facts were as follows:—The defendants were innkeepers. Guests were accommodated at the inn with sleeping rooms if required. From 90 to

100 people who were not staying at the inn, dined in it every day. The plaintiff, who was in business in Liverpool, but lived outside the town, went to the inn for supper about 9 o'clock in the evening. He went into the dining-room and hung his overcoat upon a hook, where coats were usually hung. He then left the room for a short time to speak to the manageress of the inn, returned, had his supper, and, on leaving to catch a train home, found his coat was missing. It was decided that the plaintiff was a traveller and wayfarer, that he was a guest of the inn although he only came in for supper, that he was not guilty of negligence in leaving the coat in the dining-room temporarily whilst he went to speak to the manageress, that the defendants were responsible for the loss of the coat. Wills, J., in his judgment remarked: "I think a guest is a person who uses the inn, either for a temporary or a more permanent stay, in order to take what the inn can give. He need not stay the night. I confess I do not understand why he should not be a guest if he uses the inn as an inn for the purpose of getting a meal there." And further: "The innkeeper's liability is said to arise because he receives persons causâ hospitandi. I cannot see why he receives them less causâ hospitandi if he gives them refreshment for half a day, receiving them in the same way as other persons are received, than if they stay the night at his inn. It makes no difference that he receives a large number of people who only take a meal at the inn. He does receive them, and as an innkeeper, and his liability as an inkeeper thereupon attaches in respect of them." And Kennedy, J., remarked: "I agree that, on the facts of this case, the plaintiff was a traveller; but, apart from the question whether he was a traveller or not, I am of opinion that if a man is in an inn for the purpose of receiving such accommodation as the innkeeper can give him, he is entitled to the protection the law gives to a guest at an inn."

In Norcross v. Norcross, 53 Me. 163, the facts were:— The plaintiff went to the defendant's hotel on 17th September, stayed three nights, was there again from 22nd to 26th September, and again from 29th September to 1st October, and again from 13th to 19th October. He paid his bill up to the 19th. That evening another hotel in the town was burned. A great many were going in and out of the office. Plaintiff, whose coat was hanging in the place

allotted for that purpose, took it and put it on, as he was afraid that in the bustle some one might steal it. He went out and returned about 11 o'clock. A man came in and wanted lodging. Defendant could not accommodate him; plaintiff then told defendant that the man could have his room, and he would go elsewhere for the night. He did so, and took his coat with him. Next morning he came back. No one was in the office. He did not register. He hung up his coat where others hung theirs. He did not leave it in charge of any one. He then went in to breakfast. When he came out of the breakfast-room his coat was gone. It had been stolen. It was decided that plaintiff was a guest and that the innkeeper, the defendant, was liable for the loss of the coat; that if a guest, in the absence of the landlord and his servants, hang up his coat in the place in an inn allotted for that purpose, it is infra hospitium.

In Bennett v. Mellor, 5 T. R. 273, the plaintiff's servant took goods which he had been unable to sell at the weekly market, to the defendant's inn, and asked the defendant's wife if he would leave them till the week following. She answered she could not tell, for they were full of parcels. The plaintiff's servant then sat down in the inn and had some liquor. He put the goods on the floor beside him, whence they were stolen. It was decided that the plaintiff's servant had by sitting down and partaking of refreshment become a guest and that it became the duty of the innkeeper to protect his goods or answer for their loss.

In McDonald v. Edgerton, 5 Barb. (N.Y.) 560, the plaintiff sued defendant, an innkeeper, to recover the value of an overcoat. Plaintiff stopped at defendant's inn on general training day, about 7 o'clock in the morning; soon after the plaintiff came he took off his overcoat; he gave the overcoat to the barkeeper; he treated a number of people at the bar and paid for the liquor; he then went out; in the evening he came back and asked for his coat; it could not be found; the defendant was held liable. In giving judgment the Court remarked: "The purchasing of the liquor was enough to constitute the plaintiff a guest;" citing Bennett v. Mellor, 5 T. R. 273; 2 Kent's Com. 593; Clute v. Wiggins, 14 Johns. 175. Again: "It is fairly to be inferred from the evidence in the case that the plaintiff lost his coat before he started to leave the town to go home, and if he was only out to see

the town or to view the training, intending to return to the defendant's before he left for home and get his coat, then, I think, he was still to be considered as a guest of the defendants;" citing 2 Croke's R. 189, and 1 Comyn's Dig. 421, 413, and Grinnell v. Cook, 3 Hill R. 490.

An innkeeper cannot discharge himself of the duty imposed upon him by the common law by a general notice. If he desires to limit his liability in any way he must give the guest express notice, that is, the notice must be brought home to the guest. The posting up of, or the putting upon the hotel register book, a notice, is not sufficient unless it can be shewn that the guest saw it and read it: Richmond v. Smith, 8 B. & C. 9; Packard v. Northcraft, 2 Met. (Ky.) 442. In Bernstein v. Sweeny, 33 N. Y. Super. Ct. 271, it was decided that the signing of a register under a printed heading containing an agreement that the innkeeper shall not be responsible for the loss of valuables unless deposited in the safe, is not the contract of the guest, in the absence of any proof that it was seen or assented to by him.

In Morgan v. Ravey, 6 H. & N. 265, the plaintiff was staying at an hotel in London. In his bedroom was hung up a notice that, in consequence of robberies having taken place at night in London hotels, the proprietor requested visitors to bolt their doors and leave their valuables at the bar, otherwise he would not be responsible. This notice plaintiff saw, but swore he read only the word "notice." He did not bolt his door (because, as he said, he did not know how), nor did he leave his watch or other valuables at the bar; next morning they were gone; the jury having found that there was no negligence on his part, the Court refused to disturb the verdict for the plaintiff.

The defendant, by holding himself out as an hotel-keeper or innkeeper and his house as a common inn, invited the plaintiff as one of the travelling public to become a guest. The plaintiff accepted that invitation and entered the hotel with the intention of becoming such. He did not see or learn of any notice nor have any knowledge that the defendant had provided a room and a man in charge where and with whom he could leave his coat, but, seeing others whom he speaks of as guests, hanging their coats on hooks evidently provided for that purpose in the office or public room, hung his coat there also. The defendant must be taken to

know that the plaintiff had accepted the invitation and offered himself as a guest and hung his coat where he did. There was no need for the defendant to, by any act or word, signify that he accepted the plaintiff as a guest. If he did not wish to accept him as such he should have, when the plaintiff entered the inn, so notified him. It appears to me that the plaintiff became a guest from the moment he entered the defendant's hotel with the intention of becoming such, which intention, I think, was well shewn by the plaintiff's conduct. He was a traveller; as such he entered the hotel, took off and hung up his coat, thus shewing an intention to remain, which he did, and had his dinner. No stronger evidence of intention is required. It was not necessary that he should enter his name in the hotel register. If there was any doubt of his intention, or of his being accepted as a guest up to the time of having his dinner, it was then removed, and that act, I think, if it be necessary, related back to his entrance into the hotel and his hanging up of his coat. The relation of landlord and guest having once been established, the presumption is that that relation continued up to the time in the evening when he declared his intention to, as a traveller, leave the inn and not return again. Having his evening meal puts beyond doubt the continuation of the relation of landlord and guest.

The hanging of his coat on one of the hooks in the public room, even though the hotel was thronged with people, was not negligence on the part of the plaintiff. The hooks were evidently, I think, provided for such a purpose and invited such an act. The defendant knew they were being used for that purpose on that day by his guests, and if he did not wish them so used he should have either removed them or insisted on the plaintiff placing his coat elsewhere—in the check room for instance. If then the plaintiff resisted the defendant's insistence and in turn insisted on his coat remaining where he hung it, it may be that the defendant would be free from liability. Defendant cannot be heard to say that he did not know that plaintiff hung his coat where he did. It was his duty to know, his duty to remove it to a place of safety or to safely guard it where it hung. The plaintiff, continuing to be a guest up to the time in the evening when he left the hotel to return home, had the right to leave the inn for the purpose of seeing the town or any spectacle therein, and to leave his

coat where he had hung it, relying on the defendant guarding it safely during his temporary absence.

On the evidence submitted in this action I find that defendant was on 2nd October, 1906, the keeper of a common inn, known as the Clark House, in the village of Georgetown; that plaintiff on that day was a traveller and became a guest at the said inn, and that the relation of landlord and guest was established between them; that plaintiff, by hanging up his coat where he did, placed it infra hospitium, that is, in the custody of defendant as innkeeper; that plaintiff's coat was in defendant's charge and under the protection of defendant's inn at the time of its loss; that plaintiff had no notice of any intention or desire on the part of defendant to limit his common law liability; that the plaintiff was not guilty of negligence in hanging up his coat and leaving it where he did.

The amount sought to be recovered as damages for the loss of the overcoat, gloves, and handkerchief is $20. There was no evidence on the value of the articles except plaintiff's. Judgment will be entered for plaintiff against the defendant for $20 damages and costs.

Lest it may be thought I have overlooked the Liquor License Act and the Innkeepers' Act, I may say they do not bear upon the question in this action.