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FALCONBRIDGE, C.J. JUNE 11TH, 1906.

WEEKLY COURT.

RE JANSEN.

Life Insurance — Change in Beneficiary — "Instrument in Writing"—Incomplete Will—Operation of—Insurance Act.

Motion by Mary S. Jansen, widow of W. Jansen, deceased, for payment out of Court of the amount paid in by a benefit society, being the fruits of a policy or certificate upon the life of the deceased, of which she was the beneficiary. The motion was opposed by the 5 children of deceased, who claimed under an alleged will varying the designation of beneficiary and apportioning the amount among wife and children.

W. B. Laidlaw, for the widow.

A. G. F. Lawrence, for the 5 children of deceased.

FALCONBRIDGE, C.J.:—The Grand Lodge of the Ancient Order of United Workmen issued a beneficiary certificate to the deceased in 1879, for $2,000, to be paid at his death to his wife. Jansen died on 27th June, 1905, leaving him surviving his widow and 5 children. On 16th June he had executed a document with the intention of making a last will and testament, but the persons who subscribed their names as witnesses were not both present at the same time, nor did they subscribe their names as witnesses in the presence of each other; so that the document cannot be proved as a will.

The question for determination is whether this document, which was intended to operate as a will, and which is wholly

invalid as such, can be treated as an "instrument in writing" under the Insurance Act, R. S. O. 1897 ch. 203, sec. 160, sub-sec. 1.

The point is, I think, a new one. . . . I was not referred to any authority expressly in point.

In Kreh v. Moses, 22 O. R. 307, the person who would have benefited by the writing was not one of the class known as "preferred beneficiaries:" sec. 159. But I think the principle is the same. The deceased did not intend to execute an instrument in writing to transfer the benefits of the policy inter vivos. His intention was to make a will, and he failed to make a valid one. I am therefore of opinion that the paper in question is not an instrument in writing which is effectual to vary the benefit of the certificate. To hold otherwise would, I think, be to defeat the statute prescribing how a will shall be executed.

The widow is, therefore, entitled to the fund in question. I think it is a case for directing costs to all parties to be paid out of the fund.

I refer also to Re Hughes, 36 W. R. 821, and to Long's Appeal, 86 Pa. St. R. 196, 204.

ANGLIN, J. JUNE 12TH, 1906.

TRIAL.

CRONKHITE v. IMPERIAL BANK OF CANADA.

Landlord and Tenant—Vault Door Placed on Demised Premises by Tenant — Annexation to Freehold—Fixture—Removal after Expiry of Term—Waste—Damages.

Action by the owner of a building in the city of Niagara Falls for damages for alleged waste committed by the defendants, tenants of a portion of the building, by removing the door of a vault used by them for banking purposes in the leased premises.

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

A. Fraser, Niagara Falls, for defendants.

ANGLIN, J.:—In 1896 plaintiff's predecessor in title, Alice Howard, leased to defendants the western store in the building known as "Howard's Block." The lessor constructed in the interior of the leased premises a vault of brick and masonry. The lessees provided a metal lining for this vault, which was secured by bars sunk into the masonry of the vault. At the doorway of the vault to this metal lining, upright pivots or staples of metal were affixed, upon which it was intended to hang or suspend the vault door. This door, with an expensive combination lock, the whole costing $500, was procured by the lessees, and hung upon the pivots or staples prepared for it. When open, its own weight and the support of the staples on which it hung, kept it in position. When closed and locked, it was held in place not only by the staples but also by the bolts, which the action of the lock drove into recesses in the masonry, or the metal casing prepared to receive them.

In 1890 defendants leased the corner or eastern shop of the block from Alice Howard for a term of 10 years from 1st April, 1890. The landlady constructed a new brick vault in this shop, and the tenants supplied the metal lining for it. The vault door was removed from the vault in the western shop, and hung upon the new vault in the corner shop, in the same manner as it had formerly been hung upon that in the western shop.

The lease of 1890 contains no reference to fixtures except in the covenant to leave the premises in good repair, etc. There is no evidence of any express agreement at any time between the lessor and the lessees about the ownership of the vault door; no evidence that anything whatever was said about it by one or the other of them. But there certainly was some understanding that the lessees should furnish this door.

On 10th November, 1899, the bank took a new lease of the corner premises for a further term of 5 years from 1st April, 1900, from James Dickenson, a grantee from Alice Howard. This lease contains the usual covenant by the lessee to leave the premises in good repair, etc., and a proviso "that the lessee may remove its fixtures," but makes no reference, by recital or otherwise, to the preceding lease of 1890, except in the description of the premises as "now occupied by the said lessee as a bank."

On 10th November, 1904, a further lease was taken by the bank, for a term of 18 months, to be computed from 1st

April, 1905, which contains covenants and provisoes similar to those in the lease of 1900, and the following special clause: "It is further expressly agreed between the parties hereto that, in consideration of the granting of this lease, the extension of the lease heretofore entered into between the said parties, dated the 10th day of November, 1899, is hereby surrendered."

What were the rights and relative positions of the parties between 10th November, 1904, and 1st April, 1905, is not now material; but it may be noted that the lease of 1899 is here spoken of as "an extension of lease."

James Dickenson, after executing the lease of November, 1904, conveyed to the plaintiff, subject to the tenancy of the Imperial Bank.

The lessees were still in actual possession of the premises when, in February, 1906, they took off the vault door in question and removed it to another building owned by themselves. A demand by the plaintiff for its return was refused. The present action ensued.

The parties agree that, if plaintiff is entitled to recover, the damages shall be assessed at $500; and that, as an alternative to paying that sum, defendants may restore the door in question to plaintiff. Plaintiff abandons all claim to any other relief in this action.

It was argued by Mr. Fraser, for defendants, that the provisoes in the leases of 1899 and 1904, which expressly reserve to the lessees the right to remove fixtures placed by them upon the premises, include this fixture, if it be such. In that view I cannot agree. These provisoes are, in my opinion, restricted in their operation to fixtures placed upon the premises by the lessees subsequent to the respective dates of these demises and to other fixtures, if any, then upon the premises which the parties might agree should be deemed lessees' fixtures.

Neither can I treat the leases of 1899 and 1904, as contended for by Mr. Fraser, as mere extensions of or excrescences upon the original lease of 1890. Even if the special clause in the lease of 1904 above quoted would support that contention as to the lease of 1899, it is wholly destructive of Mr. Fraser's argument when applied to the lease of 1904, under which defendants were in possession at the time of the commission of the alleged waste.

The question to be determined, therefore, is whether the lessees, in possession under the lease made in 1904, had the right to remove the vault door which they had, as tenants under an earlier lease, supplied and placed upon the premises. I shall assume that, if still in possession under the original lease of 1890, they would have the right to remove the door, though a fixture. The right of a tenant as against his landlord to remove his trade fixtures during the term, though affixed to the freehold more firmly than was this door, is well established. I refer only to some of the more recent decisions: Mears v. Callander, [1901] 2 Ch. 388, citing, with full approval, Penton v. Robart, 2 East 88; In re Hulse, 74 L. J. Ch. 246; Argles v. McMath, 26 O. R. 224, 18 A. R. 44.

This vault door was brought upon the premises to meet the business requirements of the bank. It was hung upon the pivots that it might serve the purpose for which it was designed. Its removal entails no injury whatever to the freehold. It can, when removed, be used elsewhere just as it was used upon the premises of plaintiff. The circumstances do not indicate that the bank intended that this door should become permanently a part of the freehold. It would seem not unreasonable that, if a fixture at all, it should be deemed a tenant's trade fixture and as such removable. Such I assume it to have been.

But the authorities are uniform that tenant's fixtures are removable only during the term or some further period of possession by the tenant, during which he holds the premises under a right still to consider himself a tenant, or during what has been called an excrescence upon or an enlargement of the term.

Either in 1899 or in 1904, probably in both years, there was a surrender by the lessees of the terms then respectively about to end. During the original term the door in question, if a fixture, was part of the freehold, subject, I assume, to the tenants' right of removal: Scarth v. Ontario Power and Flat Co., 24 O. R. 446, 451. That right of removal ceased with the surrender—whether by express agreement or by operation of law—of the term in respect of which it existed. Under a new lease taken by a tenant, in the absence of special agreement to the contrary, things remaining affixed to the freehold, though theretofore his removable fixtures, are demised to him as part of the premises owned by the landlord: Sharp v. Milligan, 23 Beav. 419; Pronguey v.

Gurney, 36 U. C. R. 53, 57, 37 U. C. R. 347, 356. If then, as between the landlord and the tenants, this vault door, upon its being placed in position, became a fixture, though removable by the tenants during the term, it has become the property of the landlord, and its removal in February last by the tenants was unlawful.

But did the vault door ever become a fixture at all? As between the lessor and defendants there are some circumstances which seem to indicate an intention that it should remain a chattel and should not become a fixture. Are they sufficient to warrant a finding that there was a tacit understanding or implied agreement to that effect?

The fact that the landlord, though building the masonry of the vault at his own expense, was not required by the lessees to provide the metal lining and vault door is in itself significant. When it is remembered that this special and expensive door with combination lock, requisite for the business of a bank, would probably be unnecessary for the business of other future tenants of the premises and to some tenants might be a distinct drawback, that while of great value to the bank it might very slightly enhance the value of the freehold if retained after the premises had ceased to be used as a banking house, there would at first blush seem to be strong reasons for the belief that the parties intended that it should remain a chattel. But there is no evidence that the landlord may not have contemplated leasing these premises in the future to other tenants to whom a vault equipped with such a door would be an inducement, if not a necessity. Again, there is no evidence of the rental value of the premises, and it is impossible to say that the rent of defendants was not materially reduced because of the prospective acquisition by the landlord of this valuable vault door. Though rather indicative of an intention that the door should remain a chattel, the circumstances are not inconsistent with an intention that the door should become a fixture, removable it may be, but nevertheless a fixture, and do not, in my opinion, suffice to sustain an inference that, between Alice Howard and the Imperial Bank, there was an agreement or understanding that this door should retain the character of a chattel. Neither is there evidence of any custom that such doors, when placed by banks on rented premises, are deemed chattels as between them and their landlords. Such a custom, if its existence were satisfactorily shewn, and

knowledge of it by the parties proven, might have justified an inference that the lease in question was made subject to it: Trappes v. Harter, 2 C. & M. 153. I find no solid ground upon which to rest any implied agreement between the parties as to the character of the door in question. . . .

[Reference to Reynolds v. Ashby & Son, [1904] A. C. 466, 473.]

The rule laid down by Blackburn, J., in Holland v. Hodgson, L. R. 7 C. P. 328, at p. 335, has been so often affirmed by the highest authority that it admits of no question. It is stated in these terms: "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas delivered by Maule, J., in Wilde v. Waters, 16 C. B. 637. This, however, only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy the onus."

Where there is some annexation, the mode and degree as well as the object of such annexation, the ease or difficulty in detaching the article without injury to itself or to the freehold, and whether the purpose be to use the thing as "accessory to a matter of a personal nature" or to use it "to improve the inheritance," must largely determine the effect to be given to such annexation, from which, in the absence of evidence of agreement, the intention of the annexation must be deduced. . . .

[Reference to Stack v. Eaton, 4 O. L. R. 335, 338, 1 O. W. R. 511; Hobson v. Gorringe, [1897] 1 Ch. 182, 193.]

I have carefully read and considered Lancaster v. Eve, 5 C. B. N. S. 717; Wood v. Hewett, 8 Q. B. 913; Mant v. Collins, 5 Q. B. 916; Ex p. Ashbury, L. R. 4 Ch. 630; Chidley v. Churchwardens of West Ham, 32 L. J. 486; Liscombe Falls Gold Mining Co. v. Bishop, 35 S. C. R. 539; and many other cases in which articles annexed to the free-

hold were held to have remained chattels. None of them is decisive of the present case.

This vault door is affixed, slightly it may be, to the land. It is not attached merely by its own weight. Therefore, the onus of shewing it to be a chattel and not a fixture rests upon the defendants. While the mode and degree of the annexation, because it is so slight and because the door can be removed without injury to itself or to the freehold, may not be inconsistent with its retaining the character of a chattel, can it be said that the object of the annexation was aught other than to render the vault (admittedly part of the freehold) serviceable to defendants as tenants of the shop for the purpose for which it was intended? . . .

[Reference to Wake v. Hall, 8 App. Cas. 195, 204.]

Here the mode and degree of annexation are at best inconclusive; the object of the annexation, on the other hand, "patent to all to see," was the improvement of the inheritance — the completion of the vault — at all events during the tenancy of defendants. This, I think, sufficed to make of the vault door a fixture, removable it may be as a tenant's fixture, but, while affixed to the freehold, part and parcel thereof, subject to any such right of removal.

Defendants have failed to discharge the onus of shewing that this door, annexed to and apparently part of the freehold, retained its chattel character. They did not preserve any right of removal which may originally have been incidental to it as a tenant's fixture. The title of plaintiff is, therefore, upon the admitted facts, established, and he must have judgment in the terms agreed upon, and as well for the costs of this action.

JUNE 12TH, 1906.

DIVISIONAL COURT.

VOKES HARDWARE CO. v. GRAND TRUNK R. W. CO.

Mechanics' Liens—Time for Registering Lien—Completion of Work—Contract—Work to be Done to Satisfaction of Architects—Work Done after Registration of Lien—Form of Judgment—Money in Court—Reference—Costs.

Appeal by defendant Whitham from judgment of MULOCK, C.J., 7 O. W. R. 537.

R. McKay, for appellant.

J. W. St. John, for plaintiffs.

THE COURT (MEREDITH, C.J., TEETZEL, J., ANGLIN, J.). affirmed the judgment, with a variation agreed to by counsel, to the effect that the declaration of plaintiffs' lien in the formal judgment be struck out, and that the amount which shall be found by the Master to be due to plaintiffs be paid out of the money in Court. No costs of the trial or of this appeal. Further directions and other costs reserved to be disposed of by a Judge in Chambers after the Master's report.

ANGLIN, J. JUNE 13TH, 1906.

TRIAL.

ELLIS v. NORWICH BROOM AND BRUSH CO.

Company—Sale of Assets by Directors to Managing Director —Action to Set aside—Direction to Hold Meeting of Shareholders to Ratify or Disapprove Sale.

Action to set aside as ultra vires and improper a sale by the directors of the defendant company of all the assets to the defendant Dougherty, managing director of the company.

R. N. Ball, Woodstock, for plaintiff.

J. G. Wallace, Woodstock, for defendant.

ANGLIN, J.:—Had this sale been to a stranger, I do not think the right of the directors to make it could be successfully challenged: Wilson v. Miers, 10 C. B. N. S. 348; Whiting v. Hovey, 14 S. C. R. 515, 13 A. R. 7. But, as a sale by the trustees to one of themselves, its validity is certainly open to question. Upon the evidence it is impossible to find that this sale was ever sanctioned by the shareholders. Yet it is reasonably clear that, if it should now be set aside, the shareholders would themselves immediately take steps to effect a similar sale to defendant Dougherty. Of their power to make such a sale there can be no question. It therefore seems proper before disposing of this action to direct that a meeting of the shareholders may be called for the consideration of the sale to Dougherty effected by the directors, and that they be asked to ratify it or express their disapproval of it: Bainbridge v. Smith, 41 Ch. D. 462; Pender v.

Lushington, 6 Ch. D. 70, 79-80. Should they ratify it, it is obvious that a judgment for plaintiff in this action would be of no avail. Should they disapprove, such a judgment may be necessary to preserve substantial rights. A special meeting of the shareholders may accordingly be called by the directors for 27th June, 1906. Due notice should be given of the time, place, and purpose of this meeting to all persons who are now or who were shareholders on the 1st and 3rd February, 1906. The president of the company may report fully to the registrar upon affidavit the results of such meeting. This action will then be disposed of.

JUNE 13TH, 1906.

DIVISIONAL COURT.

CHAMBERS v. JAFFRAY.

Discovery — Libel — Examination of Defendant — Answers Tending to Criminate—Privilege — Evidence Act — Rule 439.

Appeal by defendant R. M. Jaffray from order of MULOCK, C.J., 7 O. W. R. 371, requiring the appellant to attend, at his own expense, and answer certain questions which had been put to him on his examination for discovery, and which he had refused to answer, on the ground that his answers to them would tend to criminate him, and all other lawful questions which might be put to him on such examination, and that in default of his doing so a writ or writs of attachment should be issued against him.

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

R. McKay, for appellant.

J. B. Clarke, K.C., for plaintiff.

MEREDITH, C.J.:—The action is for libel, and the principal question raised upon the appeal is as to the application of the provisions of sec. 5 of the Ontario Evidence Act, as

enacted by sec. 21 of the Statute Law Amendment Act, 1904, to examinations for discovery.

But for the provisions of Con. Rule 439, as enacted by Con. Rule 1250, I should have doubted whether sec. 5 is applicable to examinations for discovery.

Con. Rule 439 is as follows: "439. A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question, by any party adverse in interest, and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination of a witness except as hereinafter provided." It is quite clear that upon the trial of the action sec. 5 would be applicable, and the appellant would not be excused from answering.

This Rule, in my opinion, therefore, puts a party on his examination for discovery, as far as the question under discussion is concerned, in the same position as he would be in if he were being examined as a witness at the trial, and he is therefore not excused from answering any question that is properly put to him, upon the ground that the answer to it may tend to criminate him, and if he objects to answer on that ground his answer is within the protection of sec. 5. This is secured to him by the words of the Rule "testify in the same manner, upon the same terms, and subject to the same rules of examinations of a witness."

A minor question raised by the appeal was dealt with on the argument.

The order will, therefore, be varied, as to the minor question, by providing that the appellant is not to be required to answer as to the person or persons under whose instructions the alleged libel was written, except such as are parties to the action; and with this variation the order will be affirmed and the costs of the appeal will be costs in the cause to plaintiff.

BRITTON, J., and MAGEE, J., gave written reasons for the same conclusion, both referring to Regina v. Fox, 18 P. R. 343, as governing this case.

JUNE 14TH, 1906.

DIVISIONAL COURT.

LIFE PUBLISHING CO. v. ROSE PUBLISHING CO.

Copyright—Infringement—Drawings in Serial Publication—British Registration—First Publication—Imperial Copyright Acts—Employment of Author by Publisher—Foreign Author Resident outside of British Dominions—Title to Copyright—Assignment—Contract—Publication by Author under License—Infringement by Copying—Delivery up of Infringing Copies.

Appeal by defendants from judgment of TEETZEL, J., 7 O. W. R. 337.

J. H. Denton, for defendants.

H. Cassels, K.C., and R. S. Cassels, for plaintiffs.

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

MEREDITH, C.J.:—I am of opinion that the judgment of my brother Teetzel is right and should be affirmed.

That the effect of the arrangements between the plaintiffs, Messrs. Mitchell and Miller, and Mr. Gibson, was to vest in plaintiffs the property, or, as it is sometimes called, the common law right to copyright, in the drawings which were produced by Mr. Gibson for plaintiffs, does not, in my opinion, admit of any doubt. Apart from the right of plaintiffs arising from the employment and payment by them of Mr. Gilbson for his services in the preparation of the drawings, the agreements expressly provide that plaintiffs shall have the right to copyright them "in such name or names" as they may see fit: see agreement of 16th November, 1899.

It is also clear, I think, that this common law right was, by the agreements between plaintiffs and James Henderson, validly transferred by plaintiffs to Henderson for the purpose of the reproduction by him of the drawings and letter press as they were to appear in plaintiffs' publication "Life," in Henderson's periodical called "The Comic Pictorial Sheet," the publication in both periodicals appearing simultaneously, the former in New York and the latter in London,

and by the agreement of 16th November, 1899, Mr. Gibson recognized and confirmed this right of Henderson under his agreement with plaintiffs.

The drawings which are alleged to have been pirated by defendants were prepared by Gibson under the provisions of these agreements, and were first published in America by plaintiffs in their periodical "Life," and appeared simultaneously in England and America, if not a few hours earlier in Henderson's periodical "The Comic Pictorial Sheet," which was the first publication of them in the British dominions.

Henderson was, in my opinion, an assign of the author of these drawings within the meaning of sec. 3 of the Copyright Act 4 & 5 Vict. ch. 45 (1842), and "The Comic Pictorial Sheet" was a book within the meaning of that section (see sec. 2), and it follows that under the provisions of sec. 3 he became entitled to statutory copyright in the drawings as part of his book: Maple v. Junior Army and Navy Stores, 21 Ch. D. 369; Comyns v. Hyde, 72 L. T. 250.

It was contended by Mr. Denton that statutory copyright in drawings was regulated by 25 & 26 Vict. ch. 68 (1862), and not by the Act of 1842; but Maple v. Junior Army and Navy Stores shews that, while they may be so as regards drawings simpliciter, when drawings form part of a book they come within the provisions of the Act of 1842.

It was also argued by Mr. Denton that, even if that be the case, drawings are protected only as forming part of a book, and that, if not entitled to copyright as drawings simpliciter, any one may reproduce them, and that defendants, having copied from a set of Mr. Gibson's drawings published in the British dominions, had not infringed plaintiffs' copyright.

Bradbury v. Hotten, L. R. 8 Ex. 1, is, however, a clear authority against the proposition . . . for, as in that case the caricatures in "Punch" which the defendants had republished for the same purpose as they were originally published, namely, to excite the amusement of his readers, so in this case the purpose of the publication in "The Comic Pictorial Sheet" and that by the defendants were the same.

Mr. Denton likened the case to that of an engraving from a picture, the engraving being protected by copyright, and argued that, as in such a case it is no infringement of the engraver's copyright to make another engraving from the

same picture, so in this case it was not an infringement to make a copy from the original drawing or from a copy of it published by the artist himself. The cases are, however, entirely different. In the case of the engraving there is no copyright in anything but the engraving, while in such a case as this the drawings form part of a book, every part of which is protected by copyright, and by sec. 15 of the Act of 1842 the printing of any book, which includes, according to the definition of a book given in sec. 2, every part of it, and therefore illustrations in it, is an infringement of the copyright in the book: Cate v. Devon and Exeter, etc., Co., 40 Ch. D. 500, 505-6; Copinger on Copyright, 4th ed., pp. 193-4.

Objection was taken to plaintiffs' title to the copyright, which they claim to have acquired by re-assignment from Henderson. It was said that an assignment from Henderson to James Henderson & Sons, who are the immediate assignors of plaintiffs, was not shewn to have been made. To this objection there are two answers, first, that there is nothing to impeach the prima facie right shewn by the certificate of the registering officer appointed by the Stationers Company, put in at the trial, and the other that if, as was practically conceded to be the fact, Henderson was a member of the firm of James Henderson & Sons, the assignment of the firm operated to pass his right in the copyright.

I entirely agree in the view of my brother Teetzel that the objection that Gibson was an alien is not entitled to prevail, and have nothing to add to what he has said as supporting that view, except to point out that since his judgment was given there has been added to the mass of opinion supporting it the opinion of a distinguished legal author and commentator (Sir Frederick Pollock.) See preface to vol. 80 of the Revised Reports.

An objection was taken to the form of the judgment which has been entered, the contention of defendants being that, inasmuch as they had made the copies in respect of which the action is brought before plaintiffs were registered as proprietors of the copyright, the judgment should not have required the delivery up of the infringing copies.

The objection is not taken in the notice of appeal, but, if open, is not, in my opinion, well taken. Section 23 of the

Act of 1842 entitles plaintiffs to that relief: Isaacs v. Fiddeman, 49 L. J. Ch. 412; Boosey v. Wright (No. 2), 21 L. T. 265.

Appeal dismissed with costs.

GARROW, J.A. JUNE 14TH, 1906.

C.A.—CHAMBERS.

LONDON AND WESTERN TRUSTS CO. v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Appeal to Supreme Court of Canada—Extension of Time for giving Notice of Appeal—Intention to Appeal—Special Circumstances—Merits.

Motion by defendants for an order extending the time for serving notice of appeal to the Supreme Court of Canada from the judgment of the Court of Appeal (7 O. W. R. 511), and for giving the necessary security, and otherwise perfecting the appeal.

Britton Osler, for defendants.

C. A. Moss, for plaintiffs.

GARROW, J.A.:—Judgment was delivered by this Court on 28th March, 1906, and the 20 days allowed for giving notice under sec. 41 of the Supreme Court Act therefore expired on 17th April. It is conceded that the case was one requiring notice to be given under that section. But no notice was served, because, it is said by way of explanation, the necessity for the notice was overlooked.

The 60 days allowed by sec. 40 expired on 27th May. On 25th May notice of this motion was served returnable on 28th May, and upon its return an adjournment took place until 9th June, when it was argued.

Section 42 provides for this Court or any Judge thereof allowing an appeal, although not brought within the time prescribed, "under special circumstances."

What should be shewn by way of special circumstances to bring the case within sec. 42? Each case must . . .

necessarily depend very much upon its own facts; but here and there are to be found in the reported decisions definitions which are, at least, useful as guides towards a proper and as far as possible uniform conclusion. . . .

[Reference to Smith v. Hunt, 5 O. L. R. 97, 1 O. W. R. 798; Rowlands v. Canada Southern R. W. Co., 13 P. R. 93; Ross v. Robertson, 7 O. L. R. 464, 3 O. W. R. 513.]

In this case I am not satisfied, upon the material before me, that there was, at any time within the 20 days after the judgment was pronounced, a bona fide intention to appeal. In a letter produced, written by a member of the firm of solicitors for defendants, to plaintiffs' solicitors, there is a statement that they were then still considering the question. The date of this letter is 24th April, or a week after the expiry of the 20 days.

It is unnecessary to say anything about the merits of the appeal, which is an appeal from the unanimous judgment of this Court, further than this, that I am not impressed that it would be in the interests of justice, that is, justice to both parties, to grant the leave, and as, in my opinion, no special circumstance has been shewn, my duty is to refuse it.

Motion dismissed with costs.

JUNE 14TH, 1906.

DIVISIONAL COURT.

HEATH v. HAMILTON STREET R. W. CO.

Negligence—Injury to Person Bicycling by Overtaking Street Car—Unusual Position of Car—Speed—Defect in Fender—Failure of Plaintiff to Look behind—Contributory Negligence—Proximate Cause of Injury—Case for Jury—Motion for Nonsuit.

Appeal by defendants from judgment of MABEE, J., 7 O. W. R. 459.

E. E. A. DuVernet, for defendants.

G. S. Kerr, Hamilton, for plaintiff.

THE COURT (MEREDITH, C.J., TEETZEL, J., ANGLIN, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER. JUNE 15TH, 1906.

CHAMBERS.

RE ELGIE, EDGAR, AND CLEMENS.

Interpleader—Application for Order—Stakeholder—Chattel Mortgage—Surplus in Hands of Mortgagee—Claim Under Order for Payment of Part of Surplus—Claim under Purchase from Mortgagor.

Motion by Elgie & Co. for an interpleader order in respect of a sum of $730.44.

John Wood (Arnoldi & Grierson), for applicants.

J. A. Scellen, Berlin, for claimant Clemens.

T. E. Godson, Bracebridge, for claimant Edgar.

THE MASTER:—The facts appearing from the material are as follows. In September last one Sieling gave to the applicants a chattel mortgage on certain logs and lumber to secure $4,200 with interest. This was to be paid by the lumber.

On 1st February Sieling gave Edgar an order for $400 on the applicants. Edgar notified them on 6th March, and on 10th March the applicants answered as follows: "We received the order signed by Mr. Sieling to pay you $400. We are not yet paid off ourselves on Mr. Sieling's account; however, we will apply the surplus on account of this order as soon as we clear ourselves."

On 2nd April the applicants were notified by Clemens that Sieling had sold to him all his interest in the lumber in question, subject to their chattel mortgage, and that "all surplus moneys after payment of your mortgage must be paid to me. I am quite prepared to carry out any arrangement for the sale of this lumber to you on the above conditions."

For some reason the applicants made no reply. The purchaser Clemens states in his affidavit that about 14th April he saw the applicants' manager at his office in Toronto, and was then informed of certain orders given by

Sieling, and that his company had not accepted the same, as there was then no money in their hands belonging to Sieling; "that all shipments of lumber had been applied on account of their mortgage, on which there was due at the date of my purchase from Sieling $796.70." The mortgage, it is admitted, has been paid off, and Clemens further states that the $730.44 are proceeds of his lumber.

This affidavit of Clemens is not in any way impeached by the applicants, who do not seem to have acted wisely in this matter. They were under no obligation to give any acceptance of the order in Edgar's favour. This was the initial cause of their present difficulty. From this they cannot be relieved to the prejudice of Clemens, who was admittedly a purchaser for value without notice of Edgar's claim.

Further, the applicants did not act wisely or fairly with Clemens. They sent no acknowledgment of his notice that he had bought out Sieling subject to their chattel mortgage. If they were intending to protect themselves against Edgar's claim (assuming that they could then have done so), they should at once have notified Clemens of this fact. Not having done this, they must be considered to have assented to his statement as to what was due them, according to the principle of Wiedeman v. Walpole, [1895] 2 Q. B. 534, a judicial affirmation of the familiar saying, "Silence gives consent." This is also consistent with the statement in Clemens's affidavit that the manager told him that Sieling had given orders on them, but that the company had not accepted them. No doubt, the applicants think they are in danger of attack from Edgar or Clemens. But this does not necessarily entitle them to interplead. See Re Smith and Bennett, 2 O. W. R. 399, and cases cited.

So far as appears, there is no ground on which the order can be made. At the time when Sieling conveyed to Clemens there was still nearly $800 due on the chattel mortgage, and there was therefore nothing applicable to Edgar's order. This would be a conclusive answer to any issue between Edgar and Clemens. He might have taken security from Sieling for his claim, and he must now recover against him if he can. The applicants said to him no more than this, that if they had in their hands anything due Sieling, when their mortgage was paid off, they would apply it on this order to Edgar. But before that time arrived Sieling ceased

to be their customer, and so there never was anything due him after the mortgage was paid.

It was suggested at the argument that Clemens might have notice of Edgar's claim and have bought subject thereto. But there is no hint of this on the material, and, if it were the case, there should have been affidavits from Edgar and Sieling on this point. As none were submitted, it must be assumed that this was the fact.

All the other claimants withdrew, except Edgar and Clemens. In view of these numerous claimants, there seems to have been sufficient ground for the motion, so that, while I feel it necessary to dismiss it, such dismissal will be without costs.

JUNE 16TH, 1906.

C.A.

C. BECK MANUFACTURING CO. v. ONTARIO LUMBER CO.

Water and Watercourses—Logs Floated over Stream—Improvements—Use of—"Reasonable Tolls"—Action for—R. S. O. 1897 ch. 142—Restriction to Future Tolls—Foundation for Action—Order Fixing Tolls.

Appeal by plaintiffs from order of a Divisional Court (10 O. L. R. 193, 6 O. W. R.), affirming the judgment of MACMAHON, J., after the trial dismissing the action.

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

W. R. Riddell, K.C., and F. E. Hodgins, K.C., for plaintiffs.

A. B. Aylesworth, K.C., and A. G. F. Lawrence, for defendants.

MOSS, C.J.O.:—Upon the argument of the appeal a number of questions were discussed which appear to me not to have any bearing upon the real question to be determined in this action.

Two orders made by the Judge of the District Court of Nipissing, under sec. 13 of the Rivers and Streams Act, R. S. O. 1897 ch. 142, were much canvassed; and their effect

upon plaintiffs' rights in this action was discussed at some length. But in truth plaintiffs' action is not founded to any extent whatever upon these orders, or either of them. Indeed, as will be seen by reference to the statement of claim, they are entirely ignored, and, although at the trial the earlier order appears to have been put in by plaintiffs' counsel, he only did so because, as he explained, a reference was made to it in the course of the evidence. The other and later one, of 30th March, was also put in by plaintiffs at a later stage of the case, but at the instance apparently of defendants.

The statement of claim sets forth that plaintiffs, in the carrying on of their business as lumbermen, found it necessary to use the stream known as "Post creek" for floating down their logs and timber, and the stream in its natural state not being navigable or floatable for saw logs or timber, plaintiffs made and maintained and kept in repair certain constructions and improvements in and on the creek, consisting of dams, slides, piers, booms, and other necessary works, in respect of which plaintiffs expended . . . $8,580.94.

It is then alleged that defendants, having prior to 1903 cut certain saw logs and timber in or near the works and improvements, prepared the same for transmission down the stream and through and over plaintiffs' improvements, but did not notify plaintiffs that they desired to use these improvements, so that plaintiffs might agree with them as to the rate of compensation for the use of the improvements or have the tolls fixed under the statute in that behalf, but, instead, proceeded to drive their logs down the creek and to use the improvements, and took part with the drive of plaintiffs, and afterwards alleged that plaintiffs hindered and delayed defendants' drive, and recovered damages to the extent of $750 under the Saw Logs Driving Act, by reason of the alleged hindrance and delay. And plaintiffs say that there was an implied understanding and agreement on the part of defendants to pay a reasonable compensation for the use of the improvements. It is further alleged that plaintiffs permitted defendants to take part in the drive and utilize the improvements under such understanding and agreement, and that otherwise they would not have permitted the driving of plaintiffs' logs over the improvements

and constructions; and that defendants, in using the improvements, caused unnecessary damage thereto.

Plaintiffs' claim is that they are entitled to be paid by defendants reasonable tolls or compensation for the use of the construction and improvements by reason of an expressed or implied agreement to pay therefor, plaintiffs having changed their position to their detriment upon the faith of the same, or under or by virtue of the expressed terms and true meaning of the Act for protecting the public interest in rivers, streams, and creeks; and they claim that the tolls or compensation should be fixed by the Court, and that they should recover damages for the unnecessary damage to the construction and improvements during the drive of the spring of 1903. The claim for damages does not appear to have been followed up.

It is quite apparent upon this pleading that plaintiffs' claim is in respect of the logs and timber driven by defendants over the improvements during the spring of 1903, and that plaintiffs are asking payment of a reasonable compensation for the use of the improvements during that period, but do not present any fixed rate or toll established by any of the methods referred to in sec. 13 of the Rivers and Streams Act; on the contrary, they ask that the tolls or compensation should be fixed and determined by the Court. And at the trial and during the argument of the appeal, they maintained the same ground and insisted upon their right to obtain from the Court judgment for such sum as the Court might fix and determine as reasonable to be allowed to them. They expressly objected to be bound by the rate fixed in the District Judge's order of 30th March, and asked to be allowed to amend their claim so as to increase the amount of the demand beyond the $1,000 therein claimed.

Their reason for this attitude evidently was, that they felt that they could not rely upon the order of 30th March as applying to defendants' saw logs and timber driven over the improvements in the spring of 1903. The object of their action was plainly to obtain judgment from the Court, notwithstanding the want of an order fixing rates applicable to the season of 1903.

The real question in this action, therefore, is whether, the tolls not having been otherwise fixed, the plaintiffs are entitled to be allowed by the Court a reasonable sum by

way of tolls in respect of the timber and logs of 1903, and to judgment therefor.

A reference to the terms of the statute makes it clearly apparent that the Court has no such power. It is true that in sec. 11 the right given to all persons to float and transmit saw logs and other timber, etc., through and over constructions and improvements, is subject to the payment to the person who has made the constructions and improvements of reasonable tolls, but that provision must be read in connection with sec. 13, which provides in explicit terms for the mode in which the tolls are to be fixed. If not fixed as otherwise provided by that section, the Judge of the County Court, or the Judge or stipendiary magistrate of the district in which the constructions and improvements are, is the proper tribunal for ascertaining and fixing the tolls. He is given specific directions as to certain matters which he is to have regard to and take into consideration, and an appeal lies from his order or judgment to a Divisional Court, and the provisions of the Act in this regard are made to apply to past as well as to present and future constructions and improvements, so that, as respects the jurisdiction of the Judge or stipendiary magistrate, all periods of time are covered. These provisions confer exclusive jurisdiction to fix the tolls upon the different tribunals mentioned in sec. 13, and render it incumbent upon any person seeking payment for the use of constructions or improvements to produce as a condition precedent to recovery an order or judgment of one of the tribunals fixing the tolls. Such being the effect of the provisions of the Act, plaintiffs' action, as launched and maintained throughout, must fail. If treated as an action based on an order of the District Judge, it must also fail, for they have produced no order covering the logs and timber driven by defendants through and over the improvements during the season of 1903. The first order of January, 1904, was set aside and vacated on appeal to a Divisional Court. The order of 30th March is, as the evidence indicates and as appears upon the face of it, applicable only to saw logs and timber to be floated or transmitted, and, as already pointed out, was not relied upon or put forward by plaintiffs as supporting their claim. It is plainly an order made applicable to the future and should only be given effect to in that sense.

The evidence in this case, as well as the judgment of Street, J. (3 O. W. R. 333), upon the appeal against the order of January, 1904 (which is not wholly printed either in the appeal book or in the report of this case in 10 O. L. R. 193), indicates that it does not necessarily follow that the rate which was fixed by the order of 30th March for the logs and timber to be floated or transmitted in the future would be the rate proper to apply to logs and timber floated or transmitted in prior years; and it is not safe or proper to treat the latter order as one fixing or assuming to fix a rate with regard to saw logs and timber floated or transmitted in the spring or season of 1903. The rate for that year was never effectively fixed by the District Judge.

The result is that there is no rate of tolls fixed in respect of the saw logs and timber floated or transmitted in the spring or season of 1903, in respect of which alone plaintiffs make claim in this action.

On these grounds the judgment of the Divisional Court should be affirmed.

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

GARROW, J.A., concurred, also giving reasons in writing, in the course of which he referred to Caldwell v. McLaren, 9 App. Cas. 392; Mayor of Newport v. Saunders, 3 B. & Ad. 411; Corporation of Stamford v. Paulett, 1 Cr. & J. 58; Barry R. Co. v. Taff Vale R. Co., [1895] 1 Ch. 128; Great Eastern R. Co. v. Harwich, 41 L. T. N. S. 533; Vestry of St. Pancras v. Batterberg, 2 C. B. N. S. 477, 486; Groves v. Wimborne, [1898] 2 Q. B. 402; President of Bronte Harbour v. White, 23 C. P. 184.

MEREDITH, J.A., concurred, for reasons stated in writing, wherein he referred to Corporation of Stamford v. Paulett, 1 Cr. & J. 58, 400; Bentley v. Manchester, etc., Co., [1891] 3 Ch. 322.

MACLAREN, J.A., also concurred.

JUNE 16TH, 1906.

C.A.

McOUAT v. UNITED COUNTIES OF STORMONT, DUNDAS, AND GLENGARRY.

Municipal Corporations—Drainage—Flooding Lands—Cause of Action—Injunction—Damages—Drainage Referee—Appeal while Reference still Pending—Negligence—Insufficiency of Excavation—Improper Deposit of Material Excavated—Breach of Trust—Allowing Contractor to Escape from Obligation as to Place of Deposit—Engineer—Directions of—Depth and Width of Excavations.

Appeal by defendants from judgment and report of Drainage Referee, dated 28th November, 1904, awarding the plaintiffs, James and Thomas H. McOuat, of the township of Matilda, $400 damages for injuries which their lands sustained by flooding.

M. Wilson, K.C., and J. Leitch, K.C., for defendants.

E. D. Armour, K.C., and I. Hilliard, Morrisburg, for plaintiffs.

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

MEREDITH, J.A.:—The appeal comes up in a manner which is quite irregular and unsatisfactory, as it appears to me. The action was for flooding lands, and the relief sought an injunction and damages; and the whole matter was referred to the Drainage Referee. After a prolonged reference, that officer has expressed the opinion that plaintiffs are entitled to recover $400 damages, but that it would be unsafe to grant an injunction without further evidence, and therefore that the reference should be postponed until plaintiffs can furnish such evidence. So that there is nothing like finality of the reference, nothing, that I can perceive, to prevent a recasting of the Referee's opinion in a very different mould, in all respects, before he becomes functus officio—before he has parted with the case. The nature of the injunction to be granted might afford a test of the Referee's opinion regarding plaintiffs' right to recover; it might prove,

even to himself, that the view he has formed is erroneous. The work was done at so much per yard, not at a price for the whole work, and all the money available was so expended. And other matters of much difficulty presented themselves. And if all that were not so, the appeal would be against a partial finding only, with the probability of another protracted reference and another costly and long drawn out appeal. That ought not to be encouraged in any case, and much the less so in one in which the reference, as far as it has gone, which might well have been heard in as many days, has already extended over more than 3 years; and this appeal over as manys days as hours should have sufficed. But the appeal has been taken, in a book of nearly 800 pages, and been argued at great, if not wearisome, length, without objection on this score from any one; so that it may be well to dispose of it on its merits, and await the next instalment, but not to pass over the mode of bringing it up as if it were quite unobjectionable to any one.

Plaintiffs' claim, as presented in the pleadings and throughout the reference, was based upon two grounds of negligence: (1) the insufficiency of the excavation; and (2) the improper deposit of the material excavated. Other grounds, affecting the validity of the first by-law, were also taken upon this appeal, but need not be referred to further than to say that they were wholly inconsistent with plaintiffs' course throughout, within this litigation as well as without, and inconsistent with their interests, as well as taken, now for the first time, more than 20 years after the statute—46 Vict. ch. 18, sec. 573 (O.)—had rendered them ineffectual, and after the dismissal of an action brought to quash the by-law.

Plaintiffs have nowhere stated the legal grounds upon which their claims are based—the legal character of the causes of action upon which they seek relief; and their counsel, upon this appeal, were unable or unwilling to state them. Giving their allegations of fact the fullest meaning, they may cover two causes of action: (1) the ordinary action of trespass upon the case for flooding their lands; and (2) breach of trust. No statute giving any right of action was relied on or referred to. . . . Township of Raleigh v. Williams, [1893] A. C. 540, affords no authority for it. That was an action based upon the duty, expressly imposed by statute, of keeping drains such as that there in

question in repair; and if it could rightly be said that it logically follows from that judgment that plaintiffs have a cause of action if they failed, through defendants' fault, to obtain all the benefit they would have had from the work in question if it had been properly done, that is, that defendants should make good the difference between the benefit plaintiffs have had and that which they ought to have had from the work, assuming that there was such a difference—the answer might well be that a judgment is an authority for that which is decided by it, and not for all that might logically follow from the reasoning in it.

Plaintiffs failed, in my judgment, to prove anything like a good cause of action at law for flooding their lands. It would be an extraordinary thing if the great expenditure of money which was incurred, the great amount of work which was done, under the direction of the most experienced and best engineers available, and the superintendence and care of a competent committee of defendants' council, and under the interested and vigilant eyes of plaintiffs and others; the removal of the dam, shoals, and other obstructions, substantially all lower down stream than plaintiffs' lands, work done for the one purpose of preventing as much as possible the flooding of such lands, should have had the effect of flooding them more than ever; and also an extraordinary thing that, though the work was begun in the year 1885, plaintiffs' claim is for injury sustained in the years 1899 and 1900 only. It would be a different thing if plaintiffs' lands were as near to the foot as they are to the head of the work. As one might well expect, the cause of plaintiffs' loss appears to have arisen, not from any greater obstruction to the channel the better opening of which was the sole purpose of the great work and great expenditure, but excessive rainfalls in 1899 and 1900 brought into the channel from a more extended watershed with increased rapidity through improved drainage and cultivation in that and from year to year—the ordinary process of evolution in such matters in this new country. Looking at the maps shewing the great area of the watershed, and the network of drains in it, and reading the evidence of the sluggish character of the stream called the Nation river, in which the work was done, and which is the only outlet for all of the waters of that area, there is nothing extraordinary in plaintiffs sustaining injury upon their low-lying lands in years of excessive rain-

fall and moisture and consequent excessive and long continued summer floods. They have, as I find, wholly failed to prove that their outlet was in any manner obstructed by anything done by defendants negligently or otherwise; though the relief which they expected to obtain by means of the work has not been obtained, the benefit of it may fall very short of their expectations; and it has been proved that the injury which they did sustain arose from other causes—those which I have mentioned. This ground of action therefore fails; and I have been unable to find anything in the Referee's reasons shewing that he had come to any contrary conclusion, that is, that he had found that the work left plaintiffs' lands worse than they were before it was undertaken.

Then are defendants liable for any breach of trust? It is said that they plainly are, for having relieved the contractors on the work from an obligation to put the excavated material upon the high and more distant banks of the stream, and permitting them to place it under such banks, thereby greatly reducing the efficacy of the work. At first sight this charge seems like a formidable indictment; but one naturally asks why, if it really were half as objectionable a course as plaintiffs assert, was it done? No one impugns the good faith or skill of the engineer nor the integrity and ability of the committee of council. Upon closer investigation, reasons which seem to be abundantly sufficient for, if they did not indeed substantially necessitate, the change, appear. The by-law contained nothing directly or impliedly bearing upon the subject; the provisions as to the removal of the excavated material are contained in the agreement with the contractor for the doing of the work—entered into several months after the passing of the by-law; and that provision by no means required the material to be removed beyond the high banks as clearly as plaintiffs contend for. It is in these words: "The material to be excavated will be measured in position, and when excavated will be placed on the bank at a distance of not less than 3 feet clear from the river, unless directed by the engineer to be placed at a less distance." The words "on the bank" are somewhat indefinite—whether near or distant, or whether high or low water, banks, is not expressly intimated. In many streams in this province the high and distant banks are in places a half a mile away or more from the river, even at high

water; but that does not seem to have been the case with the stream in question at the place where the work in question was done. Then there is the extraordinary provision contained in the words "unless directed by the engineer to be placed at a less distance;" that is—whether the words "the river" meant the water or meant the top of the high banks, near to which the water could never come—the engineer might direct a change in the place of deposit to the extent of 3 feet—one yard of earth—which could never have been meant, but is an obvious mistake, however it may have arisen. So that there was, upon the wording of the contract, abundant material for dispute and litigation upon a question whether the contractors were really bound to remove the material beyond the high banks; a thing which they could never have done at the price contracted for—29¾ cents a cubic yard for material other than rock, and $1 for the latter. There was also a provision in the contract that the decision of the engineer in charge as to the location and deposit of the material excavated and removed, should be final, subject to a provision as to arbitration contained in the agreement, and also another provision that in case of any doubt as to the meaning of the specifications the decision of the engineer in charge should be final. When the matter came to a practical test, it was found to be virtually impossible to deposit the excavated material upon the high banks, for that was private property, over which none of the parties to the contract had any power; the right to use such lands as dumping grounds would have to be acquired, if it could, and there were no means for that purpose. In these circumstances, the engineer in charge decided, as under the contract he might, that the material might be deposited in the deep places of the river so that in every case it should be at least one foot below the bottom grade of the cut. It is very difficult to find any negligence or breach of trust in this. What better could have been done? If the view that the terms of the contract required removal beyond the high bank were insisted upon, litigation with the contractor might have followed; and had the engineer decided in favour of that view, and had the contractor acquiesced in it and attempted to act upon it, litigation, in which both parties to the contract must have failed, would have been certain, at the suits of the land owners concerned, whose lands were invaded, and injunctions would have prevented the work.

So that, even if the course which the engineer adopted would necessarily have rendered the work less effectual, it could not, practically speaking, have been avoided. But it is not proved that it was likely to have or had any such effect. Why should it? Plaintiffs objected promptly to the course the engineer took; they complained to the Commissioner of Public Works for Ontario, a large provincial grant in aid of the work having been made; and the complaint was promptly investigated by the engineer of the department—a competent and impartial public officer—under the direction of the Commissioner, and was found to be unsubstantial, the engineer having reported that the course adopted was not objectionable, and that the drainage committee and engineer were endeavouring to have the work carried out to the best advantage under the circumstances. This took place in 1886, and nothing more seems to have been made of the complaint until this action was brought 15 years afterwards.

. . .

I find that the work was in no manner substantially deprived of any of its effect by the direction of the engineer in charge as to the removal and deposit of the excavated material; that that direction was a proper one under all the circumstances; that the engineer had the power to make it without the consent of either party; and that, in any case, it was no breach of trust on the part of defendants, who in good faith and with much care appointed the best available engineer, and would have been justified in acting upon his advice if a change had been made by them, not by him; that, since defendants' work ceased, plaintiffs took part in doing work of the character of which they complain, that is, dumping material excavated from the bed of the stream within the high banks; . . . it is evidence in favour of the action of the drainage engineer, of the report of the departmental engineer, and of my finding.

There is even less evidence to support the last ground of the action—that the excavations were not made to the depth and width provided for. . . .

It may be to be regretted that better drainage has not been obtained—that the scheme adopted and carried out did not prove as effectual as it was hoped it would—but the owners of low-lying lands must not expect more than they are lawfully entitled to; they must not expect the advantage of low lands, which may be acquired originally at low prices,

in receiving and being enriched by alluvial soil brought down from the higher lands and deposited upon them by floods, with all the advantages of the uplands from which the enriched soil has been by nature robbed. If swamp lands are to be thoroughly drained at some one else's expense, they would not be purchasable for a song, but would be of greater value than high and dry lands. It is easy for a purchaser of low-lying lands to complain, and one's sympathies naturally go to him when his crops are destroyed by flood, but he has no right of action except for a wrong done to him by the party sued.

The result, upon my findings, is that plaintiffs' action fails upon all grounds, assuming that they have at law or under any statute a right of action; the more so if and in so far as the right of action may be of an equitable nature for breach of trust; they have not sustained in evidence the facts upon which their claims are based. It is not necessary to consider whether in any respect plaintiffs have no right of action in the absence of the other persons having equal rights with them in the drainage proceedings in question.

Appeal allowed and action dismissed with costs.

JUNE 16TH, 1906.

C.A.

RE PORT ARTHUR AND RAINY RIVER PROVINCIAL ELECTION.

PRESTON v. KENNEDY.

Parliamentary Elections—Corrupt Practices—Proof of Agency—Appointment as Scrutineer—Burden of Proof—Common Law of Parliament—Corrupt Acts and Irregularities apart from Agency—Scrutiny of Votes—Disqualification of Voter—Crown Lands Agent—Person Voting in Wrong Subdivision—Agent or Scrutineer at Polls—Persons Voting on Transfer Certificates—Names not on Voters' Lists—Proof of Voters' Lists—Persons Voting in Wrong Subdivision without Transfer Certificates—Persons Voting on Certificates Signed in Blank—Constables—Certificates by Telegraph—Tendered Vote—Costs.

Appeal by W. A. Preston, the petitioner, from the judgment of MACLENNAN, J.A., and TEETZEL, J., the rota

Judges, dismissing the petition, after trial at Port Arthur. There were 140 charges of corrupt practices contained in the particulars, and scrutiny particulars were also delivered, and supplemental particulars. There was also a cross-petition, which was dismissed. The declared majority at the election of H. W. Kennedy, the respondent, was 14, but this was reduced to 11 by counting tendered ballots.

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

I. F. Hellmuth, K.C., F. H. Keefer, Port Arthur, and W. J. Elliott, for the appellant, contended that the trial Judge having found that one William Aikens was guilty of corrupt practices, should have found that Aikens was an agent of respondent, and have declared the election of the respondent void; that upon the evidence it was shewn that corrupt practices extensively prevailed; that upon the scrutiny of votes the trial Judges erred in refusing to strike off the vote of one W. H. Hesson as a person disqualified from voting, and the votes of other persons; that it was competent for the appellant to give evidence of any corrupt acts charged in the particulars, even though the persons charged were not agents of respondent; that the trial Judges erred in holding that the election would not be avoided at common law if acts of corruption were proved which might be supposed to have affected the result of the election; and that the trial Judges erred in holding that certain irregularities and illegalities did not shew that the result of the election was affected.

A. B. Aylesworth, K.C., and W. McBrady, Port Arthur, for H. W. Kennedy, the respondent, contra.

MOSS, C.J.O.:—The first question on this appeal is whether the election is to be avoided by reason of the corrupt acts committed by one William Aikens. That depends on whether agency has been proved. I am of opinion that it has not been established.

The corrupt acts of which Aikens was found guilty by the trial Judges were committed at Hymers, a polling place in the electoral division, on the polling day. Before that day his sole connection with the respondent was that on one occasion, several days before the nomination, he, being the owner of a livery at Port Arthur, had driven the respondent

to and from a place called Silver Mountain. During the trip the respondent canvassed him for his vote, that is, he said he would like him to support him. Aikens said he would see. He made no promise, and nothing more passed between them. The respondent made no request to him to work for him; he simply asked him for his support, and he saw and heard no more of or from him during the election.

On the day before the election Aikens and one Joseph Greer drove from Port Arthur to Hymers, arriving there in the evening. The trip was undertaken at the instance of Greer, who was not shewn to be an agent of the respondent. Greer requested Aikens to accompany him to Hymers, and in order to persuade him to do so told him he would procure a transfer of his vote to Hymers, so that he would not lose his vote by being absent from Port Arthur on polling day. And he afterwards brought and handed to Aikens a printed paper, signed by the respondent, apparently one of a number of scrutineer appointments which the respondent had signed in blank and left with his agent Mr. D. F. Burke. Aikens's name was not inserted by the respondent, and there is no evidence to shew by whom it was filled in. The number of the polling place was left blank, and never was filled in.

There is no proof of the means by which Greer became possessed of this paper. Aikens's testimony as to Greer's statements to him was received in anticipation, apparently, of proof of agency or of other testimony to shew the circumstances under which he obtained the paper, but Greer was not examined, and nothing further was shewn of the circumstances.

There was an entire failure to connect the respondent, through himself or his agents, with the giving of the paper to Aikens. What was proved falls far short of what is required in order to establish agency as against the respondent or to shift the burden of proof. The mere fact of Aikens having driven the respondent and receiving pay therefor 10 or 12 days before polling day is, of course, no proof whatever of agency on polling day. Neither is the request for his support made at the same time, nor are the two together, nor do they naturally support an inference that because of them Aikens would be found acting as an agent on the polling day at Hymers or elsewhere in the election. And, if the petitioner intended to rely upon the possession of the paper, it lay upon him to trace it and shew that it came to Aikens

through, or with the knowledge of, the respondent or his agents. And if, in order to accomplish this, it was necessary to examine Greer, it was for the petitioner, and not the respondent, to call him as a witness. But, even if it had been shewn that Aikens's appointment had come from the respondent, it does not follow that it rendered the respondent responsible for every act of which Aikens might be guilty. The agency was of a limited nature. The duties the performance of which were authorized were confined to the polling booth, and it may well be that for acts done outside of and totally disconnected with the performance of the authorized duties the respondent should not be subjected to the same consequences as in the case of corrupt acts by a general agent.

In the circumstances of this case, however, it is sufficient to say that there has been a failure to establish that Aikens was an agent for whose acts the respondent was responsible, and that the finding of the trial Judges to that effect should not be disturbed.

The common law of Parliament has also been invoked, and it is urged that enough appears in corrupt acts practised by Aikens and Greer and in irregular proceedings at and attending the election to avoid it as one not embodying the expression of the free will of the electors. Aikens and Greer's operations were confined to a very small portion of the constituency. And it was stated by counsel for the petitioner they were only prepared to shew 4 or 5 other cases in which these individuals were concerned.

The trial Judges found only one person (Aikens) guilty of corrupt practices, and they also found and reported that there was no reason to suppose that corrupt practices extensively prevailed at the election. There is nothing to connect the respondent with the alleged corrupt acts. There is the absence of proof of agency. If, in circumstances such as these, an election is to be avoided, it should only be on overwhelming proof of corrupt acts of so extensive a nature as virtually to amount to a repression or prevention of a fair and free opportunity to the electors of exercising their franchise and electing the candidate they wished to represent them.

As to the irregularities the respondent is entitled to the benefit of sec. 214 of R. S. O. 1897 ch. 9.

As regards the scrutiny and the questions which were argued with respect to it:—

1. Hesson's vote. No. 5 of the scrutiny charges.

The question is whether he was an agent for the sale of Crown lands, and so disqualified from voting under sec. 4 of the Ontario Election Act, R. S. O. 1897 ch. 9. It appears that he was an agent under the Free Grants and Homesteads Act, but his authority was restricted to taking entries and making locations for free homesteads under the Act, and that he was not authorized to sell or to receive moneys for the sale of public lands. It would be an extension of the terms of sec. 4 to say that he was an agent for the sale of Crown lands. He had no commission or authority to act as agent for sale, and he did not assume to act in that capacity. His vote was therefore properly held to be good.

2. McKay's vote. No. 49 of the scrutiny charges.

This person voted at Beaudreau's, which was not his proper polling subdivision. He was requested by the deputy returning officer at the former place to drive some voters to the poll at Beaudreau's. He objected that by doing so he would lose his vote, and the deputy returning officer thereupon furnished him with a transfer or certificate to vote at Beaudreau's. He had not been named as the agent of the respondent at Beaudreau's, nor did he recieve any such appointment other than the request of the deputy returning officer. He did not in fact, act as agent at Beaudreau's, though he appears to have taken the oath of secrecy, and his only reason for going there was to drive the voters to the poll, in compliance with the deputy returning officer's request. He was, therefore, not a person entitled to request or to be given a certificate under sec. 94 (1) and (4) of the Act. He was not an elector who had been named the agent of the respondent at a polling place other than the one where he was entitled to vote. If he was an agent at all, he was agent for an entirely different purpose, and it was the only one which he himself believed he was appointed for. His vote should not have been allowed. From the short note of the judgment in his case it would seem that the vote was allowed on another ground, viz., that his name being on the original general voters' list, and his vote having been tendered and accepted at Beaudreau's, it should not be struck off, although his name was not on the list at that polling subdivision.

This point will be dealt with later on, when the cases of that description are reached.

3. A class of persons voting on transfer certificates whose names were not on the voters' list in the poll books of the polling subdivisions from which they were stated to have been transferred.

The trial Judges ruled that in order to render these votes void it was incumbent on the petitioner to produce the original general voters' list and shew that the names of the voters were not on it. The petitioner contends that it was sufficient to produce the list in the poll book of the subdivision from which the voter was transferred, and that if it appeared that the voter's name was not on it his vote must be disallowed. The question depends on the meaning to be given to the words "voters' list" as they appear in sec. 94 of the Election Act. To what list is the returning officer to refer before giving a certificate entitling an elector to vote at a polling place other than the one where he is entitled to vote? The purpose of the reference if of course to ascertain whether the applicant for the certificate appears to be entitled to vote at the subdivision from which he seeks to be transferred. The returning officer is not required to give the certificate unless requested to do so at least two days before the polling day: 4 Edw. VII. ch. 3, sec. 2. This enactment seems to contemplate that by that time all the subdivision poll books will have passed from his possession. And these seem to be the only voters' lists that are at any time in his possession. The voters' list certified by the County Judge from which the lists in the subdivision poll books are made up is never in his possession.

Section 21 (3) of the Voters' Lists Act, R. S. O. ch. 7, enacts that the Judge shall retain one of the certified copies, and shall deliver or transmit by post registered one of the certified copies to the clerk of the peace of the county or union of counties within which the municipality lies, and one of the certified copies to the clerk of the municipality, to be kept by him among the records of his office. Section 77 of the Election Act provides that, subject to certain provisions of the Act which do not affect the present question, the first and third parts of the last list of voters certified by the Judge and delivered or transmitted to the clerk of the peace under the Ontario Voters' Lists Act, before the date of the writ of election, shall be the proper list to be used for the

purposes of an election. Section 78 enacts that, subject to sec. 108, no person shall be admitted to vote unless his name appears on the list in the poll book.

Then by sec. 84 of the Election Act it is enacted that every returning officer upon granting a poll at an election shall forthwith deliver to the clerk of the peace as many blank poll books as there are polling subdivisions in the electoral district, and the said clerk of the peace shall without delay enter or cause to be entered in the poll book for each subdivision from the proper list of voters the name of every person appearing therefrom to be entitled to vote within the subdivision for which the poll book is required, and certify it as a true copy of the proper list of voters for the polling subdivision, and the poll books so completed shall be re-delivered to the returning officer, who shall immediately cause them to be delivered to the deputy returning officers appointed to hold the polls throughout the electoral district. And by sub-sec. (2) the clerk of the municipality, who has the custody of a voters' list, shall, if required by the returning officer, discharge the duties assigned to the clerk of the peace.

Thus it appears that the only custodians of copies of the voters' lists certified by the Judge are the Judge, the clerk of the peace, and the clerk of the municipality. The only lists, therefore, to which the returning officer could refer for the purpose of giving a certificate under sec. 94 were the lists in the poll books for the subdivisions delivered to him by the clerk of the peace or the clerk of the municipality. It follows that in the cases under consideration the production of the poll book of the subdivision was all that was necessary for the petitioner's purpose. The contrary ruling of the trial Judge should therefore be reversed.

4. Cases of persons voting at a polling place other than that in which they were entitled to vote without a transfer certificate enabling them to vote at the polling place at which they did vote.

These votes are in direct violation of sec. 78 of the Election Act. Except in the case of a tendered vote under sec. 108 or a vote polled upon a transfer certificate under sec. 94, no person is entitled to be admitted to vote unless his name appears on the list in the poll book. The votes were therefore improperly received. The only question there can be is whether the vote having been received, it ought to be allowed to stand where it is shewn that the voter was entitled to vote

elsewhere. But such a practice would tend to many irregularities and perhaps frauds. And it is better that in the few instances where such a thing does occur the vote should be lost than that so serious an innovation of the statute should be permitted. The rulings in the Lincoln Case (2) with regard to James B. Gray's vote and William T. Gibson's vote, H. E. C. 514, 515, do not carry the law to the point argued for. In each of these case it would appear that the voter's name was on the list at the place where he voted, and the objection was that, notwithstanding the presence of the name on the list, the vote was bad for want of qualification. The judgment in the Prescott case, H. E. C. 780, appears to be based on similar grounds.

At the time when these decisions were rendered and until 1892, the provision of the statute was not so clearly expressed as at present. The Ontario Election Act, 1892, for the first time enacted in sec. 72, what is now sec. 78 of the present Election Act. Previous to this the expression used was "on the last list of voters" (see 32 Vict. ch. 21, sec. 10, and 39 Vict. ch. 11, sec. 9); or "on such list" (see R. S. O. 1877 ch. 10, sec. 73); or "on the list" (see R. S. O. 1887 ch. 9, sec. 72). These left open the argument that if the name appeared on the list or any of the lists prepared by the clerk of the municipality and delivered to the clerk of the peace, the vote once polled was good. The ruling in the case of William Little's vote in the Brockville case, H. E. C. 130, may have proceeded on this view. The words of sec. 78 of the present Act, "on the list in the poll book," seem to end all uncertainty.

5. Persons voting on certificates signed in blank by the returning officer and whose names were afterwards filled in by the election clerk or other persons.

These certificates are clearly against the provisions of sec. 94, which prohibit a returning officer from giving a certificate until he has ascertained by reference to the voters' list that the applicant is entitled to vote (sub-sec. 1) and from signing such a certificate until the name, residence, and occupation of the person to whom it is to be granted have been inserted therein (sub-sec. 4). A personal duty is cast on the returning officer which he must perform for himself as long as he continues to hold the position. And there is nothing in the Act to warrant him in giving his signature in blank to be afterwards filled in by others with

the names of persons in regard to whom he has not obeyed the injunction of the statute. The holder of such a certificate is thus placed in a position to poll a vote at a polling place where his name does not appear on the list in the poll book, although he is not in truth the holder of (to employ the language of sec. 92) "a certificate properly granted under sec. 94."

The only question then is, whether the elector should be deprived of his vote by reason of the returning officer's neglect of duty. But, as the elector is seeking a special privilege, it is no hardship to impose on him or the person making the request on his behalf the duty of seeing that the statutory requirements are duly complied with. And there appears to be no good reason why the considerations applicable to the preceding cases should not also apply to these.

6 and 7. It is apparent from what has been said that certificates given to constables and certificates sent by telegraph are not properly granted under sec. 94, and cannot support votes received by virtue of them.

The argument of convenience having regard to the area and extent of the constituency is no doubt weighty, especially as regards certificates filled in by the election clerk, but there are the positive prohibitory terms of the section, which close the door against the signature to the certificate until the name, residence, and occupation of the elector have been inserted therein.

8. White's case. Upon the evidence this elector did not tender his vote to the deputy returning officer at the proper polling place (Bouin). His name was not on the list of the poll book in the custody of either Woodside (in the evidence called Whiteside) or Bouin, and he did not demand from the latter or receive a tendered ballot in the manner required by sec. 108. His vote could not in any event be counted on the scrutiny. And even if there had been a proper demand and an improper refusal there was nothing more than an irregularity.

The result on the whole is that the election is not avoided, but, as some of the rulings on the scrutiny proceedings were erroneous, the case must go back to be continued on that branch, pursuant to the arrangement made at the trial.

As to costs. The petitioner failed on the charges of corrupt practices, and he should pay to the respondent the costs of

and occasioned by that branch of the case. The costs of the scrutiny should be reserved to be dealt with by the trial Judges or Judge by whom the scrutiny is continued and concluded.

And as on the appeal success is divided, there should be no costs of it to either party.

OSLER and GARROW, JJ.A., for reasons stated by each of them in writing, agreed with the conclusions reached by the Chief Justice.

MACLAREN, J.A., also concurred.

MEREDITH, C.J., agreed as to the scrutiny, but dissented as to the corrupt practices and proof of agency, and was of opinion that the election should be avoided.

JUNE 16TH, 1906.

C.A.

VALIQUETTE v. FRASER.

Negligence—Injury to Person—Falling of Wall of Building—Exceptional Storm—Defective Construction—Employment of Competent Superintendent and Builder — Cause of Injury.

Appeal by plaintiff from order of a Divisional Court (4 O. W. R. 543, 9 O. L. R. 57), affirming judgment of TEETZEL, J. (4 O. W. R. 60), dismissing the action, which was brought by the widow and administratrix of one J. S. Valiquette to recover damages in respect of the death of her husband, a boiler-maker, who, while working for a contractor at a boiler-house in course of erection for defendants Fraser & Co., was killed by the falling of a wall of the building. After the walls and roof had been completed, machinery was brought into the building through large door openings left unclosed for that purpose. The wind during a violent storm, rushing in through the openings, forced off the roof, and the walls fell. The Court below held that leaving the openings was not a negligent act, and also that there was no liability by

reason of the mode of construction, even if it was defective, the owner being entitled to rely on the skill of competent architects and builders.

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

J. Lorn McDougall, Ottawa, for plaintiff.

C. A. Moss, for defendants.

MEREDITH, J.A.:—To entitle plaintiff to judgment in this action, it was necessary for her to prove that defendants were guilty of actionable negligence towards the man who was killed—the breach of some duty which they owed to him—and that such negligence was the real cause of his death. It is enough to say that both of these things have not, if either of them has, been proved. . . . The wall fell in a squall of a very unusual and extraordinary character —of very unusual, concentrated, energy. The building was in an unfinished state, still under construction; among other things, the openings for windows and doors were not yet filled in, giving much greater scope to the destructive power of the storm.

After the best consideration I have been able to give to the case, I am unable to find that actionable negligence has been proved—that the onus of proof in this respect has been satisfied; and, if it had, I would be unable to find that any such negligence, and not the effect of an extraordinary wind storm upon a new building in an unfinished state, was the proximate cause of the injury.

After the findings of the trial Judge and of the Divisional Court against plaintiff on these pure questions of fact, one should need to be very clearly of a contrary opinion before giving effect to this appeal; to the contrary of that, I would have reached the conclusions which I have expressed upon these questions if there had been no prior findings upon such questions.

Appeal dismissed, and with costs if demanded.

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

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

JUNE 16TH, 1906.

C.A.

GLOSTER v. TORONTO ELECTRIC LIGHT CO.

Negligence—Injury to Infant—Electric Wire—Proximity to Highway—Nuisance—Jury.

Appeal by defendants the electric light company from judgment of TEETZEL, J., in favour of plaintiffs, upon the findings of a jury, in an action by a boy of eight and his father against the electric light company and the corporation of the township of York, to recover damages for injuries sustained by the boy and consequent expense occasioned to his father by the alleged negligence of defendants in leaving a live wire so exposed that the boy touched it. This was in crossing the Glen road bridge from the city of Toronto into the township of York, on 8th October, 1904. The jury exonerated the township corporation, but found the electric light company guilty of negligence, and assessed the boy's damages at $1,700 and the father's at $800.

W. R. Riddell, K.C., and R. H. Greer, for defendants.

W. N. Ferguson, for plaintiffs.

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

OSLER, J.A.:—. . . Several years before the occurrence which gave rise to the action, a private corporation known as the Scottish Ontario Land Co. were the owners of a large plot of ground in the township of York near the city of Toronto, part of which they had laid out into building lots, laying out streets thereon which connected with existing highways in the township. They had also, in order to provide for access to and from the city, built a substantial bridge 24 feet in width over a wide and deep ravine on their property. Neither the street (Glen road) as laid down on the plan through the ravine, nor the bridge over it, had been assumed by the defendant township corporation as a public highway, though the latter, as the settlement in the township grew up, came into constant and extensive use. After the bridge was built, and some 9 or 10 years before action, the defendants the electric light company carried their

wires west of the bridge across the ravine on poles along the sides and bottom of the ravine, the wire as it came up the incline at the north end of the bridge being between 6 and 7 feet from the west side of the bridge, according to the recollection of such witnesses as could speak to its position at that time. The right of the defendants to erect these poles and carry their wires across the ravine in this manner was not in dispute, and the wires or some of them were connected with poles for arc lights a short distance beyond the north and south ends of the bridge.

In course of time the bridge became out of repair and dangerous, and, while it had become of great importance to a large section of the public in the city and township, the company who had built it had ceased to have much, if any, interest in its maintenance, and had put up a notice that persons using it did so at their own risk, and the township corporation disclaimed any obligation to repair it.

The legislature finally intervened, and by 3 Edw. VII. ch. 89, after reciting that the bridge had become to all intents a public highway, enacted that the township, without passing any by-law for the purpose, should reconstruct and repair it as a local improvement, assessing the cost upon the property benefited as described in the Act. The works were to be performed under the supervision of a competent engineer to be appointed by the County Judge, but their construction was not to impose upon the township any liability for their future maintenance and repair.

The new bridge thus built by the township under the authority of the Act was being practically used for traffic of all kinds by the end of the first week in August, 1904, though some work remained to be done upon it, and it was not finally approved by the engineer in charge until the middle of September, subject to some painting being done upon it, which seems not to have been completed before 1st October.

The bridge was an iron structure, 4 feet wider on each side than the old one, or in all a trifle more than 32 feet wide. On each side it was protected by a lattice-work iron railing 4 feet 1 inch in height above the sidewalk of the floor of the bridge, with lozenge-shaped openings therein, 16¼ inches in width. The distance between the railing and defendant company's wire, as reduced by the widening of the bridge, was variously stated as from 14 to 20 inches, the wire being, at

the place where the boy touched it, a little lower than half way between the top of the railing and the floor of the bridge.

On 8th October, 1904, plaintiff Francis Gloster, a boy of between 8 and 9 years of age, who was crossing the bridge or playing thereon with some companions, pushed his arm through one of the lower openings in the lattice work of the railing, and touched or took hold of the wire. There was some reason to suppose from his examination before the trial that he was attempting to reach it with a small metal toy he had in his hand, but this he would not admit or did not remember when giving his evidence at the trial. The insulation of the wire being imperfect, the result was that the boy's hand, where it had taken hold of the wire, and his head, which rested upon or touched part of the iron work of the railing, were very severely burnt.

It was quite clear from the whole of the evidence that the wire could not be touched accidentally by any one merely passing over or standing on the bridge or at the railing, or who was looking through or over the railing, or without intending to touch it or without deliberately reaching out through the railing as far as the wire, and there was no evidence that there was anything of a character likely to entice or induce children to play with or put their hands upon it, and the Judge, without objection, so told the jury.

There was evidence that a servant of defendants, in the ordinary course of his duty, crossed the bridge for the purpose of trimming the electric lamps, and it was said that he must have seen that it was being widened and the distance between the bridge and the wire reduced, and it was also shewn that on one occasion, while the work was going on, the superintendent of construction visited the bridge and stood on the bank of the ravine, though he did not cross over, and the railings of the bridge were not then up. He knew that the bridge was being repaired, but not that it was being widened. At the south end the wires appear to have been much more distant from the bridge than at the north.

The findings of the jury which affected the defendant company were, that the proximity of their wires to the west side of the bridge was a source of danger to the travelling public, and that the negligence of which they were guilty consisted in the wires being too close to the bridge, and for an unreasonable length of time.

I am of opinion that in this case the defendant company are entitled to judgment. The question is whether there was evidence upon which the jury could reasonably have found that the electric wire was a nuisance to those lawfully using the highway. This, I think, must be answered in the negative, and it therefore becomes unnecessary to consider the further question, whether, if the wire could be held to be a nuisance, there was evidence that the defendant company had notice of the altered conditions which made it such.

The highway near which the wire was erected was the bridge. It extended to the width of the bridge, and no further. Everything outside of or beyond that was the property of other persons, upon or over which the public had no right to be, and upon that property the defendant company's wires were lawfully erected.

The duty of the defendant company, as established by Barnes v. Ward, 9 C. B. 392, and kindred authorities, was so to use the property of which they were in occupation that it should not be dangerous to persons using the highway with ordinary care.

A breach of that duty is a public nuisance, and gives rise to an action at the suit of any one who suffers a particular injury. . . .

[Reference to Barnes v. Ward, 9 C. B. 392; Hardcastle v. South Yorks R. W. Co., 4 H. & N. 67, 74; Hounsell v. Smyth, 7 C. B. N. S. 731.]

If in the present case the defendant company's wire had been strung so close to the bridge that any one lawfully using the bridge by travelling along it, or leaning against or looking over the railing, might accidentally or inadvertently touch it, there would be evidence on which a jury might well find such a wire to be a public nuisance. But where, as here, it is distant at least 14 inches from the bridge, separated from it by a railing, and cannot be reached or touched by any one without intending to do so, or without stretching up through the railing beyond the side of the bridge, and therefore outside the highway, as far as the wire, I fail to see how the latter can be said to be a source of danger to any one lawfully using the highway. The use of the bridge by the public as a highway, or for any lawful purpose incidental to such use, was not impeded by the existence of the wire in its then situation, and no deviation was possible by night or by day, in the ordinary course of

such user, which could have resulted in the wire being touched by any one. . . .

[Harrold v. Watney, [1898] 2 Q. B. 320, distinguished. Reference also to Lynch v. Nurdin, 1 Q. B. 29; Binks v. South Yorkshire R. W. Co., 3 B. & S. 244; Macdowall v. Great Western R. W. Co., [1903] 2 K. B. 331; Smith v. Hayes, 29 O. R. 283; Newell v. Canadian Pacific R. W. Co., 7 O. W. R. 771; Hughes v. Macfie, 2 H. & C. 744.]

There being, then, no evidence that the defendant company ought reasonably to have anticipated that any one—children or others—using the highway, would have interfered with their wire, and no evidence of the neglect of any duty on their part to the public, it appears to me that the action fails and that the appeal must be allowed.

JUNE 16TH, 1906.

C. A.

GREIG v. MACDONALD.

Partnership — Dissolution — Claims against Withdrawing Partner—Moneys of Firm Used for Private Purposes—Sale of Interest without Deduction—Construction of Agreement—Reformation—Fraud.

Appeal by defendant from the order of a Divisional Court (6 O. W. R. 342) reversing the judgment of BRITTON, J. (5 O. W. R. 80), so far as it was in favour of defendant, and awarding judgment in favour of plaintiffs for $321.51.

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

George Kerr and Joseph Montgomery, for defendant.

W. E. Middleton, for plaintiffs.

MOSS, C.J.O.:—The cause of action alleged was an indebtedness by defendant to plaintiffs individually and as members of a partnership carrying on business under the firm name of Greig & Stewart. The partnership between plaintiffs was entered into on 12th February, 1902. Prior

to that date plaintiff Greig and defendant were co-partners carrying on the business which was subsequently carried on by plaintiffs Greig and Stewart.

It appears from the statement of claim that all the items of alleged indebtedness in respect of which judgment has been given in favour of plaintiffs were items incurred before 12th February, 1902, and could not in any sense be said to be liabilities incurred to the present partnership. Plaintiffs therefore do not shew on the face of their statement of claim that there is a cause of action by them as partners against defendant in respect of these items. It seems equally plain upon the evidence that plaintiff Greig could not maintain the claim individually, for, when these items of alleged indebtedness were incurred, plaintiff Greig and defendant were in partnership, and the moneys which were paid out, and in respect of which defendant was chargeable in the partnership accounts, would properly form part of the accounting between plaintiff Greig and defendant upon the adjustment of the partnership accounts between them. But on 12th February, 1902, and as preliminary to plaintiffs Greig and Stewart forming their co-partnership, defendant sold his interest in the partnership business and the assets to plaintiff Stewart. Thereupon plaintiff Greig and defendant dissolved partnership. The effect in law, therefore, was that the rights of plaintiff Greig and defendant respectively were to have the partnership accounts taken and the business wound up and adjusted.

But defendant having sold and transferred his interest to plaintiff Stewart, the latter was in law entitled to the same right as against plaintiff Greig. Instead, however, of plaintiffs exercising their rights in that regard, they agreed to form and did form their present co-partnership. The instrument of agreement under which defendant transferred his interest to plaintiff Stewart is dated 12th February, and shews upon its face that up to that date plaintiff Greig and defendant were partners, and that they had agreed upon a dissolution. It also shews that defendant had agreed to sell to plaintiff Stewart his interest in the business for . . . $4,500 cash; and it also goes on to say that the present plaintiffs agreed to continue the business as partners and to assume the payment of all the debts and liabilities of the former firm and to indemnify defendant against the debts and liabilities. It is, in fine, an agreement taking effect, as

of its date, upon the business, both as regards transfer of defendant's interest and as regards formation of the new partnership.

By a separate agreement plaintiffs agreed as to the terms of their partnership, and in that instrument, to which defendant was not a party, they assumed to make their partnership relate back to 1st February, 1902. That mode of dealing between themselves could not alter defendant's position as a partner from 1st to 12th February, nor could it operate to give to defendant Stewart any higher rights in respect of the late partnership than he had under his agreement with defendant.

Taking, therefore, the instruments and the items of the claim, it is apparent that plaintiffs could maintain no right to recover them in the way in which it is sought to recover them in this action. As already pointed out, plaintiffs could not recover them as debts due to their partnership; and plaintiff Greig could not recover them as an individual. And furthermore, the agreement between defendant and plaintiff Stewart operated as a sale by defendant to plaintiff Stewart of defendant's interest as it stood on 12th February, whatever that interest might be, and it is clear that that interest was subject, on the taking of the accounts, to the allowance of those items against defendant.

It is argued, however, and the Divisional Court has come to the conclusion, that the sale by defendant to plaintiff Stewart was a sale of his interest as of 1st February, and by reference to a balance sheet, prepared on that date, shewing the respective interests of plaintiff Greig and defendant in the partnership. But the evidence does not sustain that view, even if it could be received as against the instrument.

No case was made for reforming the instrument, nor does there appear to be any good reason why it should be reformed. It is, no doubt, correct to say that reference was made to the balance sheet of 1st February, but it was only with a view to plaintiff Stewart seeing in a general way what defendant's substantial interest in the partnership amounted to. The amount agreed to be paid was certainly not based upon the balance sheet, which shewed an interest worth a much larger sum than $4,500. And if the amount paid had been intended to represent the exact value of the interest of the defendant, it would have been necessary to consider

what had accrued to him out of the business between 1st and 12th February, a thing which, of course, was not either done or thought of . . . There was no representation to plaintiff Stewart by defendant as to the exact amount of his interest in the business, and there was no false suggestion or concealment to lead plaintiff Stewart to believe that no change, either as to payments on account of defendant or as to credits to which he was entitled, had occurred between 1st and 12th February.

It was suggested for plaintiffs that defendant had committed a virtual fraud by the manner in which the items now in dispute were dealt with during the period between 1st and 12th February, but there is really no ground for any such conclusion upon the evidence. The actual bargain and the real transaction between the parties was a sale by defendant and the purchase by plaintiff Stewart of the interest of defendant as it existed on 12th February.

Plaintiffs do not seek to set aside the sale, nor ask to have matters restored to their former position. They adhere to the sale, but seek by inference rather than by evidence to change the nature of the transaction and to deprive defendant of the position which he held as a partner between 1st and 12th February. And no case has been made for altering or reforming (as was said in argument) the instrument of agreement entered into by defendant, and that instrument standing, plaintiffs' claim fails.

The appeal should be allowed, and the judgment of the trial Judge restored, with costs throughout.

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

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

MEREDITH, J.A., dissented, for reasons stated in writing.