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MACMAHON, J. APRIL 1ST, 1905.

TRIAL.

WESTON v. SMYTHE.

Deed—Description—"Intersection"—Dividing Line between Houses—Production—Ejectment—Tender of Deed after Action—Costs.

Action of ejectment brought to determine the boundary line between adjoining lots conveyed to the plaintiff and defendant respectively.

A. H. Sinclair and W. A. McMaster, Toronto Junction, for plaintiff.

R. G. Smyth and J. Tytler, for defendant.

MACMAHON, J.:—About 1880 Mrs. Wood purchased the land on which the 3 houses numbered 230, 232, and 234 on the west side of Euclid avenue, in Toronto, are built. At the time she purchased, the only building on the property was what is now known as house No. 232. . . . About two years after purchasing, she built the houses 230 to the south and 234 to the north of 232. The walls of these houses from the foundations up were of stone and brick, and formed separate and distinct houses. The north wall of 230 extended 13 feet 3 inches nearer to the street line of Euclid avenue than the south wall of 232, and the remainder of the north wall of 230 was built close up to the south wall of 232. And the south wall of 234 extended 13 feet 3 inches nearer to the street line of Euclid avenue than the north wall of 232 did, while the remainder of the south wall of 234 was built close up to the north wall of 232.

The deed from the North British Canadian Investment Co. to plaintiff bears date 23rd February, 1903, and describes the land sold to plaintiff as "commencing at a point on the western limit of Euclid avenue where it is intersected by the production easterly of the southern face of the southern wall of house number 232 (that is, where the northern wall of number 230 joins the southern wall of 232), said point being distant 32 feet and 6 inches more or less measured northerly along said limit of Euclid avenue from southern limit of said lot number 1; thence northerly along said avenue 20 feet 6 inches more or less to the intersection of production easterly of northern face of northern wall of house 232; thence westerly along said last production face of wall and limit between premises in rear of houses numbers 232 and 234, in all 129 feet to eastern limit of lane; thence southerly, etc.

The word "intersection" usually means, "the place where two things intersect or cross." "Intersect" has, however, another meaning, although rarely applied, "to divide or separate (two things) by passing between them:" Murray's Dictionary: and it is in this latter sense that "intersection" was intended to be used in the above description, that is, "the dividing line between the two houses."

The North British Canadian Investment Co. conveyed to defendant by deed dated 23rd October, 1903, house No. 234 . . . described as "commencing at the said westerly angle of said lot number 4 now defined by production easterly of southern face of southern wall of house No. 234 to Euclid avenue, thence northerly along the western limit of Euclid avenue 17 feet," etc. . .

Two years after 234 was built, Mrs. Wood added a facing of brick 9 inches thick to the north wall of 232, from where the rear wall of 234 ended to the rear of the wall of 232—a distance of 32 feet 6 inches; and plaintiff contends that, according to the description in the conveyance to him, the "production easterly of the northern face of the northern wall of 232" means the production easterly from the west corner of 234 along the face of the brick wall of 232, which would carry the line through the south wall of 234 from the point where the wall of 232 strikes it on the west end to the front of 234. . . .

The surveyor who made the survey and prepared for the North British Company the description used in the conveyance to plaintiff, and also prepared a plan . . . . said that measuring 20 feet 6 inches from the intersection of the

walls of 230 and 232 reached exactly to the dividing line between houses 232 and 234, thus giving to plaintiff the full width of 20 feet 6 inches in the front of 232, as called for by his deed. . . .

According to my view, the description intends that the northern face of the northern wall of 232, no matter how devious its course may be, is to be followed and produced easterly through the intersection or dividing line between houses 232 and 234.

If I am right in the conclusion that the northern face of the northern wall of 232 is that wall which runs from the front or easterly junction of the two houses westerly through and along where the wall of 232 abuts on the wall of 234, and from such junction ends at the rear of 234 along the face of the brick wall of 232 (added by Mrs. Wood) to the rear of the house, then all plaintiff is entitled to recover is the land described in a conveyance thereof from defendant and his wife to plaintiff, bearing date 18th August, 1904. That land is of the value of $30, and a conveyance thereof was tendered to plaintiff on 19th August, 1904.

Defendant added a storey to 234, and in doing so built in the south wall of his own house. He never interfered with or claimed any of the land on which 232 was built, or any part of the wall of that house.

Plaintiff is entitled to judgment for the land covered by the deed to him from defendant above referred to, with costs up to 19th August. Defendant is entitled to the costs from 19th August.

APRIL 3RD, 1905.

DIVISIONAL COURT.

RE SLATER v. LABEREE.

Division Courts — Jurisdiction — Ascertainment of Amount over $100—Extrinsic Evidence — Promissory Note — Indorser.

Appeal by plaintiffs from order of MAGEE, J., in Chambers, ante 420, dismissing motion by plaintiffs for an order in the nature of a mandamus to the junior Judge of the County Court of Carleton to compel him to try an action, in the 1st Division Court in that county, against the indorser of a

promissory note, to recover the amount of the note, which was more than $100.

W. E. Middleton, for appellants, contended that the Judge in Chambers was wrong in holding that, inasmuch as plaintiffs to establish their case had to give evidence of dishonour and notice to defendant, the Division Court had no jurisdiction under sec. 72 of the Division Courts Act, as amended by 4 Edw. VII. ch. 12, sec. 1 (O.); that the amending Act is merely a legislative declaration in favour of the narrower interpretation theretofore placed upon sec. 72; and that it was not the intention of the legislature to take away the jurisdiction of the Division Court, unless it was necessary for plaintiffs to give evidence of the kind pointed out in Kreutziger v. Brox, 32 O. R. 418, for the purpose of establishing their claim.

A. J. Russell Snow, for defendant, contra.

THE COURT (MEREDITH, C.J., BRITTON, J., CLUTE, J.), agreed with the contention of plaintiffs and allowed the appeal with costs and made the order asked for by plaintiffs with costs.

APRIL 3RD, 1905.

DIVISIONAL COURT

BANK OF MONTREAL v. MORRISON.

Foreign Judgment — Action on — Defence — Defendant not Served with Process in Original Action—Finding of Fact—Leave to Amend—Original Cause of Action—Adding Assignors as Plaintiffs.

Appeal by plaintiffs from judgment of FALCONBRIDGE, C.J., ante 90.

J. A. Worrell, K.C., and W. D. Gwynne, for plaintiffs.

Z. Gallagher, for defendant.

THE COURT (MEREDITH, C.J., BRITTON, J., CLUTE, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER. APRIL 4TH, 1905.

CHAMBERS.

BEATTY v. McCONNELL.

Pleading—Statement of Claim—Fraud—Notice—Embarrassment.

Motion by defendants to strike out 9 paragraphs of statement of claim as not being properly pleaded and being embarrassing.

J. H. Moss, for defendants.

T. P. Galt, for plaintiff.

THE MASTER :—I do not think the motion can succeed. The statement of claim is perhaps inartistic in some respects, and reads in places more like an affidavit than a pleading. This, however, is no ground for excision. Nor can I see that any unnecessary or irrelevant facts are set out. The action is to set aside a deed to Bull and a deed from him to McConnell.

This claim is based on two grounds. The first is, that plaintiff is a purchaser for value without notice. As to this there is no objection.

The second is alleged fraud on the part of defendant G., in that he knew of plaintiff's title, and yet, by concealment and misrepresentation, induced the Provincial Secretary to issue deed to Bull on ground that he had lost his certificates.

Paragraphs 10 and 11 sufficiently charge fraud against G., and paragraphs 12 and 13 allege notice to other defendants through G. as their solicitor, so that all had notice of plaintiff's title before issue of deed to Bull.

This seems enough to satisfy the rule as to allegations of fraud laid down by Lord Watson v. Salomon v. Salomon, [1897] A. C. at p. 35; see also judgment of Thesiger, L. J., in Davy v. Garrett, 7 Ch. D. at p. 489.

It does not seem to me that defendants here can truly say they are embarrassed in finding out what is the case they have to meet. This is the test given in Davy v. Garrett, supra, at p. 488.

The plaintiff's case is set out fully and clearly. The claim is simple, to have the deeds to Bull and McConnell set aside as clouds on his title. The facts on which he relies are also fully set out; none occurs to me as stated which would not strengthen his case if proved. This is more especially the case as there is a claim for "damages from defendants for their fraudulent attempt to deprive plaintiff of his said lands."

It must be assumed on this motion that such a claim can be successfully made, though no grounds of special damage are given. The fact of course may be otherwise. I am not able to consider this.

The motion is dismissed. The costs will be in the cause.

A reference to Harris v. Harris, 1 O. W. R. 734, may be useful; also to cases cited at end of Stratford Gas Co. v. Gordon, 14 P. R. 407.

MEREDITH, C.J. APRIL 4TH, 1905.

WEEKLY COURT.

RE WIARTON BEET SUGAR CO.

JARVIS'S CASE.

Company—Winding-up—Contributory—Payment for Shares—Conditional Agreement—Condition Subsequent.

Appeal by John Jarvis from the report of an official referee (McAndrew) dated 28th January, 1905, settling the appellant upon the list of contributories for $14.25 as the amount unpaid on one share of the capital stock in the Wiarton Beet Sugar Company, Limited, which was being wound up under the Dominion Winding-up Act.

W. M. Douglas, K.C., for appellant.

W. H. Blake, K.C., for liquidator.

MEREDITH, C.J.:—I am of opinion that the conclusion of the official referee is right and must be affirmed.

The effect of the agreement of 13th January, 1900, and the subsequent acts of the parties, was, I think, to constitute the appellant a shareholder in præsenti with a collateral

agreement as to the mode in which he was to be permitted to pay for the share for which he had subscribed.

Although the agreement provides that the appellant is not to incur any responsibility or liability "in consequence of" his "stock" beyond his agreement to pay for the same by the delivery of beets in the manner provided by the agreement, and in the schedule at the foot of the agreement under the heading "amount of stock subscribed for payable," and the words "5 per cent. within 30 days balance in beets as mentioned in contract," in the body of the agreement it is provided that in paying for beets delivered under the agreement the company is to retain from the person delivering them in each season a sum equal to 19 per cent. of his stock "in the company herein subscribed for, and for which certificate of paid up stock shall be given," and it is also provided that in case the appellant should fail to deliver beets as agreed he would be required and he agreed to pay to the company in money on or before 31st January in each year a sum equal to that which he should have omitted to pay for in beets, for which he should receive "certificates on paid up stock," and that 20 per cent. additional on the sum omitted to be paid in beets should be collected for the benefit of the company.

It is impossible, I think, in view of these provisions, to find that the subscription for the share was to be a conditional one, in the sense that the appellant should not become a shareholder until the five years over which the contract for the supply by him of beets extended. On the contrary, the basis of the agreement is that the appellant should become a shareholder in præsenti, and the agreement that he should be entitled to pay a part of the sum payable in respect of his share in beets is, therefore, I think, necessarily a collateral one, and in so far as it is a condition must be treated as a condition subsequent.

The appellant had made delivery of beets as he had agreed to do in two of the years, and had therefore paid, in addition to the 5 per cent. paid in cash, 38 per cent. of his share, and, according to the terms of the agreement, he was entitled to a certificate or certificates shewing that his share had been paid up to that extent, and also, I apprehend, in case dividends had been declared, to a dividend on what had been paid.

Pellatt's Case, L. R. 2 Ch. 527, is, I think, distinguishable. The facts were very different from those which are found to exist in this case, and, moreover, nearly 3 years

before the winding-up began, Pellatt had repudiated the contract to take the shares, which was a conditional one. . . .

The appeal therefore fails and must be dismissed. As the case is a test one, it would not be unreasonable that the costs of both sides should be paid out of the assets of the company, and I so direct, unless the liquidator objects to that disposition being made of them. If he objects, the case may be spoken to on the question of costs, if the appellant so desires, but if he does not the appeal will be dismissed without costs.

APRIL 4TH, 1905.

C.A.

TORONTO GENERAL TRUSTS CORPORATION v. CENTRAL ONTARIO R. W. CO.

Release—Pledge of Bonds — Agreement for Release — Judgment —Satisfaction—Terms.

Appeal by S. J. Ritchie, from judgment of MEREDITH, J., reversing the finding of the Master at Belleville, on a reference before him, and declaring that Stevenson Burke, the respondent, should be allowed to make proof before the Master as the holder and owner of 225 bonds of the Central Ontario Railway Company.

A. B. Aylesworth, K.C., and J. H. Moss, for appellant.

G. T. Blackstock, K.C., and T. P. Galt, for respondent.

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

MACLENNAN, J.A.:—The principal question depends upon certain documents signed by the respective parties on the 10th and 11th March, 1902.

For several years prior to that time there had been much litigation between the parties in the United States, that is, Federal, Courts, and also in the State Courts of Ohio, arising out of stock and bonds of different companies belonging to Ritchie, including the 225 bonds in question, held by Burke as security for money due to him.

Burke had obtained a judgment or order of the United States District Court for the sale of the stocks, bonds, and securities held by him under which he himself had become the purchaser thereof, whereupon Ritchie took proceedings in the same Court to have it decided that such sale was invalid, and for redemption of his securities.

The price at which Burke had bought in the bonds in question was $5,000, and, after crediting the price agreed by him to be paid for all the securities, there remained a balance of debt due to him of $67,000 or thereabouts.

Afterwards Burke took proceedings in the Circuit Court of Summit County, Ohio, a State Court, based upon the judgment and sale made in the United States Court, and obtained a State judgment for the said balance of debt of $67,000 against Ritchie. Ritchie afterwards appealed from this judgment to the Supreme Court of the State, still insisting on the invalidity of the sale of his securities to Burke.

Pending these appeals, Ritchie circulated extensively, among persons likely to become purchasers of such securities, notices warning all persons against purchasing the same or any part thereof pending the appeals.

In March, 1902, Burke, being anxious to realize his securities, free from any cloud upon, or doubt of, his title, sought an interview with Ritchie in order if possible to settle their differences.

The parties met at Burke's office on 10th March, 1902, and on that occasion an agreement was prepared, and signed by both. At the same time two or perhaps three other papers were also prepared and signed by Burke. Ritchie testifies that the agreement was dictated by Burke to and engrossed by his stenographer in duplicate, and signed by him, and also by Ritchie without then reading it, that he took one copy home with him, and then found that it was not in accordance with the agreement as he understood it. He says that, as he understood the agreement to which they had come, it was that all existing litigation between them was to be ended, and all judgments released and discharged, and that he, Ritchie, was to be entitled to get back the bonds in question on payment of the $5,000 for which Burke had bought them in, under the judgment in the Federal Court, together with interest from the date of sale. On reading the agreement he found that it provided that he was not to have the bonds, without also paying the $67,000

judgment held by Burke, in the Circuit Court of Summit County, as well as the $5.000 at which the bonds had been bought by Burke. He says he went back to Burke next day, and that upon stating his objection Burke at once prepared and signed a discharge and acknowledgment of satisfaction of the Circuit Court judgment.

The only evidence on this part of the case is that of the respective parties. They do not differ as to the circumstances under which the papers were prepared and signed. They differ, however, altogether as to what the agreement was apart from the writing, Burke asserting that the writing contains the true agreement between them, and that the paper signed by him on the following day was not intended to affect or vary the instrument signed by both on 10th March.

There is no doubt whatever that if it depended on the formal agreement of 10th March which both parties signed, Burke's contention must prevail. It is distinct that Ritchie was not to have the bonds without payment, not only of the $5,000 and interest, but also of the amount of the decree in the Circuit Court of Summit County, Ohio, amounting with interest to about $70,000. That stipulation is emphasized by a clause in the agreement that any action then pending in any Court between the parties, except the decree of the Circuit Court of Summit County, should be dismissed by plaintiff, and all errors released, so that thereafter from no existing cause whatever should any litigation of any kind be instituted by one against the other, nor should any claim be set up by one against the other for the ownership of any stock held or owned by either in any company or corporation in which either one or the other had at any time been interested.

The whole question turns upon the effect of the paper signed by Burke on 11th March.

There is some confusion as to which of two papers was signed on that day. Besides the principal agreement, there were four other papers signed on the 10th or 11th. Three of these were acknowledgments of satisfaction of judgments—what according to our former practice would be called satisfaction pieces—with the nature and effect of which Burke would be familiar, for he had been a State Judge for a number of years, and was still a lawyer in active practice.

One of these satisfaction pieces, as I may call them, was of the judgment in the United States Court for the balance due to Burke from Ritchie after crediting the price of the bonds in question and other securities bought in by him. Another related to the appeal to the Supreme Court of the State above referred to, taken by Ritchie against Burke's judgment in that Court. This is signed by both Burke and Ritchie and also by Ritchie's wife, who had been a party to the appeal, and simply declares that the action, that is, the appeal, so far as those parties were concerned, was settled. The third paper relates to the same appeal as the second, and is signed by Burke alone. It is intituled in the Supreme Court of the State, and between Ritchie and wife, plaintiffs in error, and Burke et al., defendants in error. Therein Burke acknowledges satisfaction in full from Ritchie of the decree of about $70,000, rendered in the Circuit Court of Summit County, and agrees that at any time Ritchie desires he may have the action, as far as Burke is concerned, entered settled and satisfied in full, and the action dismissed at his cost and expense. Also that, at any time it may be decided by Ritchie, the original decree in the Federal Circuit Court for the balance due to Burke may be entered satified and discharged. It is also further understood that Burke will enter satisfaction of the balance due on the original decree in the Federal Circuit Court on which the proceeding in the Circuit Court of Summit County (the State Court), then pending in the Supreme Court of Ohio, was predicated. The fourth satisfaction piece relates to the judgment in the State Circuit Court for the $67,000 or thereabouts now in dispute, and which by the signed agreement was expressly excepted from the judgments agreed to be discharged.

In his evidence in chief Ritchie says distinctly that it was the first of the above papers which was signed on the second day. He corrects this with equal distinctness in cross-examination by counsel for Burke, and says it was the fourth paper above mentioned which was signed on the second day. Burke says in his evidence, that, upon looking the papers over, so far as he can remember it was the second paper which was signed on the second day. I think the papers themselves contain conclusive evidence that it was the fourth paper above mentioned which was signed on the second day.

The express intention of the written agreement was that the judgment in the State Circuit Court for $69,000 or thereabouts was to be excepted and not to be discharged, and it is

not likely that a lawyer like Burke would on that day do the very thing which he stipulated carefully he was not to do. It is clear that as long as that judgment stood, the discharge of the judgment in the Federal Court would not affect it. It would still stand good until it was actually satisfied. The judgment in the Federal Court was merged in the subsequent judgment in the State Circuit Court, and the discharge of the former would not affect the force and validity of the latter. I therefore think that the papers themselves afford clear evidence that when the parties separated on 10th March, the express discharge of the State Circuit Court judgment had not been signed, and that it was that discharge which was signed on the following day.

It was argued that the third paper, if signed on the first day, was an answer to this argument, for that also expressly acknowledges satisfaction in full from Ritchie of the same debt recovered in the State Court, and provided that Ritchie might at any time have it entered settled and satisfied in full, and have the action dismissed. But there are two answers to that argument. The first is, that this paper is not intituled in the Circuit Court, but in the Supreme Court, and was not per se a satisfaction piece which could be entered in the Circuit Court; and the other is that, having been signed at the same time as the agreement and as a part of the same transaction, the two papers being read together, their necessary meaning would be that the discharge would be given when the judgment debt was paid according to the agreement, or in case Ritchie chose to abandon the redemption of the bonds. The same paper, it is to be observed, provides for the satisfaction of the original decree in the Federal Circuit Court. All these papers except No. 3 were duly entered and recorded in the respective Courts on 14th March afterwards. No. 3 could not be so entered, for it was not intituled in the Circuit Court, but in the Supreme Court, in which none of the judgments referred to therein were recovered.

If then, as I think it must be taken, the paper signed on the second day was, as deposed by Ritchie, the fourth above mentioned, what effect is to be given to it? It is intituled in the State Circuit Court and in the cause as intituled in that Court. It recites the judgment and the appeal taken to the Supreme Court, that the appeal has been settled and adjusted and is to be so entered by the appellants,

and then proceeds: "But in order that the records in Summit County may shew that said decree in favour of said Burke has been satisfied, discharged, and settled in full, it is hereby agreed and declared that the said Stevenson Burke has received satisfaction of said decree in full and that said action in the Supreme Court is to be entered settled." The legal effect of this document, when entered on the record of the Court, was prima facie to extinguish the judgment debt, and having been given on the following day at the request of Ritchie, and for the very purpose of obtaining freedom from the obligation to pay it, and for the purpose of qualifying and correcting the agreement which had been signed on the previous day, I see no reason why it should not have its legal effect given to it, nor why as between the parties the judgment debt for the sum of $70,000, with interest, mentioned in the agreement, should not be regarded as having been satisfied.

The learned Judge has treated the case as one in which the onus rested on Ritchie, but I think that is otherwise, and that it rested upon Burke to shew that the satisfaction piece signed by him under the circumstances ought not to have its legal effect.

There was another point argued, namely, that the money was to be paid on or before 1st January following, and was neither paid nor tendered. I do not think that objection ought to prevail, for Burke admits that he would not accept payment unless the whole sum was paid.

For these reasons I think the appeal should be allowed and that the Master's decision should be restored.

APRIL 4TH, 1905.

C.A.

BIRMINGHAM v. LARKIN.

Master and Servant—Injury to Servant—Canal Works—Dangerous Place—"Way"—Workmen's Compensation Act—Negligence of Superintendent—Workman Conforming to Orders—Contributory Negligence.

Appeal by defendants from judgment of a Divisional Court (3 O. W. R. 607) allowing (STREET, J., dissenting) an

appeal by plaintiff from judgment of MacMahon, J. (2 O. W. R. 536), which dismissed the action, and ordering judgment to be entered for plaintiff for $750 and costs, in an action by a workman to recover damages for injuries sustained by the alleged negligence of his employers.

E. E. A. DuVernet, for defendants.

G. H. Watson, K.C., and L. V. O'Connor, Lindsay, for plaintiff.

The judgment of the Court (Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.), was delivered by

Osler, J.A.:—I am of opinion that the judgment of the Divisional Court (Falconbridge, C.J., Britton, J.), should be reversed and the judgment of MacMahon, J., at the trial restored, for the reasons given by him and by Street, J., the dissenting Judge in the Divisional Court. . . .

The place from which plaintiff undertook to hand up the plank he was carrying to his fellow workman Clairmont was not a "way" which he had been authorized or directed to take by any one in authority, or to whose orders he had been directed to conform. He appears rather to have handed up the plank from that place for the common convenience of himself and his fellow servant, instead of going a little further on to the place clear of obstruction and free from danger which he had just before been using for the same purpose. I can see no ground on which his employers can be held liable.

Appeal allowed with costs.

April 4th, 1905.

C.A.

FLYNN v. TORONTO INDUSTRIAL EXHIBITION ASSOCIATION.

Negligence—Injury to Person—Dangerous Place on Premises—Invitation—Part of Premises Used by Licensee—Responsibility of Owner—Construction of License—Extent of Invitation.

Appeal by defendants from judgment of Meredith, C.J., in favour of plaintiffs in an action for damages for negligence causing personal injuries to the infant plaintiff.

The appeal was heard by Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.

G. F. Shepley, K.C., and R. H. Greer, for defendants.

W. N. Ferguson, for plaintiff.

Garrow, J.A.:—The action was brought by the infant plaintiff and her father to recover damages resulting from an injury to the infant plaintiff in the circumstances following.

Defendants are the lessees of a large enclosed park in the city of Toronto, which they use for the purpose of holding an annual exhibition in arts, manufactures, agriculture, etc. Admission is obtained through a gate or gates, upon payment of a fee. The exhibition is widely advertised and attracts large numbers of people during the two weeks of its course. And in addition to the exhibition itself defendants allow within the park various places of amusement as attractions for the purpose of increasing the popularity of the exhibition itself.

The infant plaintiff, aged 14 years, visited the exhibition grounds in September, 1903, paid the usual fee at the gate, and was admitted to the park. In the park, but in a small enclosure with a gate, stood a machine called a "Razzle Dazzle," a species of merry-go-round. This had been erected and was owned by Sprague & Co., travelling showmen, under an agreement with defendants, for the privilege of erecting and maintaining which they had paid to defendants $100. At the gate which admitted to the "Razzle Dazzle" a further fee of 5 cents was collected by Sprague & Co. for their own use. The agreement between Sprague & Co. and defendants provides that defendants "agree to provide the contractor (Sprague & Co.) with ground space not exceeding 50 feet on the grounds during the term of the Toronto Exhibition for 1903, for the purpose of enabling the contractor to give performances or exhibitions of his said show, and charging an admission fee to the public therefor. The association (defendants) to be entitled to $100 of the gross receipts therefrom, to be paid in cash. . . . The contractor agrees to be governed by the general rules and regulations of the said association, and that the general management and conduct of the show shall be subject to the supervision and approval of the manager of the association, who shall also have the right to require the removal of any objectionable features

in connection therewith, and to cancel this contract and order the closing up of the said show for violation of the terms of this contract or for any neglect, misrepresentation, vulgarity, or infringement of rules, without him or the association being liable for any claims or expenses incurred on the part of the contractor. . . . The contractor shall indemnify the association from and against all claims and demands, costs, charges, and expenses, which the association may incur or be put to by reason of any accident to any person caused by the negligence of the contractor or in the giving of his said show, and the association shall not be responsible to the contractor for any damages or loss occasioned by fire or any other cause. It is distinctly understood that no vulgarity, immoral displays, or objectionable features of any kind will be tolerated, and the manager of the association shall be the sole judge or authority in the foregoing or any other matter whatsoever."

The infant plaintiff paid the 5 cents demanded for a ride in the "Razzle Dazzle," and was seated upon it, with some 45 others, when it suddenly collapsed, and she was very severely injured.

The collapse, it is scarcely disputed, occurred owing to the faulty material of the centre post, which was of wood, upon which the whole weight rested, and the lack of sufficient guys or stays—defects which, as the evidence shews, would have been easily ascertained by anything approaching competent inspection, of which there was absolutely none by defendants.

The question in the action is not as to the negligence of some one, which is admitted, but simply as to upon whose shoulders should rest the responsibility, upon those of Sprague & Co. or of the defendants, or of both. The learned Chief Justice in his judgment remarks that the case is near the line, that it involves difficult questions . . .

I agree with the learned Chief Justice in regarding the case as one of difficulty, differing as it does in its facts from all the numerous cases to which we were referred, in the important circumstance of the second enclosure and the payment of the second fee.

The legal duty of one inviting another to come upon his premises, to take reasonable care that the premises are in a reasonably safe condition, is well settled. There are in the case at bar apparently two questions, the first whether the small enclosure continued to be the "premises" of defendants notwithstanding the agreement with Sprague & Co., and

the second, the extent of the invitation created by the general admission to the park.

The first question is, I think, largely one of law; in other words, of the proper construction of the before mentioned agreement; and the second is, I think, chiefly a question of fact.

As to the first, I cannot accede to the argument of Mr. Shepley that the agreement was in effect a lease, giving a right of exclusive possession to Sprague & Co. There is no demise of any land, no land is in fact described, so as to be ascertained, although this alone might not be sufficient if land had afterwards been pointed out and taken possession of by the tenant. But the intention of the parties at the time, as expressed in the instrument, is important where the matter is in doubt: see Taylor v. Caldwell, 3 B. & S. 826. And the extensive reservation of powers of superintendence and control, including cancellation, and the insertion of the covenant of indemnity, are each and all circumstances of considerable, and combined of conclusive, potency to indicate that a lease with the right of exclusive possession was not intended.

I think, therefore, that the instrument in question was clearly in law a mere license, and not a lease. But this conclusion is not, in my opinion, necessarily conclusive against defendants, although it certainly tends towards a solution against them, for it might well be that, notwithstanding the invitation did not extend to the use of the machine, and it is in this particular that I have found the greatest difficulty in reaching a solution entirely satisfactory to myself. Invitation is, as I have before pointed out, very largely a question of fact to be determined on the evidence. And the final question really is, was there, in all the circumstances, reasonable evidence from which the learned Chief Justice, or a jury, had it been before a jury, could have found in favour of plaintiffs upon this question. If there was, the judgment should stand unless it can be fairly regarded as against the weight of evidence.

So viewing the case, I have come to the conclusion that there was such reasonable evidence, and I also think that the judgment of the learned Chief Justice is the correct result upon the weight of evidence. The machine, to begin with, stood upon defendants' premises, placed there by and with their express license and consent and for their benefit, both

direct and indirect. Their manager in the witness box speaks of it, quite correctly, as one of the "attractions:" it may have been the main one to children like the infant plaintiff. Defendants undoubtedly expected and intended it to be used by its patrons exactly as the infant plaintiff was using it when injured, indeed it could only be reached at all by those whom defendants had first invited or permitted to enter through the outer gates. The fact that they had reserved extensive powers of control, and had taken a covenant of indemnity, is also significant on this subject, as well as upon the earlier one of lease or license. These circumstances all point, probably, towards ownership by defendants, and certainly towards possession and power of control by them.

If they had been the owners of the machine, even if they had collected the additional fee for themselves, the original invitation would, I think, have clearly included the right to use the machine on payment of the additional fee, and if the machine, although not owned by them, had been placed by the owner or by an independent contractor where it was for the use of defendants' patrons, the same result would, I think, follow: "Francis v. Cockerill, L. R. 5 Q. B. 501. And the circumstance that the independent contractor, or the owner in this case, collected a small additional fee for his own use, although certainly important, is not, in my opinion, decisive against plaintiff's claim, but was simply a circumstance to be considered with the other facts in estimating whether or not, in all the circumstances, defendants did or did not invite the infant plaintiff to use the machine in question.

I think the appeal fails and should be dismissed with costs.

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

MOSS, C.J.O., MACLENNAN and MACLAREN, JJ.A., concurred.

APRIL 4TH, 1905.

C.A.

GIBB v. McMAHON.

Specific Performance—Contract for Sale of Land by Trustees —Evidence of Concurrence by All—Statute of Frauds— Correspondence—Authority of Trustees to Bind Co-trustee.

Appeal by defendants from order of a Divisional Court (3 O. W. R. 645) reversing judgment of STREET, J., dismiss-

ing action for specific performance of a contract for sale to plaintiff of a hotel property in Toronto.

T. D. Delamere, K.C., and A. B. Aylesworth, K.C., for appellants.

C. H. Ritchie, K.C., and M. H. Ludwig, for plaintiff.

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

MACLENNAN, J.A.—Defendants are trustees of the property in question, which is freehold, under the will of Mary Furlong, deceased, who died 12th February, 1895. Defendants McMahon and William Walsh and her son William Furlong were appointed executors and trustees by a codicil to the will. Furlong having died, defendant Louis R. Walsh was appointed trustee in his place, under a power contained in the will; and the trust estate was conveyed so as to become vested in the three defendants upon the trusts of the will.

By the will four-thirteenths of her estate were given to her son William, and three-thirteenths to each of three grandchildren, to be sold and distributed by the trustees at the expiration of ten years; and if her son died before the time for distribution, without leaving descendants, his share was to be divided between her grandchildren. The trustees were also to be guardians of the grandchildren, and, notwithstanding the postponement of the distribution, express power was given to the trustees to sell the property at any time in their discretion.

In the year 1903, although the ten years from the death of the testatrix had not expired, it was considered expedient to sell the hotel property, and it was advertised, but only one offer appears to have been received.

Defendants McMahon and William Walsh resided in Toronto, and the other trustee, defendant Louis R. Walsh, resided at St. Mary's.

On 1st September, 1903, McMahon wrote a letter to Louis R. Walsh at St. Mary's on the subject of the sale of the property. He tells him of the advertisement offering it for sale, and that only one offer had been received, namely, from one Hammall, the lessee, who had offered $11,500, but was willing to give $12,000. He says that he and William Walsh thought it wise to sell now, and gives various reasons for

doing so, and then adds these words: "Will you kindly let me know your opinion at once? Are you willing that we should accept $12,000?" On receiving this letter Louis R. Walsh applied his mind to the subject, conferred with a person who he thought might be willing to become a purchaser, and on 7th September answered, saying he thought "it would be wise to accept Hammall's offer," and giving some reasons for so thinking. He adds also: "Under the circumstances, I think it would be better to accept."

There was no further communication between Louis R. Walsh and his co-trustees.

Presumably McMahon received this letter on 8th September, but he did not then close with Hammall. That must have been because he thought it was proper and his duty to take more time. He had had inquiries from A. C. Macdonell on the 4th after his letter to Louis R. Walsh, and, later, inquiries from another firm of solicitors, to whom he named the sum of $13,000 as a price. Immediately afterwards, upon his own sole judgment, and without consulting either of his co-trustees, he assumed, in the name of all, to make the offer to those solicitors of 14th September which is now in question, and which was accepted. I think that was a clear breach of trust. It was a very simple thing to have made the offer subject to the approval of his co-trustees. It was their right to judge and to decide whether a definite offer to accept $13,000 or any other sum should be made, if it was thought that Hammall's offer of $12,000 should not be accepted. It is true that William Walsh did afterwards assent to and approve of the offer, when made aware of it. But it is evident that William Walsh was not so free to exercise his judgment as to the price to be asked after the offer had been made in the name of all, as he would have been if consulted previously. He in effect consented and approved under pressure, under natural reluctance to disapprove of what his co-trustee has assumed to do.

Pending the correspondence with Louis R. Walsh and up to 14th September, the prospects for the sale of the property had improved. The negotiations with Hammall went no further. New inquiries were being made. The situation was quite different from what it was on 1st September, when Louis R. Walsh was consulted, and there is no pretence that he was consulted afterwards, not but that when he became aware of what had been done he promptly refused to approve

of it or to be bound by it, and the present action was commenced on 21st September afterwards.

The sole question is, whether this is a valid contract for the sale of this trust estate, and whether defendants are bound to perform it specifically; and I am clearly of opinion to the contrary, and with great respect, that the judgment of the Divisional Court is wrong and should be reversed, and that the judgment of Street, J., at the trial should be restored.

It may be that if immediately upon receiving the letter of 7th September McMahon and Walsh had completed a contract with Hammall at $12,000, and had assumed to sign it on behalf of Louis R. Walsh, as well as on their own behalf, and there had been no change of circumstances in the meantime, the cestuis que trustent would have been bound. I express no final opinion on that point, though, as at present advised, I think they would not. It is not a case of principal and agent like Ireland v. Livingstone, L. R. 5 H. L. 416, cited by the learned Chancellor, but a case of trustees selling, not their own property, but the property of their cestuis que trustent. What Louis R. Walsh was asked for was his opinion, and whether he was willing that they should accept $12,000. He gives his opinion, and that is all. Authority to sign the contract for him is neither asked for nor given, and up to the moment of signing, or giving express authority to sign, he had the right and power to change his mind.

But, however that might have been, that is not this case. A fortnight had elapsed since the circumstances related in McMahon's letter of 1st September. Further inquiries for the property had been made; a new customer had been found; a new negotiation had been opened with the prospect of a better price. I think it is plain that the cestuis que trustent had a right to the benefit of Louis R. Walsh's best judgment in the changed situation, before concluding the new contract, and to have that judgment manifested by his signature, either actual or expressly authorized. Nothing is better settled than that where there are several trustees all must act: Lewin on Trusts, 10th ed., p. 278, and cases there cited. And see Luke v. South Kensington, 11 Ch. D. 125. . . .

Here the question is whether the estate of the infant cestui que trust is bound by this contract, of which one of the trustees had absolutely no previous knowledge, and which

he repudiated as soon as it came to his knowledge, a contract assumed to be signed on his behalf 14 days after the information given to him, on which he expressed his willingness to sell.

The Courts are extremely careful in enforcing the specific performance of contracts by trustees for the sale of the lands of their cestuis que trustent, as to which see Sneesby v. Thorn, 7 De G. M. & G. 309; Goodwin v. Fielding, 4 De G. M. & G. 90; and the cases cited at pp. 180 and 181 of Fry on Specific Performance, 4th ed. In Lewin on Trusts, 10th ed., p. 484, it is laid down that "in no case will the Court enforce specific performance of a contract which amounts to a breach of trust;" and in Mr. Justice Fry's treatise, at p. 181, it is said that "even where there is nothing amounting to a distinct breach of trust, the Court will be delicate of interfering against trustees; so that where in a contract of sale by them there is any want of business-like character, the Court will not, it seems, interfere unless the price be shewn to be equal or more than equal to the value of the property."

For these reasons I think the appeal should be allowed, and the judgment of Street, J., restored.

APRIL 4TH, 1905.

C.A.

TRUSTS AND GUARANATEE CO. v. ROSS.

Sale of Goods—Contract — Statute of Frauds — Inability of Vendor to Deliver Goods—Breach of Contract.

Appeal by defendant from judgment of MACMAHON, J., at the trial, in favour of plaintiffs, in an action for breach of contract to purchase a grocery and hardware stock belonging to plaintiffs as executors of one McCalla.

On the refusal of defendant to carry out his alleged contract plaintiffs sold the grocery stock at a loss, and claimed the difference between the price defendant agreed to pay for it and that which they were afterwards obliged to sell it for.

Defendant denied that there was any contract in fact, or any contract in writing to satisfy the Statute of Frauds. He also defended on the ground that plaintiffs were not ready and willing or able to deliver the goods they had offered to

sell, having sold and disposed to other persons of a substantial part thereof before their acceptance of defendant's alleged offer.

E. E. A. DuVernet and A. C. Kingston, St. Catharines, for defendant.

G. Lynch-Staunton, K.C., and A. W. Marquis, St. Catharines, for plaintiffs.

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

OSLER, J.A.:—At the trial it appeared that plaintiffs were executors of one John McCalla, who had carried on a general grocery and hardware business in St. Catharines. They caused an advertisement to be published asking for tenders for the purchase en bloc of the grocery and hardware stock, goodwill, fixtures, etc., of the business. The advertisement stated, inter alia, that intending purchasers were to tender at a rate of so much in the dollar for the stock and fixtures, and a specified sum for the goodwill; that the business had been continued from McCalla's death by the executors, and was a going concern; that the stock sheets might be seen on application to the executor's solicitor; and that further particulars and conditions of sale might also be seen there.

Mr. A. W. Marquis was solicitor for the executors. He stated that after the publication of the advertisement, defendant came into the office on two occasions and looked over the stock sheets: that on 22nd September, 1902, the day before the tenders were to be opened, defendant met him in the street in the evening and said he thought he would make a tender on the stock; that he asked defendant to come into his office and write it. Defendant asked the witness to write it out for him and gave him the figures, 75 cents for the grocery stock and 50 cents for the hardware stock; nothing for the goodwill. Witness said: "Then I will write that tender out and sign your name, per myself." This the defendant assented to and instructed him to do so. The witness accordingly wrote and sent to the plaintiff the following:

"To the Trusts and Guarantee Co. (Ltd.), Toronto:

"Dear Sirs,—I offer 75 cents on the dollar for the grocery stock and 50 cents on the dollar for the hardware, but nothing for the goodwill.

"Yours,

"John Ross, per A. W. Marquis."

And on 24th September, having heard from plaintiffs accepting the offer, he wrote defendant . . . "Your tender for the McCalla stock was accepted by the Trusts and Guarantee Co., Ltd. Please call and execute an agreement in accordance with the conditions of sale and make your deposit." . . .

The conditions of sale referred to in this letter and in the advertisement were not produced or proved, as was admitted on the argument of the appeal, and in the meantime plaintiffs had continued from 22nd September to sell and dispose of the goods in the shop as they had been previously doing. On 1st October, 1902, plaintiffs wrote defendant expressing their surprise that he had not executed the agreement required for carrying out his contract, and notified him that they would hold him responsible for any loss they might sustain if they were obliged to dispose of the stock in another way. And on 3rd October defendant's solicitors in answer to that letter wrote saying that defendant had decided not to enter into "the agreement," and repudiated any liability for "the transaction:" that the goods were not as represented, and that a great many of the staple articles such as tobacco and sugar were sold, thus depreciating the value of the stock offered for sale. Defendant said he had seen the advertisement and examined the stock sheets. He admitted that he had met Marquis in the street and spoken of the sale, and that he had said he would give him 50 and 75 cents, provided that the deal was straight, i.e., alluding to the stock sheets, and that the staple goods as tea, tobacco, and sugar were there, but that he had never authorized Marquis to put in a written tender for him.

It appeared that a substantial quantity of the staple goods as specified in the stock sheets had been sold off in carrying on the business, and had not been replaced.

I am of opinion that, on both the objections taken, defendant is entitled to succeed. Plaintiffs are obliged to concede that the conditions of sale referred to in the advertisement and in their agent's letter of 24th September were part of the contract they rely upon, and that defendant's offer was upon the terms of and subject to these conditions, as otherwise, the acceptance contained in that letter not being an unqualified acceptance of defendant's offer, proof of a contract would fail for that reason.

And on the other hand, if the offer was subject to such conditions, they have not been proved, and the written evidence of a contract fails in that direction also.

It is evident from the only allusion to the conditions in the evidence (apart from the exhibits) that they were of importance in regard to the other objections to plaintiffs' right to recover, namely, that they were not ready and willing or able to deliver the goods which defendant's verbal or written tender (assuming the authority of Marquis to make one) referred to.

The advertisement invited tenders at so much in the dollar on the stock, as shewn by the stock sheets. That stock had been, as regards several items, substantially depleted and not replaced at the date of the offer. It by no means follows from the fact that the advertisement refers to the business as having been continued from McCalla's death as a going concern, that the stock sheets on which tenders were invited and made were not those which shewed the actual condition of the stock at the time of the offer, and one would expect to find that it was so, as the advertisement called for tenders at a rate of so much in the dollar on the sheets of which inspection was invited. It was essential for plaintiffs to prove clearly that defendant had entered into a contract which entitled them to insist that he was bound to take just what was in the shop, though in fact less than what the stock sheets he was said to have tendered on shewed. It may be that the conditions would have shewn this, but it does appear from the evidence that defendant would not have got what he supposed, and I think rightly supposed, he was buying.

I think the appeal should be allowed and the action dismissed, and with costs.

APRIL 4TH, 1905.

C.A.

ONTARIO PAVING BRICK CO. v. TORONTO CONTRACTING AND PAVING CO.

Sale of Goods—Action for Price — Contract — Damages for Delay—Breach of Contract—Penalties—Inspection Fees.

Appeal by defendants from judgment of a Divisional Court (3 O. W. R. 759) reversing the judgment at the trial

of FALCONBRIDGE, C.J., who dismissed the action, which was brought to recover the price of brick sold and delivered by plaintiffs to defendants for the performance of a street paving contract which the latter had with the corporation of the city of Toronto.

W. N. Ferguson, for defendants.

W. H. Irving, for plaintiffs.

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

GARROW, J.A.:—There was no dispute about the amount owing to plaintiffs, but the real question in issue was as to a claim for damages made by defendants for an alleged default on plaintiffs' part in performing their contract, which defendants place at $285, made up of one simple item, namely, 95 days of inspection at $3 per day, which defendants had to pay as the price of an extension of time by the city, which extension they say was wholly attributable to the default of plaintiffs. The Chief Justice at the trial acceded to this view, and dismissed the action.

The Divisional Court was of the opinion that plaintiffs should only be charged with one-half of the item in question, and gave judgment in favour of plaintiffs for $142.50.

The date of defendants' contract with the city is 25th September, 1902, and the time for completion expressed in the contract is 60 days from a notice to proceed. Some work was done in the same autumn, but the formal notice to proceed was apparently given, or perhaps repeated, in the following spring, with the result that the date for completion was apparently as of 3rd June, 1903. The contract between plaintiffs and defendants was not made until 17th March, 1903, although conversations had previously taken place and prices had been quoted.

Plaintiffs began to deliver the bricks in the same month, and by 28th May had delivered 108,000, of which none had up to that date been laid. The delivery contained 128,500 in June, 164,600 in July, and 40,000 in August, the last delivery on 10th August, and on 15th August defendants' contract with the city was completed.

There appears to have been no lack of good faith on either side. If plaintiffs were bound by their contract with de-

fendants to supply the bricks with sufficient expedition to enable defendants to have completed their contract by 3rd June, then they made default. But, whether or not that is the proper construction of that contract is now apparently of no consequence, because that they did make some default appears to be now conceded. And the only question in the Divisional Court, and upon this appeal, is as to proper amount which they should pay as damages.

If the default of plaintiffs had been the sole cause of the damages to which defendants were put, the judgment of the Chief Justice could, I think, have been supported, but that it was the sole cause was not the opinion of the Divisional Court, and I am not at all convinced that the latter opinion is not correct. The total inspection fees were 149 days, and from this 54 days are allowed for the 2 months allowed by the contract for the performance of the work. Of this total, 32 days were for inspection in 1902, before the contract between the parties to this action was made. As I have mentioned, 54 days were allowed for the full performance of the paving contract, and deducting these 32 days left only 22 days of the original time, in 1903, for performance, which the evidence shews was wholly insufficient. Even the defendants' manager in the witness box was unable to attribute the whole delay to plaintiffs.

And, in addition, the evidence shews that 20 days would have sufficed, after the foundation, kerbing, etc., were prepared, to lay all the brick. That would mean, of course, 20 days' inspection attributable to the brick, and if so why should plaintiffs be charged with 95 days? This sum is not in fact a penalty. It is a charge made by the city for actual inspection fees by the city inspector at $3 per day, which defendants agreed to pay in consideration of obtaining an extension of time to complete, and, in so far as any delay was attributable to plaintiffs, could have been reduced or confined to the 20 days, by adopting plaintiffs' suggestion to only begin the work of brick laying after all the bricks were on the ground.

These and similar considerations justify, in my opinion, the judgment appealed from, and the appeal should be dismissed with costs.

APRIL 4TH, 1905.

C.A.

TAYLOR v. OTTAWA ELECTRIC CO.

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

Appeal by defendants from judgment of TEETZEL, J., upon the findings of a jury, in favour of plaintiff, in an action for damages for injuries to plaintiff, his horse and vehicle, through coming into collision with one of defendants' motor cars in the city of Ottawa.

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

A. E. Fripp, Ottawa, for plaintiff.

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

MOSS, C.J.O.:—The accident occurred on 14th November, 1903, at the intersection of Sussex and York streets. Defendants have a double line of tracks on Sussex street, which runs north and south. On the day in question plaintiff was driving a milk delivery waggon drawn by one horse. The waggon is closed on the top and sides, with an opening in the centre of each side about 22 or 23 inches wide. The driver's seat is to the rear of this space, through which he can look out if he is sitting upright or by leaning slightly forward. Plaintiff was driving along York street in a westerly direction approaching Sussex street, not travelling fast, at a slow trot, the horse being a quiet one and perfectly under control. He says that when his horse reached the crossing on the east side of Sussex street, he, the plaintiff, looked south along Sussex street and saw no car in sight. He says he could see almost if not quite down to George street, a street crossing Sussex street about 300 feet south of York street; there were no vehicles to obstruct his view. He proceeded to cross the tracks to the west side of Sussex street, intending then to turn south, but before the waggon was fully across the east track it was struck by a car coming from the south.

The negligence charged in the statement of claim is in not giving warning of the approach of the car by sounding the gong, in going at an excessive rate of speed, and in want of care and caution on the part of those in charge of the car,

and defective brakes and appliances. The following questions were submitted:

1. Was the defendant company guilty of negligence? A. Yes.

2. If so, in what did such negligence consist? A. By not properly controlling the car.

3. If the defendant company was guilty of negligence, was the injury to plaintiff caused by such negligence? A. Yes.

4. Could the plaintiff by the exercise of reasonable care have avoided the injury? A. No.

5. In what respect do you think the plaintiff omitted to take reasonable care? Not answered.

6. Might the defendants' motorman, after the position of the plaintiff became apparent to him, by the exercise of reasonable care have prevented the accident? A. Yes.

7. At what sum, if any, do you fix plaintiff's damages? A. $1,000.

Upon these answers judgment was entered for plaintiff, and defendants now appeal. . . .

We think there should be a new trial.

Plaintiff says he looked down the street, and, although he could see almost to George street, 300 feet away, he saw no car. Almost all the other evidence as to the car tends to shew that at the time he speaks of the car was plainly in sight, somewhat to the north of George street. The jury have not found that it was travelling at an excessive rate of speed, nor have they found that there was a failure to sound the gong, and upon the present evidence it is fair to assume that they felt unable to assign either of these as acts of negligence. The negligence found is not distinctly charged in the pleadings, and, in the absence of a finding of excessive speed, there is difficulty in saying in what respect the car was not under control. There is no evidence of any defect in the brakes or other appliances, and there is a good deal to shew that the motorman was active in the use of both brake and reverse power as soon as it became apparent that plaintiff was about to cross the track. . . .

It is sufficient to say that the findings, as they are, are not satisfactory, nor are they so supported by the evidence as to render it proper that the judgment should stand.

There will be a new trial; the costs of the last trial to follow the event; the costs of the appeal to be costs to defendants in any event.

APRIL 4TH, 1905.

C.A.

WEBB v. McDERMOTT.

Principal and Agent — Sale of Land — Vendor's Agent— Secret Commission from Purchaser—Knowledge of Vendor.

Appeal by plaintiffs from judgment of a Divisional Court (3 O. W. R. 644) reversing the judgment at the trial of FALCONBRIDGE, C.J. (ib. 365) and dismissing the action.

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

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

G. F. Henderson, Ottawa, for defendant.

GARROW, J.A.:—The judgment appealed against proceeded wholly upon the question of the knowledge of plaintiffs at or before the time the transaction in question was closed, that their agent, defendant McDermott, to whom they paid a commission of $275, by allowing him to retain the same out of purchase money for selling a timber limit which they owned in partnership, was also paid a commission by the vendees of $100, the action having been brought to recover these two sums, and the contention being that the payment of the $100 was in effect a bribe which disentitled defendant to commission and made him liable to account for both sums.

A perusal of the evidence convinces me that the judgment of the Divisional Court is well founded. It is quite impossible to ignore the very explicit statement by Mr. Farley, one of the plaintiffs, that he was told by Mr. Hitchcock, one of the vendees, some days before the transaction was closed, namely, or or about 2nd March, that defendant and the vendees had an understanding, and that the vendees were to pay defendant $250 if the transaction with plaintiffs was carried out. Plaintiffs were already suspicious of defendant, as the correspondence shews. And yet, notwithstanding what Mr. Farley had heard from Mr. Hitchcock, they proceeded with the transaction and closed it up on the basis of a sale at $5,500, and allowed defendant to retain his commission of

$275 out of the $500 which had been paid to him when the agreement was made.

It is true there are some singular circumstances in the case. Mr. Webb, the co-plaintiff, says he never heard or knew that defendant was to receive a commission from the other side until the whole transaction was closed, when he was told by Mr. Hitchcock, apparently, as the evidence shews, in ease of his conscience. But, if he had previously told Mr. Farley, this seemed unnecessary on every ground. And, if he had told Mr. Farley, it is singular that the latter did not inform his co-partner Webb. Again, the circumstances deposed to by Mr. Hitchcock as to the payment of the $100 (not $250) would not imply, but rather the contrary, that there had been prior thereto an agreement with defendant to pay him the larger sum of $250, and he was not even asked a question about it while in the witness box by either side, a strange oversight surely, especially on plaintiffs' side. Again, defendant when examined was not asked about the alleged prior agreement to pay $250, and his account of why he was paid the $100 substantially agrees with the evidence of Mr. Hitchcock, from which the same inference might well be drawn that there was no such prior agreement, but for the explicit statement before mentioned by Mr. Farley.

It was not material, I think, that the exact amount of the alleged secret commission should have been disclosed. If plaintiffs were willing that defendant should accept $250, it ought, I think, to be assumed that they would have been at least as willing that he should receive $100. As has been pointed out in many authorities, the vice in such transactions consists in the secrecy. An agent for a vendor may accept a commission from the purchaser, provided he does so to the knowledge and with the acquiescence of the vendor. The judgment appealed against finds that to be the condition in the present case, and, the evidence supporting the finding, I think the appeal fails.

Mr. Aylesworth, for plaintiffs, also argued that, even with such knowledge, plaintiffs are entitled to recover the $100 as purchase money. But on the theory that it was paid with the knowledge of plaintiffs as commission, it cannot be called, and sued for as, purchase money. It was not paid as purchase money, but as commission. Plaintiffs' right to treat it as purchase money depended upon proof that it was

paid secretly,: and therefore in fraud of them, and in that they failed.

The appeal should be dismissed with costs.

OSLER, J.A., gave reasons in writing for the same conclusion, and referred to Culverwell v. Campton, 31 C. P. 342.

MOSS, C.J.O., MACLENNAN and MACLAREN, JJ.A., concurred.

APRIL 4TH, 1905.

C.A.

BEATTIE v. DICKSON.

DICKSON v. BEATTIE.

Partnership—Death of Partner—Continuation of Business by Executors — Sale of Business and Stock in Parcels — Rights of Purchasers—Use of Firm Name—Goodwill—Business.

Appeal by Margaret Beattie and John J. Hislop, the plaintiffs in the first and defendants in second action, from judgment of MACMAHON, J., 3 O. W. R. 2, in so far as it was against the appellants.

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

J. P. Mabee, K.C., for appellants.

W. Proudfoot, K.C., for respondents.

MOSS, C.J.O.:—These cases were tried together by MacMahon, J., and the appeals from his judgment were argued together. . . . On and prior to 25th April, 1888, one Alexander Beattie and Robert Dickson, the defendant in the first and plaintiff in the second of these actions, were copartners in the business of dry goods merchants and grocers. They had two establishments, the main one in Stratford, and another in the village of Thedford, and the business was carried on in each place under the firm name of A. Beattie & Co. Alexander Beattie died on 25th April, 1888, leaving a will, whereof he appointed his widow Margaret Beattie, one

of the plaintiffs in the first and one of the defendants in the second of these actions, his executrix, and Robert Dickson and one James Sclater his executors. Under provisions in the will enabling the business to be continued, it was carried on under Robert Dickson's management until the year 1903, the firm name of A. Beattie & Co. being continued. In the year 1888 the firm established a branch grocery at Stratford under the name of A. Beattie & Co., of which defendant John J. Hislop was manager, and in 1889 a branch grocery was established in St. Mary's. This latter was carried on under the name "Oak Hall," was conducted by one Laird, and was not known to the public as being connected with the business of A. Beattie & Co.

In May, 1903, a fire occurred in the general dry goods establishment at St. Mary's, which destroyed the building and a large part of the stock. The premises were not the property of the firm, and the owner having refused to erect another building, and having offered the premises for sale, Dickson was desirous that the firm should purchase them and erect a building thereon in which the business might be continued, but his co-executors would not agree. He thereupon became the purchaser of the premises on his own behalf, and commenced the erection thereon of a building which he proposed should be rented to the firm in order that the business might be continued in the old place. But before the building was completed, difficulties and disputes arose between the parties, and it became evident that they could not continue to carry on business together. There were some negotiations with a view to one party or the other becoming the purchaser of the entire interest in the business. These failed, and it was proposed to offer the entire business, with the goodwill, for sale by tender. But it appeared that Hislop held an agreement made with him while he was manager of the Stratford branch, giving him the privilege at any stock-taking of buying out the business of A. Beattie & Co. in Stratford, at the usual stock-taking value, on furnishing payment or security satisfactory to the firm. He insisted on his right of purchase, and while negotiations with regard to his becoming the purchaser were proceeding, he and Mrs. Beattie entered into an agreement to become partners in the Stratford business. Ultimately it was agreed that he should purchase the Stratford business and the Oak Hall business at St. Mary's for the sum of $22,000. This transaction was

carried into effect, and it is under it that it is now asserted by the plaintiffs in the first action that they are entitled to restrain Robert Dickson from using the name of A. Beattie & Co. in connection with the business at St. Mary's and Thedford.

Soon after this a sale was made by the executors of Alexander Beattie's will to Robert Dickson of the general dry goods business at St. Mary's, and also of the business at Thedford. There is a dispute upon the evidence as to the terms of the sale, and as to the intention of the parties, and as to whether there was any agreement or stipulation as to the use of the name of A. Beattie & Co. But it is evident that the executors, qua executors, were not intending to reserve any part of the business for the estate of their testator. It was to be sale of everything connected with the business as carried on at St. Mary's and Thedford not already disposed of, and it is plain, as pointed out by the trial Judge, that the sale to Hislop of the Oak Hall business in St. Mary's carried with it no right to the use of the name of A. Beattie & Co., for that name had never been used in connection with it, and it was not known to the public as being connected with A. Beattie & Co. The only objection made to Dickson being entitled to the use of the name of A. Beattie & Co. came from Mrs. Beattie, evidently in the interest of the partnership between her and Hislop. And the evidence shews that this objection was withdrawn by her authorized agent, Stevenson. It was urged that he was not authorized to agree to withdraw the objection. But Mrs. Beattie does not deny his general authority, nor does she say that she did not expressly authorize him to withdraw it. All she can say is that she doesn't remember. However that may be, his general authority would extend to enable him to do so. He was acting for her in her individual capacity, as well as in her representative capacity. He represented her in all the dealings which led to the sale to Dickson, and she says she left the matter almost entirely in his hands; she took no active part in the transaction herself. The fact that Stevenson did withdraw the objection is fully established by the evidence. Nothing being retained by the estate on the sale to Dickson, there is no reason why he, as the survivor of the partnership of A. Beattie & Co., as well as the purchaser from the estate of Alexander Beattie, should not be entitled to the use of the name as used in connection with the business of which he became the purchaser. Neither the estate nor his co-executors can be under any liability by

reason of Dickson carrying on the business. Their actual connection with the business was terminated by the sale. And under the present system of registration of partnerships it will be made to appear that they are not carrying on the business.

In Lindley on Partnership, 6th ed., p. 441, it is said that "the right of a late partner to prevent the continued use of his own name on the ground of exposing him to risk is a purely personal right, and does not devolve either on his executors or his trustee in bankruptcy, for they would not be exposed to risk:" see Webster v. Webster, Johnston 490 n.

It was argued that by the sale to Hislop of the Stratford business, the goodwill and the sole right to the use of the name passed to him. But he did not become the purchaser of any part of the business with which the name was connected except the Stratford business. That was all his original agreement entitled him to purchase. Suppose that after he had bought that, the old firm had continued the business in St. Mary's and Thedford, could he have restrained them from using the name of A. Beattie & Co.? Unless he could, and it seems very difficult to argue that he could, how can he say that because, after he bought, the old firm decided to wind up and sell out, a better right accrued to him? It seems plain that the goodwill of the whole business and the right to restrain the use of the name by the old firm or purchasers from them did not pass to Hislop. At the highest the right to use the name in connection with the Stratford business passed to him upon the sale of that business, and that right has been adjudged to him by the trial Judge.

It was contended, but somewhat faintly, that the question whether Dickson was entitled to hold the premises in St. Mary's as purchased for his own benefit was not properly in issue, and was not rightly determined in these actions. But upon the pleadings and the evidence it is quite clear that it was one of the matters in issue, and was gone into at the trial. And upon the evidence the only finding could be as declared in the formal judgment that Dickson did not purchase the premises as trustee for the firm.

For these reasons as well as for the reasons given by the trial Judge, his judgment should be affirmed. The appeals are dismissed with costs to the respondents in each.

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

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

APRIL 4TH, 1905.

C.A.

HOCKLEY v. GRAND TRUNK R. W. CO.

DAVIS v. GRAND TRUNK R. W. CO.

Railway—Injury to Person at Crossing—Death—Negligence—Conflicting Evidence—Findings of Jury—Excessive Damages—Reduction—New Trial.

Appeals by defendants from judgment of ANGLIN, J., of 23rd November, 1904, upon findings of jury, in favour of plaintiff Anne Hockley, who sued under the Fatal Injuries Act for losses sustained by death of her husband, for $5,000 and costs, and in favour of plaintiff Davis, who sued for loss of horse and waggon, for $208 and costs, in actions for damages alleged to have been occasioned to plaintiffs because of the negligence of defendants' servants in running an express train without blowing whistle when crossing the 10th concession of Whitchurch, on 13th November, 1902. The deceased, one Hockley, while driving home from Stouffville, was run down by the express train and instantly killed.

W. R. Riddell, K.C., for defendants, contended that deceased did not exercise reasonable care and was guilty of contributory negligence, and also that the damages were excessive.

J. W. McCullough and James McCullough, Stouffville, for plaintiffs.

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

MOSS, C.J.O.:—These cases were before us on 23rd and 24th February, 1904, on an appeal from the judgment of a Divisional Court setting aside a judgment entered at the trial in favour of defendants and directing a new trial. We then held, affirming the judgment of the Divisional Court, that there was evidence proper to be submitted to the jury, and we are told that an appeal from our decision was dismissed by the Supreme Court.

On a second trial the case was fully tried, and resulted in judgment in favour of plaintiffs in the first mentioned action for $5,000, and in favour of plaintiff in the secondly mentioned action for $208, and defendants have appealed. On the argument of the appeal Mr. Riddell, for the defendants,

conceded that there was evidence to go to the jury in support of plaintiffs' case, but he contended that upon the whole evidence it was shewn beyond reasonable doubt that defendants were not in fault, that the findings of the jury were against the evidence and the weight of evidence, and that the damages awarded to plaintiff Mary Ann Hockley were excessive. At the last trial much additional testimony as to the existence of dense fog and as to the absence of the statutory signals was adduced by plaintiffs, and the evidence in support of plaintiffs' case was amply sufficient, if credited by the jury, to justify their finding that defendants' negligence was the cause of the injuries complained of.

There was a conflict of testimony between plaintiffs' and defendants' witnesses upon every issue except as to the fog, with respect to which there was not any great difference of opinion. On the argument before us there was no attempt to shew that evidence had been improperly received or rejected. The case was very fairly left to the jury by the trial Judge. It was for them to decide upon the testimony before them, and they determined adversely to defendants. So far, therefore, the appeal fails.

The only question remaining is as to the amount of damages awarded in the Hockley case. The deceased husband and father was 32 or 33 years of age. He was a day labourer by occupation. He had no permanent engagement, though he seems to have had fairly constant employment. The statement as to his wages is not very definite. It is said he made $1 and $1.50 a day and his board, and in digging wells sometimes he would make from $3 to $4, and then again he did not. There is nothing to shew that there were prospects of his materially bettering his condition as time went on. As a labouring man the outlook for steady employment or advanced wages would diminish with increased years.

It is to be regretted that more facts were not placed before the jury, if available. Upon the evidence as it stands, we think the jury would have taken a juster view if they had awarded a less sum. It is difficult for a jury to free themselves from feelings of sympathy where the circumstances were such as they were in this instance.

On the whole we think there should be a new trial unless the plaintiff Mary Ann Hockley consents to reduce the judgment to $4,000, apportioned as follows: $2,800 to her and $1,200 to her infant son. If she accepts the latter alternative, the appeal will be dismissed with costs. If she declines,

there will be a new trial, the costs of the former trial to be costs in the action, the costs of the appeal to be costs to defendants in any event.

The appeal in the Davis case is dismissed with costs.

APRIL 4TH, 1905.

C.A.

RE CHANTLER AND CAMERON.

Criminal Law—Procedure—Right of Accused to Inspect Panel of Jurors — Provincial Statute — Absence of Dominion Legislation.

Appeal by F. P. Chantler from order of STREET, J., dated 6th June, 1904, dismissing appellant's application for a mandamus to the sheriff of Middlesex commanding him to shew to appellant or his agent for examination the panel of jurors at the Middlesex Sessions, for the purpose of determining whether it would be necessary to strike a special jury for the trial of appellant upon a charge of receiving stolen cattle.

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

F. Arnoldi, K.C., for appellant.

J. R. Cartwright, K.C., for the Attorney-General.

GARROW, J.A.:—I think the judgment of Street, J., refusing a mandamus, should be affirmed.

The appeal is based upon the argument that sec. 85 of ch. 31, C. S. U. C., is still the law in criminal matters, because being matter of criminal procedure the Legislature had no power to pass 58 Vict. ch. 15, sec. 3 (O.), now R. S. O. 1897 ch. 61, sec. 94.

It was long ago determined that Parliament might pass legislation to permit the trial of criminal offences without a jury: Rex v. Bradshaw, 38 U. C. R. 564. And it has also been determined that the qualification and mode of selection of juries for criminal trials are within the exclusive jurisdiction of Parliament: Regina v. O'Rourke, 32 C. P. 388, 1 O. R. 464. And it may be conceded that the right of a person charged with a criminal offence to an inspection of the jury panel and to obtain a copy of it falls within these decisions as matter of criminal procedure.

But that is not enough, in my opinion, to enable the appellant to succeed.

Section 85, before referred to, was the law until 58 Vict. ch. 15, sec. 3 (O.), was passed. No one will contend that in so far as jury lists for use in the trials of civil actions are concerned, the change was not within the competency of the Legislature. And there is no provision in the law for the preparation of two lists, one for criminal and the other for civil trials. Parliament has at no time made any special provision upon the subject, but has apparently been content to adopt and to utilize the lists prepared by the local authorities for local purposes within their jurisdiction, the right being of course reserved to at any one time intervene by legislation if thought necessary. But while using the locally prepared lists, must they not take them cum onere, so to speak, that is, with such limitations and conditions as the local legislature in its wisdom has imposed, such as the secrecy until 6 days before the sitting of the Court imposed by the statute of 1895, in lieu of the publicity, or rather accessibility, permitted under the former statute? There is no doubt that the statute of 1895 made a very distinct change of policy in this respect—doubtless, we must assume, based upon valid reasons. Can it be open to the Dominion Parliament without active interference by legislation to defeat this policy, and to say the lists must be open to inspection in criminal matters whatever you may direct in civil? I cannot think that such a result was ever intended, nor that it necessarily flows from what has been done in the way of legislation. . . . [Reference to Regina v. O'Rourke, 1 O. R. 464, at p. 475, per Hagarty, C.J.]

After various amendments to the criminal law in other respects, including the revision of 1886, the Criminal Code, 1892, was passed. And by this Code a somewhat elaborate procedure was enacted apparently aiming to be as far as possible inclusive; and yet while it deals with many similar provisions it makes none upon the subject in question. See sec. 654 as to copy of indictment; sec. 653, right to inspect depositions; sec. 655, right to a copy of depositions, etc. And not only is there this negative testimony as to intention, but there is also the opposite in the provisions of sec. 658, which provides that in the case of any one indicted for treason, etc., he shall have delivered to him at least 10 days before his arraignment . . . a copy of the panel of the jurors who are to try him. The well known maxim, expressio

unius est exclusio alterius, might well, it seems to me, be invoked against the appellant's present argument.

And it is of some moment as indicating the view of the Dominion authorities that the learned commissioners for the Revision of the Dominion Statutes (Revision of 1886) treat sec. 85 before mentioned as provincial. See Appendix 1 to R. S. C., vol. 2, at p. 6.

Then, in view of all these circumstances, it will be well to look closely at the exact language used in the Code to see if there is anything to lead to a contrary conclusion. The section adopting the local lists is 662, which enacts that "Every person qualified and summoned as a grand or petit juror according to the laws in force for the time being in any province of Canada shall be duly qualified to serve as such juror in criminal cases in that province." This language is far from adopting as stereotyped the statute law as it stood at Confederation or at any other time, and is even more explicit than the provisions contained in 32 & 33 Vict. ch. 29, which was the law when the language . . . was used by Hagarty, C.J., and, so far from leading to a contrary conclusion, seems to me, in reasonably explicit terms, in view of all the circumstances, to prescribe the same conditions in all particulars for the qualification of a juror in criminal matters as must be possessed by a juror in civil matters, one of which is that his name after he has been drafted for any panel, in the manner pointed out by the Act (R. S. O. 1897 ch. 61), shall be kept by the sheriff under lock and key, subject to the exception in the case of a special jury being required (see sec. 94), until 6 days before the sitting of the Court for which the list has been drafted.

The appeal should, I think, be dismissed with costs.

MACLENNAN and MACLAREN, JJ.A., concurred.

OSLER, J.A., dissented, giving reasons in writing.

APRIL 4TH, 1905.

C.A.

SORENSON v. SMITH.

Master and Servant—Injury to Servant—Negligence—Questions for Jury—New Trial.

Appeal by defendants from judgment of TEETZEL, J., delivered after trial of the action with a jury, in favour of

plaintiff for $1,000 damages, upon the findings of the jury, in an action for damages for personal injuries received by plaintiff while in defendants' employment.

A. B. Aylesworth, K.C., and E. S. Wigle, Windsor, for defendants.

M. K. Cowan, K.C., for plaintiff.

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

MOSS, C.J.O.:—. . . Plaintiff is seeking damages for an injury he received while in defendants' employ on a dredge belonging to defendants which was engaged in dredging in the Detroit river. The dredge is a large vessel constructed of thick, heavy timbers, with very weighty engine and machinery, the crane and dipper alone weighing, it is said, about 10 tons. For the purposes of operating the dipper in the bottom, it is, of course, necessary that the dredge should be and remain absolutely stationary. This is effected by three anchor posts, one at each of the forward corners and one in the centre of the stern. These posts or "spuds," as they are termed by some of the witnesses, are heavy timbers 30 or 40 feet long, 18 inches square, sharpened at the lower ends, and shod with steel. They are lifted and lowered by means of ratchets worked by steam from the engine, but their movements are independent of the movements of the engine. When they are lowered or dropped to the bottom, the dredge is immovable horizontally, and will remain so until the spuds are raised by the machinery attached to them. When it becomes necessary to move the dredge to another station, it is done by a tug, or by a tug with the assistance of a line from the dredge to a kedge anchor, according to the swiftness of the current and other circumstances.

The plaintiff was a scowman or one of the men working on the scow into which the deposit lifted by the dipper is emptied, but when the dredge had to be moved by means of the tug and the line from the kedge anchor, it was his duty to handle the line. The line in question is a thick, heavy rope, 5 or 5½ inches in circumference, and capable of bearing an enormous strain.

On the morning when the plaintiff was injured, the dredge was lying in the Detroit river at a place called the Limestone Crossing, the channel in which was being deepened. At the place in question there is a swift current of some 4 or 5 miles

an hour. The dredge was lying with her head down stream, and was firmly anchored. Up stream and about 500 feet from the stern of the dredge was a kedge anchor with a float attached. From the anchor the 5 or 5½-inch line extended to the dredge, passing over the stern or along the starboard side towards the bow until it reached a spool . . placed near the outer edge of the dredge and about 18 or 20 feet from the bow, around with it passed to a capstan about 6 feet further inboard and 3 feet further from the bow than the spool. The spool was fastened by two drift bolts driven to the lower flange into the plankshear and gunwale, and by two other bolts through the deck planks and secured by nuts on a washer extending from one bolt to the other.

The capstan was fastened by bolts with nuts through the deck planks and timbers, and was so adjusted with reference to the machinery as to revolve whenever the engine was in motion. Plaintiff's duty was to manipulate the line, passing it loosely over the capstan so as to permit of its "rendering" or revolving inside the coils to the line without gripping them so as to tighten the line, and to keep the line in that condition until he received the signal to hold fast, and thereby cause the capstan to begin to draw on the line.

On the morning in question it was necessary to move the dredge up stream. To do this required the force of the tug and the engine operating on the line from the kedge anchor.

The tug was signalled and came to the dredge, and having attached its line to the tow post on the port side of the stern, moved out so as to make the line taut preparatory to the signal to commence hauling.

Plaintiff was told by the captain of the dredge to stand by his line, which he interpreted to mean to get the line in readiness, pass it around the spool and the capstan, ready to haul upon receiving the signal. At this time the dipper was resting on the bottom, and the anchor posts or spuds were down, and, as plaintiff and all others on the dredge knew, until these were raised and the dredge set free there was to be no hauling either by the tug or on the line. The signals, when all was ready to haul, were one long blast and one short blast from the whistle of the dredge, answered by corresponding blasts from the tug.

The engineer started the engine for the purpose of raising the dipper, thus of course causing the capstan to revolve. Plaintiff had placed a number of coils upon the capstan, and was standing waiting for the signals. Before the dipper had

been raised more than a few feet, and before the anchor posts or spuds had been raised, and before any signal was given, the line tightened on the capstan, thereby producing a tremendous strain between the capstan and the kedge anchor. But the dredge and the kedge anchor being immovable, it was inevitable, as many witnesses say, that if the strain continued something must give way; it was only a question what would give way first. The result was, that the spool was violently wrenched from its fastenings, the drift bolts were drawn from the gunwale, a portion of the deck planks was torn out, the spool was thrown against the side of the house part, deeply indenting the dog rod—a brass rod used as a stay—and rebounding went overboard.

Plaintiff was standing in the space between the spool and the capstan, and was struck by the line, breaking his leg.

As originally framed, the statement of claim assumed that the dipper and anchors of the dredge were all up, and that everything was in readiness to move, but that, through the failure of the tug to commence hauling at the proper time, the entire strain of the whole weight of the dredge was cast upon the line, and consequently upon the spool, thereby causing it to give way, and that the spool was improperly and insufficiently fastened, and that the person in charge of the dredge was negligent in not giving the signal to the tug.

The case was tried on a former occasion, and on the answers of the jury judgment was entered for the plaintiff for $650 damages. Upon appeal by defendants to a Divisional Court the judgment was set aside and a new trial ordered. It was pointed out by the Judges of the Divisional Court that the evidence taken at that trial developed that the most substantial question between the parties had not been tried. It had been made to appear that the spool by reason of the tightening of the line was subject to a pressure or strain which it could never have been intended to stand, and therefore the real question was not whether the spool was insufficiently fastened, but what was the cause and whose fault was it, if any person's, of this enormous strain having been put upon it.

Subsequently the statement of claim was amended, but not so as to bring out very clearly the real issue between the parties.

At the trial before Teetzel, J., a number of questions were submitted to the jury. They found that plaintiff's injury was caused by the negligence of defendants. To the

question "Wherein did such negligence consist?" they answered, "In not properly fastening the spool, and the engineer starting the engine too fast." In answer to a further question, "Was the injury to the plaintiff caused by reason of any defect or arrangement of the ways, works, machinery, plant, or other premises connected with the defendants' business?" they answered in the affirmative, and further that the defect consisted "in not properly fastening the spool and the engineer starting the engine too fast."

They were also asked to find: (12) Was there at the time of the accident any abnormal strain put upon the spool?" (13) If so, how was it occasioned? (14) Was it the fault of any person? (15) If so, whose fault was it?

Now, the last three of these questions were really the important and crucial questions in the case. This had been indicated by the Divisional Court, and the Judge in his charge seems to have impressed the same view on the jury. Upon the evidence it seemed manifest that there could only be one finding on question No. 12. The Judge evidently supposed that the finding must be in the affirmative, and he submitted the question more as a matter of form than anything else. The jury, however, answered in the negative and thus relieved themselves of answering the three following questions.

Now if this answer could be supported upon the evidence, it would become necessary to examine the other findings and the evidence bearing on them. But not only is the answer not supported by the evidence, but it is opposed to the whole body of the testimony, as well as to common knowledge, and, it may be added, to common sense. The evidence demonstrates that in the conditions then existing with the force of a powerful engine applied to a line passing from one immovable object to another immovable object, the strain was tremendous and abnormal, and, as one witness said, what was being done was just pulling to break the line, and the effect would be to part the line or pull the spool out or pull the kedge anchor out or move the dredge, or something would have to give way.

It is difficult to understand how, in face of the evidence and of the Judge's charge, the jury could make the finding they did on this point, and it cannot be permitted to stand. The result is, that the most important question involved in the action, viz., what was the cause of the abnormal strain, by what means was it produced, and to whose fault, if it was the fault of any person, was it owing, has not yet been tried.

There must be a new trial, and in that view it is proper to refrain from further discussion of the evidence bearing on any branch of the case. But, in view of the fact of two trials by jury, with most unsatisfactory results in each instance, and of the accumulation of testimony occasioned thereby, it may be well worthy of the consideration of the next trial Judge whether a jury should not be dispensed with. It would certainly be satisfactory if the case could be finally disposed of without more than another trial.

There will be no costs of the last trial. The costs of the appeal will be costs to defendants in any event of the action.

MACMAHON, J. APRIL 5TH, 1905.

TRIAL.

GUMMERSON v. TORONTO POLICE BENEFIT FUND.

Pension — Police Benefit Fund — Police Officer Permanently Incapacitated—Retirement from Service—Injuries Received in Execution of Duty—Evidence.

Action for a declaration that plaintiff was entitled to a pension from defendants, and for payment of arrears thereof.

Plaintiff was for nearly 15 years a member of the Toronto police force, and during that period a percentage was deducted from his pay, as provided by the rules and regulations, forming a benefit fund to provide allowances and pensions for sick and disabled members of the police force. Plaintiff alleged that he was entitled to be paid by defendants a pension for life at the rate of 75 cents per day from 1st September, 1903.

Section 32 of the rules of the Toronto police benefit fund provides that "where, in the execution of duty, such injuries have been received as, in the opinion of the police commissioners, permanently incapacitate the member from further service on the police force, the following regulations shall govern: . . . (b) after 10 years' service, or not more than 20 years' service, the member shall be entitled to receive a pension of three-eighths pay for life, such pay being computed at the rate, or the average rate, of pay received by the member during the last year of service."

Section 36 provides that "any member claiming an allowance or pension who is dismissed or compelled to resign shall have his case considered by the committee, and his right to any allowance or pension determined by a majority

of said committee, subject to the approval of the board of police commissioners."

E. F. B. Johnston, K.C., and R. McKay, for plaintiff.

A. B. Aylesworth, K.C., and D. T. Symons, for defendants.

MacMahon, J.:—Plaintiff joined the Toronto police force on 8th July, 1889, and remained there until 1st September, 1903, a period of 14 years and 2 months, when he was struck off the strength of the force.

Plaintiff injured his right foot on 19th January, 1899, at the gymnasium, while vaulting over a wooden horse, this being part of a manual exercise prescribed by an inspector in the police force, and unquestionably the injury he then received was while engaged in the execution of his duty as a policeman.

The allegation is that the injury then received resulted in his being permanently incapacitated from further service in the force. . . .

[Examination of the testimony of witnesses.]

In March, 1903, plaintiff was at Dr. McMaster's surgery, when the Roentgen ray was applied to the foot, and skiagraphs produced shewing the metatarsals. On that occasion, besides Dr. McMaster, Drs. Bingham, Powell, and Edy were present and examined the foot, and, with the exception of Dr. McMaster, all were called as witnesses for defendants. The consensus of their opinion was, that the then condition of the foot was not attributable to the accident of 4 years before, of which they were told. They said that the examination of the foot shewed . . . that there had been a breaking down of the arch—a condition stated to be frequently found in postmen, policemen, and nurses. They concluded that plaintiff was suffering from Morton's disease, which is caused by inflammation arising from a pressure or pinching of the metatarsal nerve, caused, they thought, by a breaking down of the arch of the foot.

Mr. Irving Cameron (the eminent surgeon) was called as a witness, and said that from the history of the case, as given by the physicians attending plaintiff after the accident, his ability to resume duty a few days after it occurred, and his continuance on duty with but slight intermissions

for 3 years, convinced him that the condition of the foot in 1903 was not produced by the injury to it in 1899. . . .

Plaintiff was almost continuously on duty for nearly 4 years after the accident, that is, from 1st February, 1899, to 7th December, 1902, and during that period I find that he made no complaint to any of his superior officers on the police force that he was suffering pain or was lame, or was in the slightest incapacitated from performing his duty as a policeman. This, together with the evidence of Dr. Edy, who attended him from the day of his injury up to December, 1902, satisfies me that the injury to plaintiff's foot on 19th January, 1899, did not result in his being permanently incapacitated from further service on the police force. And the evidence of Drs. Bingham and Powell and Mr. Irving Cameron points almost unerringly to the conclusion that plaintiff was from December, 1902, suffering from metatarsalgia, produced by other causes than the injury to his foot in January, 1899. . . .

There will be judgment for plaintiff in respect of the cause of action set forth in the 11th paragraph of the statement of claim, for $20 with Division Court costs, being the amount retained by defendants as security for the return of plaintiff's clothing and equipment, which I find he did return. And there will be judgment for defendants dismissing with costs all the other claims. Plaintiff's debt and costs to be set off pro tanto against defendants' costs.

MARCH 17TH, 1905.

DIVISIONAL COURT.

GOULD v. MICHIGAN CENTRAL R. W. CO.

Master and Servant—Dismissal of Servant without Notice—Proof of Custom—Damages—Costs.

Appeal by plaintiff from judgment of County Court of Elgin dismissing action brought by a machinist to recover damages for wrongful dismissal from the service of defendants, without notice, in breach of a contract to give plaintiff steady employment.

J. M. Ferguson, for plaintiff, contended that defendants should not have been permitted to give evidence that they were

accustomed to dismiss employees without notice, and that in any case such a dismissal was a breach of the agreement.

D. W. Saunders, for defendants, contra.

The Court (MEREDITH, C.J., TEETZEL, J., CLUTE, J.), held that no custom or notice of a custom was proved.

Appeal allowed with costs (fixed at $20) and judgment to be entered for plaintiff for $75 with costs on the Division Court scale and no set-off.

MEREDITH, J. APRIL 3RD, 1905.

TRIAL.

REX v. BEARDSLEY.

Criminal Law—Arson—Evidence—Previous Fire.

Indictment for arson.

H. B. Morphy, Listowel, for the Crown.

E. F. B. Johnston, K.C., for the prisoner.

MEREDITH, J., against the objection of counsel for the prisoner, admitted evidence to shew that, 9 years before, a fire had occurred on other premises occupied by the prisoner, in suspicious circumstances, and that a fire inquest was held, and a settlement of the prisoner's claim upon an insurance company made for an amount less than the original claim.