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BOYD, C. OCTOBER 29TH, 1906.

TRIAL.

McGREGOR v. VILLAGE OF WATFORD.

Highway—Dedication — Plan — Registration — Lots Sold Fronting on Highway as Laid out—Incorporation of Village—Costs.

Action against the corporation of the village of Watford and two men named Kelly, for a declaration that a certain parcel of land was not part of a highway, but was the property of plaintiff, and for an injunction and damages in respect of trespass thereon.

BOYD, C.:—Having referred to cases cited, I retain the opinion expressed at the trial, that the road in question was a public highway subject to the jurisdiction of the municipality, and the judgment provisionally announced should be made absolute.

The locus in quo was marked as a street on a registered plan made and filed, no doubt, while yet the locality was part of the township, but yet practically contemporaneous with its being set apart as an incorporated village. The plan filed on 3rd June, 1873, was, no doubt, in actual anticipation of the incorporation of the village, which was consummated on 25th June, 1873. The first sale of lots made in recognition and affirmance of the plan by the owner was in 1876. Subsequent legislation, which was retroactive, declared that allowances for roads which have been or may

be laid out in cities, towns, and villages, and fronting upon which lots have been sold, should become public highways. See sec. 62, R. S. O. 1887 ch. 152; Roche v. Ryan, 22 O. R. 107; Sklitzsky v. Cranston, ib. 590, 593; and Gooderham v. City of Toronto, 25 S. C. R. 246, 261, 262. I am disposed to hold also, if it were necessary, that the road in question laid out in 1873 has been so used and controlled by the municipality and so abandoned by the owner and his successors in title, as to entitle the defendants to deal with it as they have done. These matters I commented on at the close of the argument.

Judgment is to dismiss the action with one set of costs (and two counsel fees, senior and junior) to the defendants.

BOYD, C. OCTOBER 29TH, 1906.

TRIAL.

CANADIAN OIL FIELDS CO. v. TOWN OF OIL SPRINGS.

Assessment and Taxes—Mineral Lands—Principle of Assessment—Buildings and Plant—Scheme of Assessment Act, 1904—Valuation—Clerical Error.

Action for a declaration that an assessment made upon plaintiffs was illegal, and to restrain defendants from enforcing it.

BOYD, C.:—Sub-section 3 of sec. 36 of the Assessment Act of 1904 (4 Edw. VII. ch. 23 (O.)), is not a novel provision. It has been in force since 1869 (33 Vict. ch. 27, sec. 5), and was then introduced in order to encourage investors in mining and mineral propositions by keeping down the assessable value to that of farming lands. The evidence in this case is that if the actual value of the lands in question as mineral lands was to be the basis of taxation, the burden would be much more onerous than it now stands.

The contention here is briefly this, that it was in the power of the assessing body of the municipality to assess

both land and buildings in the case of mineral lands. The only power, it is argued, was to fix the value of the lands (apart from all structures thereon) on an agricultural basis, and then further to tax on the footing of the income produced. But it is shewn and conceded on all hands that there is no income as to this property, so that the point is reduced to whether "buildings" could be assessed separately as well as the land.

Regard now the scheme of the Act. By the interpretation clause the word "land" shall include (b) trees, &c., (c) minerals, gas, oil, &c., (d) all buildings, structures, machinery, and fixtures erected or placed upon, in, over, under, or affixed to land. (Section 2, sub-sec. 7.)

By sec. 5 all real property (which includes buildings and structures thereon) shall be liable to taxation, subject to certain exemptions, of which, by sec. 5, sub-sec. 16, "all fixed machinery used for manufacturing or farming purposes" is exempt from taxation, but this exemption, as appears from the very frame of the whole sub-clause, does not cover natural gas and oil appliances constructed upon this property. It was not suggested that this machinery and plant were used for manufacturing purposes. By sec. 22, the assessor is to ascertain and set down in the roll particulars as to the value of the land, exclusive of the buildings (13), and further (14) as to the value of the buildings.

Then as to valuation of lands: real property shall be assessed at its actual value except in the case of mineral lands: sec. 36 (1). In case of land with buildings the value of each separately is to be ascertained and set down in different columns. And the test for the value of the buildings is the amount by which the value of the land is thereby increased: sec. 36 (2). As to mineral lands, the buildings thereon shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes: sub-sec. 3. I do not read this to mean that the value of the mineral lands and buildings is to be estimated as if there were no buildings thereon, or, to put it another way, that the value of mineral lands and all structures thereon were to be valued as if they were agricultural lands without buildings. Agricultural buildings are to be valued and assessed if the land is improved thereby—so are structures on mineral lands to be assessed and valued. The scheme of

the Act is to put mineral lands and buildings on the footing of farming lands and buildings—but not to give to mineral lands any further benefit, such as to exempt all structures and appliances thereon in the nature of buildings from being taxable in any wise. Probably the trouble and apparent difficulty has arisen from too literally regarding the section when it speaks of "the lands in the neighbourhood for agricultural purposes" as if it meant to exclude the buildings. But the term "land" as used in the statute per se includes buildings; only they are to be kept separate in making up the values. And it is only in this new Act that buildings are to be kept separate from lands in the analysis of assessment: sec. 22 (13, 14). In the earlier Acts was no such distinction. We need not fall back on cases to find out what is meant by "buildings." The interpretation clause suffices, and under its terms all the derricks, tanks, pipes, jerkers, triangles, and other odd-sounding contrivances may readily be grouped.

I see no ground to interfere with the conclusion of the County Judge on this head.

The assessor gave evidence that he valued all the buildings or improvements on the property at a rate of $75 for each well—which he says was greatly below their real value, and that on any footing whether of agricultural or other purpose, or even as old iron, they would be worth $75; I am not concerned with values — with the little or much, or the less or more, it is enough if the buildings are assessable. In that case jurisdiction to assess attached, and the judgment of the County Judge on the amount is conclusive: Act of 1904, sec. 75.

It is admitted, however, that there is a clerical error in his figuring by which "three" is extended as "five," and that the valuation as to certain warehouse buildings, from which the Court of Revision deducted $2,000, was intended to be affirmed by the Judge. The amount of assessment should be reduced by this $2,000; but in other respects the action fails.

As to so much of the action as relates to this clerical error, no costs; as to the rest of the litigation, costs to defendants.

MACLAREN, J.A. OCTOBER 29TH, 1906.

C.A.—CHAMBERS.

CROWN BANK OF CANADA v. BRASH.

Leave to Appeal to Court of Appeal—Order of Divisional Court Reversing Judgment at Trial—Grounds of Appeal—Judicature Act, sec. 76 (1) (g).

Motion by defendant Brash for leave to appeal to the Court of Appeal from order of a Divisional Court, ante 400, reversing judgment of TEETZEL, J., who tried the case with a jury.

G. H. Watson, K.C., for applicant.

F. Arnoldi, K.C., for plaintiffs.

MACLAREN, J.A.:—The action is based upon promissory notes discounted by the bank at the request of one Campbell, purporting to act for a firm composed of defendant and Campbell, but which are said to be forgeries and discounted without the authority or knowledge of defendant. The jury found that the bank manager had notice or knowledge of the want of authority of Campbell, but also found that he acted honestly and in good faith. Teetzel, J., relying on the first of these answers, dismissed the action; the Divisional Court, acting on the latter answer, gave judgment for the bank.

Defendant Brash urges the following as special reasons sufficient under sec. 76, sub-sec. 1 (g), of the Judicature Act, to entitle him to such leave: that the amount in question is nearly $1,000, being said to be $940; that the Divisional Court reversed the decision of the trial Judge and set aside the answer as to notice or knowledge without holding that there was no evidence to be submitted to the jury upon this point; that the answer as to good faith did not override that as to notice, and was not sufficient alone under the Bills of Exchange Act to entitle the bank to judgment; that there was such evidence and sufficient to justify the answer as to notice; that if the trial Judge had been in the Divisional Court, defendant could have appealed

without leave; and that this was not a proper case for the Divisional Court to enter judgment; but at most it should have ordered a new trial.

It is to be observed that the first requirement in the old sec. 77 of the Judicature Act as to leave does not appear in the section of the Act of 1904 which superseded it, which is now sec. 76 above mentioned. I was not referred to any decisions under the new section on this point, nor am I aware of any. I am of opinion, however, that the reasons existing in this case would have been sufficient to have justified leave under the old law, upon the decisions.

Motion granted; costs in the cause.

CARTWRIGHT, MASTER. OCTOBER 30TH, 1906.

CHAMBERS.

DAVIES v. SOVEREIGN BANK.

Parties—Joinder of Defendants—Pleading—Specific Performance—Motion to Compel Plaintiff to Elect to Proceed against One of Two Defendants—One Claim against both Defendants.

This action was begun in June, and the statement of claim was delivered on 20th August, 1906.

The statement of defence of defendants the Corporation of the City of Toronto was delivered on 8th September. The amended statement of claim was delivered on 29th September, and on 23rd October the defendants the city corporation gave notice of a motion to compel plaintiff to elect whether he would proceed in his action against them or against defendant Eckardt.

The motion was argued on 26th October.

F. R. MacKelcan, for defendants the city corporation.

W. B. Laidlaw, for defendants the Sovereign Bank.

W. H. Blake, K.C., for defendant Eckardt.

Frank Arnoldi, K.C., for plaintiff.

THE MASTER:—It would seem that the motion is in any case too late now that the action is ready for trial, notice of which has been given by the Sovereign Bank.

Waiving that objection, it seems no less evident that the motion cannot succeed unless the amended statement of claim differs materially from the original.

In that the allegation was that the city corporation alleged that Eckardt was their agent at the sale which is in question. The city corporation were not otherwise mentioned.

To this their statement of defence was delivered as above. It denied that the city corporation authorized Eckardt to bid for them at the sale. The amended statement of claim alleges as to the city corporation that they were represented at the sale by one or more persons authorized to bid on their behalf, and that such persons arranged with Eckardt to bid in their stead, which he did, "and on each occasion when his bidding procured the said property to be knocked down to him he bid for the City of Toronto;" that the city corporation before action refused to disclaim; and that defendant Eckardt now denies that he bid for or purchased on behalf of the city corporation.

So far as the city corporation are concerned, it does not appear how they are being attacked on a different ground in the amended statement of claim from that set up in the original. The same relief is asked as against Eckardt and the city corporation, viz., specific performance of the contract for purchase, as plaintiff alleges it to have been made.

In any case I think that the decision in Evans v. Jaffray, 1 O. L. R. 614, applies. There the Chancellor said: "Despite the form of pleading, there is such unity in the matters complained of as between all parties as justifies the retention of the defendants who appeared."

Here it would almost seem as if the city corporation wished to deny the agency of Eckardt, and yet keep any other claim they may have. It is not easy to understand, otherwise, why at first they did not wholly disclaim, and then, no doubt, the action would have been discontinued as against them. They did not deliver any amended statement of defence.

The amended statement of claim adheres to the allegation that Eckardt at the sale was bidding for the city. As against the city and Eckardt, plaintiff has only one claim, viz., to have the sale, as he understood it, carried out. But he is in doubt as to whether the city or Eckardt is liable (or whether perhaps they are both liable). He is therefore in a position similar to that of the plaintiff in Tate v. Natural Gas Co., 18 P. R. 82. There the whole question is discussed by Meredith, C.J., and his opinion was approved by the Court of Appeal as being a proper application of Rule 192.

I think therefore that the motion fails and should be dismissed on three grounds:—

(1) Because it is made too late.

(2) Because defendants found no difficulty in pleading to the original statement of claim.

(3) Because the amended statement of claim does not set up any new or different cause of action, and the joinder of the city and Eckardt seems right under the Rule and the authorities.

The costs will be to plaintiff as against the moving defendants in any event.

ANGLIN, J. OCTOBER 30TH, 1906.

CHAMBERS.

WAGAR v. CARSCALLEN.

Pleading—Statement of Claim—Striking out—Embarrassment—Fraud — Setting out Facts and Circumstances—Anticipating Defence—Leave to Amend.

Appeal by defendants from order of Master in Chambers, ante 426, refusing to strike out part of the statement of claim.

C. A. Moss, for defendants.

J. H. Spence, for plaintiff.

ANGLIN, J., ordered that upon certain amendments being made by plaintiff the appeal should be dismissed; costs in the cause.

MACMAHON, J. OCTOBER 30TH, 1906.

TRIAL.

MUSSEN v. WOODRUFF CO.

Sale of Goods—Specified Article of Machinery—Absence of Express Warranty—Implied Warranty—Evidence—Capacity of Machine.

Action for the balance of the price of machinery sold by plaintiff to defendants.

E. E. A. DuVernet and W. B. Milliken, for plaintiff.

C. A. Moss, for defendants.

MACMAHON, J.:—Plaintiff carries on business at Montreal as a dealer in railway, mining, and contractors' supplies. Defendants are a joint stock company, incorporated as the Woodruff-Robins Company, under the Ontario Companies Act, and carry on business in Toronto as constructing engineers and architects. By order in council of 6th December, 1905, the name was changed to "The Woodruff Company, Limited."

The defendants, after an interview with Mr. Chadwick, the agent of plaintiff, sent a written order to plaintiff at Montreal, as follows:

"W. H. C. Mussen & Co., Toronto, August 26th, 1905.
Montreal, Canada.

Please send to Toronto at Fairbanks switch, Bloor street west, G. T. R., 1 Smith mixer, number 2½, with Fairbanks-Morse gasoline engine hoisting drum attached, all on truck complete, for $1,350 f.o.b. Montreal (confirming order telephoned by Samuel Shaw), and charge to the account of Woodruff-Robins Company, Ltd.

If it is not possible to make prompt delivery inform us.

Send all bills in duplicate. Per C. L. Weismer."

Prior to the giving of this written order, Samuel Shaw, the manager of defendant company, telephoned to plaintiff to the same effect as is contained in the written order.

The "Smith mixer" is a machine patented in the United States, and is, under some arrangement with the patentees, manufactured by plaintiff, and is warranted to have a capacity of mixing 200 cubic yards in 10 hours. The Fairbanks-Morse gasoline engine is manufactured by the Fairbanks-Morse Company of Montreal, and with it no warranty was given.

The Smith mixer and the gasoline engine and hoisting drum attached thereto were shipped from Montreal on 8th September, 1905, and were invoiced at the price agreed upon, viz., $1,350, which appears to have been made up as follows: mixer on trucks, $750, gasoline engine, $450, and hoisting drum, $150. Plaintiff also sent a "clutch," charged as an "extra," at $50, making the whole bill $1,400.

It was not seriously contended that the Smith mixer did not perform its work satisfactorily, or that the engine supplied was not of ample power to run the mixer itself; but the contention of defendants is that, although they had ordered a Fairbanks-Morse gasoline engine, the one sent was insufficient for the purpose of running the mixer and hoisting a load at the same time, and that there was an implied warranty that it would do so.

The order being for a machine of a specified kind, viz., a Fairbanks-Morse gasoline engine with hoisting drum attached, without an express warranty, the defendants are liable, although the engine did not answer their purpose: Chanter v. Hopkins, 4 M. & W. 399; Prideaux v. Bennett, 1 C. B. N. S. 613.

The evidence, however, satisfies me that the engine was of sufficient capacity to run the mixer and hoist the load.

In a trade catalogue issued by the Smith Mixer Company, which (at p. 18) gives the capacities of the different sized mixers made by them, it is said that for 2½ mixer a ten-horse power engine is required for the running of the mixer alone; and at p. 13 the advantages and disadvantages of using gasoline power are fully pointed out. It is there stated that a gasoline engine, being a more complex apparatus than a steam engine, is more easily deranged, and the causes of trouble are harder to find; and that "in

experienced and intelligent hands the delays will be short and the advantages will overbalance the disadvantages, making it a more desirable outfit, particularly for scattered work requiring frequent moves, than a steam engine and boiler would be under those circumstances. But parties with inexperienced help are cautioned that they may look for trouble. No guarantee is furnished with gasoline engines but that of the makers. I must not be held responsible for them in any way."

The gasoline engine furnished by the plaintiffs was one of nine horse power. Mr. Mussen stated that his firm sells a mixer of their own, and that their mixers do not require a ten horse power engine for the double purpose of running the mixer and hoisting the load, and that was the reason of his ordering a nine horse power engine from the Fairbanks-Morse Company.

The defendants put up the mixer and engine immediately on its reaching Toronto, to be used in the erection of a building in Bloor street, the walls of which were to be of concrete 30 feet high. Difficulties (frequently found in starting new machinery) were experienced at first in running the engine because of some minor defects in the machinery, which were immediately remedied, and because Denice, who was running the engine, had not discovered a well in the machine which should have been kept filled with oil. These minor defects were immediately remedied, and after that, as explained in a letter from Chadwick to plaintiffs of 11th October, 1905, "the mixer and hoist seemed to please everybody on the job."

On one occasion the platform of the elevator, containing two barrows filled with concrete, was taken up so suddenly that it struck a beam, and the platform was slewed around and tilted over on its side. From the evidence it is clear that the young man (Porter) running the engine lost control of it, and the turning over of the platform was not attributable to any defect in the machinery, but to the fact that it was carried too far, because the power was not shut off in time. This incident demonstrated the lifting capacity of the engine, as the load was a heavy one. Complaint was also made that the drum became bound, and as a consequence there was difficulty in getting the hoisting apparatus in motion. The drum was one usually supplied

with the Fairbanks machine, and I find was of good workmanship, although some slight defects were found when hoisting was first commenced. . . .

[The learned Judge proceeded to summarize the evidence of some of the witnesses, and concluded.]

Having regard to the whole evidence, I reach the conclusion that the engine was capable of performing and did perform the work in a satisfactory manner.

Plaintiffs are entitled to recover the $350, the balance due under the contract, and the $8 for the mixer gear, with interest from the time of the shipment of the engine. They are not entitled to be paid for the clutch, as it was not ordered. While the clutch may have advantages, the engine is frequently kept running without the use of one.

Defendants must pay the costs of the action.

The counterclaim will be dismissed with costs.

BOYD, C. OCTOBER 30TH, 1906.

TRIAL.

McINTOSH v. LECKIE.

Contract—Exclusive Right for Term of Years to Enter on Land and Drift for Oil or Gas—Forfeiture Clause—Construction—Penalty—Payment—Time—Lease or License—Profit a Prendre—Specific Performance—Injunction—Subsequent Lease—Registry Laws—Improvements—Reference.

Action for a declaration that a certain lease or license to plaintiff to prospect for oil and gas upon certain land has not been forfeited, and to be admitted into possession, and to restrain the defendants from operating under a subsequent lease during plaintiff's term.

BOYD, C.:—Under the terms of the document called a lease, which is signed and sealed by defendant, plaintiff had the exclusive right to drift for petroleum and natural gas by entering upon the lands described for the term

of 5 years from 16th December, 1903. The rights of the parties depend upon the construction of an annulling clause . . . "This lease to be null and void and no longer binding on either party if a well is not commenced on the premises within 6 months from this date, unless the lessee shall thereafter pay yearly to lessor $50 per year for delay."

The first 6 months expired on 16th June, 1904, and no well had been begun. Plaintiff wrote defendant on 13th June regretting delay and stating that he would hold the lease valid by making the yearly payment. This first payment of $50 was made by cheque dated 8th July, which was received and cashed by defendant on 10th August, 1904, and a receipt therefor given on the back of the lease in these words: "Received from McIntosh $50 on account of delay in beginning operations under within lease."

Early in August, 1905, plaintiff tendered the second yearly payment of $50, which was refused by defendant. In his evidence defendant says that he thought the second payment should have been made before 16th June, 1905, and if it had been offered before that time he would have accepted it. Taking this view, that the lease had ceased to be binding on him, the defendant in chief made another lease for oil purposes to his co-defendants on 28th July, 1905.

Plaintiff's lease was registered in May, 1904, and, unless it has been avoided by what has occurred . . . it is evident that in the face of the Registry Act the defendants cannot claim to have the exclusive or indeed any right to the oil products during the term of plaintiff's lease.

The case was argued almost exclusively on American decisions; I have turned to those cited and others, but I do not think that many of those relied on for the defence are applicable to our system of jurisprudence. While papers such as the present are treated as dealing with profits à prendre and incorporeal hereditaments, yet the concluded agreement is regarded as subject to the flexible doctrine applied in cases of specific performance. And when circumstances of apparent hardship or of an unequal dealing are presented, the Court has held its hand and refused to enforce what appears to be the plain agreement of the parties.

There is no evidence of any unfair dealing or overreaching by the lessee; both parties understood what was being

done in granting this lease so-called, and defendant was willing to accept the penalty if it had been tendered in proper time. The contention thus seems to be reduced to a narrow issue—was defendant right in refusing to take the second $50, tendered early in August, 1905?

The "lease" is for 5 years; a well is to be begun in 6 months; if not a yearly payment of $50 is to be made for delay. If no well, the first payment is to be made "thereafter," that is, after the expiry of the 6 months, or after 16th June, 1904. Defendant put an interpretation upon the clause as to time when he received the first penalty payment on 10th August, 1904. The payment of $50 is to be made "per year" and "yearly." The $50 is for the whole of the first year in which default is made—it will cover from December, 1903, to December, 1904. Then $50 is to be paid for the next year, not in advance, and, if not so provided for, then at any time during the year. The tender early in August, 1905, was within a year of the first payment, and it was within the second year of the lease, and might have been validly made at any time during that second year. I think defendant's position and contention is untenable, that this second payment should have been made before 16th June, 1905, and he acted unadvisedly in granting another lease while yet the first was current. As to the time of payment when something is to be paid per year or yearly, see Nowery v. Connolly, 29 U. C. R. 39; Turner v. Allday, Tyrw. & G. 819; Lynch v. Versailles Fuel Gas Co., 165 Pa. St. 518.

Much argument was directed to the position that this document was a one-sided or unilateral contract of revocable nature at the option of the maker. I cannot take this view. The legal effect of this instrument (by whatever name it may be called) is more than a license; it confers an exclusive right to conduct operations on the land in order to drill for and produce the subterraneous oil or gas which may be there found during the period specified. It is a profit à prendre, an incorporeal right to be exercised in the land described: Duke of Sutherland v. Heathcote, [1892] 1 Ch. 473, 483. . . . Gowan v. Christie, L. R. 2 Sc. App. 273, 284 . . . Funk v. Haldeman, 53 Pa. St. 229, 243.

It is said in Sharp v. Wright, 28 Beav. 150, that when only a royalty rent is reserved and not a rent certain, there

is an implied obligation to begin work at once, and this doctrine has been invoked as giving a right to rescind. But it is excluded by the terms of the contract, which provides for the very case of failure or delay in beginning operations, and fixes the sum by way of penalty that shall then be paid per year.

The result is that plaintiff is still entitled to the rights given by the "lease" he holds, and defendants should be enjoined from operating for oil or gas in his territory during the currency of his term. He is entitled to possession for the purpose of experimenting or searching for oil and gas, and if he take the benefit of what has been done by defendants, or asks account of what profit they have made, it must be on terms of compensating them for the improvements, as to which there may be a reference to the local Master.

Costs of action to plaintiff.

OCTOBER 30TH, 1906.

DIVISIONAL COURT.

WOODRUFF CO. v. COLWELL.

Company—Parties to Action—Authority to Use Name—Solicitor—Meeting of Shareholders—Security for Costs.

Appeal by defendant from order of BOYD, C., ante 314, dismissing appeal by defendant from order of Master in Chambers, ante 302, dismissing motion to strike out the name of the company as plaintiffs, and for security for costs.

C. A. Moss, for defendant.

W. E. Middleton, for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J., ANGLIN, J.), dismissed the appeal with costs to plaintiff in the cause.

OCTOBER 30TH, 1906.

DIVISIONAL COURT.

LONDON AND WESTERN TRUSTS CO v. LOSCOMBE.

Third Party Procedure—Action by Liquidator of Insolvent Company against Directors—Illegal Acts—Depleting Capital of Company—Relief over against Individual Shareholders in Respect of Payments to them—Rule 209—Scope of—Indemnity, Contribution, or Relief over.

Appeal by defendants Wortman and Durant from order of MABEE, J., ante 406, setting aside order of Master in Chambers giving directions as to trial of third party issues, and setting aside service of a third party notice upon Moorehouse and Watson, two shareholders in the Birkbeck Loan Co.

W. E. Middleton, for appellants.

C. A. Moss, for the third parties.

G. S. Gibbons, London, for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J., ANGLIN, J.), upon counsel assenting, dismissed the appeal with costs of the third parties to be paid by the appellants, the liquidators undertaking, for the purpose of enabling the defendants to take such proceedings as they may be advised to be indemnified by third parties and other shareholders who have received dividends out of their share of the fund to be distributed, that there shall be no distribution made unless by leave of the Judge of the County Court of Middlesex, on notice to the defendants. As between the plaintiffs and defendants costs of the appeal to be costs in the cause.

CARTWRIGHT, MASTER. NOVEMBER 1ST, 1906.

CHAMBERS.

OUTERBRIDGE v. OLIPHANT.

Discovery — Production of Documents — Privilege — Sale of Patent Rights—Letters before Sale.

Motion by defendant for order that plaintiff file a further affidavit on production.

R. W. Eyre, for defendant.

G. H. Kilmer, for plaintiff.

THE MASTER:—On the first return of the motion leave was given to plaintiff to file a further affidavit. This has been done, and sufficiently shews privilege as to all letters written by him to Harvey, under the decision in Thomson v. Maryland Casualty Co., 11 O.L.R. 44, 7 O.W.R. 15. The only question remaining is as to the letters written by Harvey to plaintiff before the sale was made by defendant to plaintiff which has led to this action.

The statement of claim alleges that plaintiff bought on the faith of a representation by defendant that an application for a patent in the United States was pending, and in reliance on certain other representations made to him by defendant as to the nature and efficiency of the devices in question; that defendant knew that the application had been rejected; and that the alleged devices were not new, nor was defendant's assignor the first inventor.

The statement of defence alleges that plaintiff solicited defendant to allow him to purchase, and that defendant told him the patent had not been granted. It further states that the application for a patent is still pending before the United States patent office. Harvey's name is not mentioned in the pleadings. He is a partner of plaintiff, and it was through him that plaintiff was brought into communication with defendant. Harvey had seen Oliphant in Newfoundland, where the latter had gone to try and get his invention adopted by the government of the colony.

There were only two letters written by Harvey to plaintiff before the parties to the action met. The motion is therefore limited to these—which were dated 25th and 28th March. From plaintiff's depositions it would seem that he read such portions of these as had anything to do with Oliphant's invention.

It seems that defendant has got at least all he was entitled to, and more than he could have had as of right. The action is based on what took place between plaintiff and defendant after they met at Toronto. What Harvey wrote to plaintiff cannot be material, seeing that he is not even mentioned in the pleadings. If either side was relying on anything Harvey did before the bargain was made, a different case would be made.

The motion will therefore be dismissed. The costs will be in the cause, as plaintiff was allowed to supplement his affidavit on production.

BOYD, J. NOVEMBER 1ST, 1906.

WEEKLY COURT.

DRIFFILL v. OUGH.

Parties—Creditors' Action—Payment of Plaintiff's Claim—Motion to Add another Creditor as Plaintiff—Practice—Costs—Injunction.

Motion by a creditor for an order substituting or adding him as a plaintiff, the original plaintiff, who instituted the action on behalf of himself and all other creditors of the defendant, having been paid his debt by defendant.

W. E. Middleton, for applicant.

A. E. Scanlon, for defendant.

BOYD, C.:—This is an action by one creditor on behalf of all other simple contract creditors to vacate a transfer of property alleged to be in fraud of creditors. The named plaintiff has been settled with by the defendant so far as to have received payment of the debt; no settlement has been made as to costs, and the plaintiff does not seek to dismiss the action, but is willing that another unpaid creditor should be added as a co-plaintiff.

According to the well settled practice in creditors' class suits, the creditor named as plaintiff is up to judgment master of the proceedings as dominus litis, and other creditors have before judgment the right to begin actions each for himself, because they cannot prevent the original creditor plaintiff from stopping or settling his action before judgment. This is very fully discussed by Wilson, C.J., in McPherson v. Gedge, 4 O. R. 256, and referred to in Re Ritz and Village of New Hamburg, 4 O. L. R. 639, 642, 1 O. W. R. 574, 690. No doubt, under the present practice, the Court would not sanction a separate action by

every creditor, but should take steps to ensure the prosecution of one for the benefit of all, as is pointed out by Kekewich, J., in In re Alpha Co., [1903] 1 Ch. at p. 207. In the present instance, the course of the Court would be to allow the controversy to be settled as between the named plaintiff and the defendants, as was done in Pembroke v. Topham, 1 Beav. 318. And the proper course for the creditor now seeking to intervene would be to begin an independent action.

There are General Orders, such as 266 and 313, which give large discretionary power as to the substitution and addition of parties, but I incline to think that they do not cover, and were not intended to cover, such an application as the present. I therefore make no order to change parties, but give no costs of the motion, nor do I vacate the injunction as long as the present action is pending.

OSLER, J.A. NOVEMBER 1ST, 1906.

C.A.—CHAMBERS.

RE GEROW AND TOWNSHIP OF PICKERING.

Appeal to Court of Appeal—Leave to Appeal—Order of Divisional Court Reversing Order Quashing Municipal By-law—Special Grounds—Passage of Local Option By-law Procured by Treating.

Motion by J. M. Gerow for leave to appeal to the Court of Appeal from order of a Divisional Court (ante 356) reversing order of MEREDITH, C.J., quashing by-law No. 871, being a local option by-law, of the township of Pickering, which was approved by the electors by a majority of 205.

J. E. Jones, for the applicant.

J. E. Farewell, K.C., and W. H. Blake, K.C., for the township corporation.

OSLER, J.:—The only ground on which the motion can be supported is that there are special reasons for treating the case as exceptional and allowing a further appeal: Judicature Act, sec. 76 (1) (g).

There was a majority of upwards of 200 in favour of the by-law in a total vote of 1,184.

There was no evidence that the passage of the by-law had been procured through or by means of any violation of the provisions of sec. 245 or 246 of the Municipal Act, i.e., bribery or undue influence, as defined by those sections, but the by-law was quashed on the ground that, having regard to the evidence and admissions of one Vanstone, and his avowed purpose and determination at all hazards to procure its passage, he had corrupted so widely by the expenditure of money in treating that there could not have been a free and fair expression of the will of the electors.

Vanstone was not in any sense an agent of those who were in good faith promoting and interested in the passage of the by-law. His object was a personal one—the satisfaction of a grudge he had against some hotel keeper in the township.

That he did work for the passage of the by-law, and did spend money liberally in treating those with whom he came into contact, may be conceded. So much, but no more, is shewn by his evidence. The case goes no further.

In the Tamworth Case, 10 M. & H. at p. 85, Willis, J., said: "If it had been established that there was throughout the borough, or any great part of it, general drunkenness (though not traceable to the respondent or any agent of his), if it produced obvious demoralization to an extent which must have influenced the election, I should have considered that a strong case had been made to be rebutted on the part of the respondent."

Nothing of this kind was shewn here, not even that a single voter had been intoxicated, and, acting upon the principle of the above case, the Court below, in reversing the judgment of the Judge of first instance, held that Vanstone's evidence was not sufficient to justify the conclusion that his conduct had so corrupted the electorate as to affect the honest vote in favour of the by-law.

The question is one of fact, and the Divisional Court and the Judge of first instance differ in their estimate of the value of the evidence on which its determination depends. I can see no reason, in the circumstances of this particular case, why the decision of the former should be reviewed by a further appeal. That a "prohibition" by-

law should be carried or defeated by bribery or should be defeated by general treating, I can understand, but that such a by-law should be carried by treating, unless to the extent of producing such a general condition of demoralization and drunkenness that the voters did not know what they were about, is hardly intelligible upon the ordinary processes of human reason.

The motion for leave is therefore refused with costs.

CARTWRIGHT, MASTER. NOVEMBER 2ND, 1906.

CHAMBERS.

CARTER v. LEE.

Discovery—Examination of Person for whose Benefit Action Defended—Rule 440—Manager of Assignor Company.

Action against the assignee for the benefit of creditors of an incorporated company, to recover the amount of a promissory note and cheque given by the company.

Plaintiff moved for an order allowing him to examine the manager of the company for discovery under Rule 440.

G. M. Clark, for plaintiff.

McCormack (Lennox & Lennox), for defendant.

THE MASTER:—Mr. Clark relied on Garland v. Clarkson, 9 O. L. R. 281, 5 O. W. R. 62. Rule 440, as interpreted by that case, seems to be entirely in point, unless there is a difference between an individual and a corporation.

The Rule says "A person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination."

By the Interpretation Act, R. S. O. 1897 ch. 1, sec. 8, sub-sec. 13, it is declared that "the word 'person' shall include any body corporate," etc.

It would therefore seem that the order should go.

Costs in the cause.

CARTWRIGHT, MASTER. NOVEMBER 2ND, 1906.

CHAMBERS.

APPLEYARD v. MULLIGAN.

Dismissal of Action—Motion to Dismiss for Failure of Plaintiff to Attend for Examination for Discovery—Illness of Plaintiff—Medical Evidence as to—Undertaking to Proceed to Trial—Excuse for Delay—Increased Security for Costs.

Motion by defendants to dismiss the action and strike out plaintiff's reply to defendants' counterclaim and allow judgment to be signed therefor, or that plaintiff furnish further security for costs, on the ground that plaintiff has not complied with an order of 29th September requiring her to attend for examination for discovery.

J. E. Jones, for defendants.

J. Bicknell, K.C., for plaintiff.

THE MASTER:—The history of the action is as follows. The writ issued 11th May, 1905. On 11th December, 1905, a motion was made to dismiss for default in filing affidavit on production, and also to change venue from Hamilton to Toronto. At the same time plaintiff moved for order to be allowed to plead to defendants' counterclaim.

On 6th April, 1906, a motion was made to dismiss for non-attendance of plaintiff for examination for discovery. This was dismissed, but plaintiff was ordered to go to trial at the next non-jury sittings.

On 29th September a similar motion was made, and plaintiff was again ordered to go to trial at the coming non-jury sittings at Ottawa, and submit to examination in the meantime as might be arranged. On 24th October the present motion was made, and enlarged until the 31st, and finally came up on that day, after the cross-examination of Dr. Hastings on his affidavit made in answer to the motion to dismiss.

On all of these three motions to dismiss there have been affidavits of plaintiff's medical attendants that she was and is unequal to the strain and worry of an examination.

On the present occasion, Dr. Hastings, one of the medical men, has been cross-examined, but without inducing him to recede from that opinion. He thinks that in two or three months she may perhaps be equal to the ordeal. Dr. McPhedran speaks of a month or six weeks. No doubt all this is very exasperating to defendants. This is intensified by the fact that these outstanding claims by and against plaintiff prevent the winding-up of the estate of the late Mr. St. Jacques, of the Russell House at Ottawa. With every disposition to relieve defendants and have the litigation ended, I cannot see, in the face of the material, what can be done. I do not see why defendants do not themselves give notice of trial for the January sittings. When this was suggested on the argument, it was said that defendants might in this way be embarrassed in regard to their counterclaim. But, if this is the only objection, it can easily be removed. Defendants may withdraw their counterclaim and make it the subject of a separate action. But it does not seem probable that the counterclaim would require plaintiff's examination to corroborate it.

The motion is dismissed and plaintiff is relieved from the undertaking to go to trial next week. If defendants wish to proceed they can give notice for the next sittings. Plaintiff is willing to give additional security. The costs of the motion will be in the cause, except those of cross-examination of Dr. Hastings, as to which there will be no costs. It was reasonable to take the step, but nothing was gained by it.

MACMAHON, J. NOVEMBER 3RD, 1906.

TRIAL.

MILLAR v. BECK.

Contract—Purchase of Timber Limits — Agreement to Share Profits—Denial of Signature—Action to Perpetuate Testimony and Enforce Agreement—Assignee of Part of Claim —Purchase for Benefit of Incorporated Company—Parties —Amendment—Declaratory Judgment.

The statement of claim alleged: (1) that on 9th December, 1903, defendant purchased, at an Ontario govern-

ment sale, 8 timber berths for about $350,000; (2) that defendant entered into an agreement with one Peter Ryan for the transfer to the latter of a one-half interest in the profits to be derived from the purchase and sale of the berth, as follows: "For and in consideration of your agreement to share equally with you in the net profits from the lease of the Blood Indian reserve, I agree to share and share alike with you any profits derived from the purchase and sale of the timber berths bought by me at the sale on 9th December, 1903, or by any one on my account or on account of the C. Beck Manufacturing Co. Limited, save and except such berths to be for the use and operations of the company;" dated 15th December, 1903, and purporting to be signed "C. Beck"—the defendant—and with a seal attached; (3) that Ryan on 4th December, 1905, in consideration of $2,000, sold and transferred to plaintiff a one-fourth interest in the above agreement and a one-fourth share of the profits to be derived from the same; (4) that since the transfer defendant had denied the genuineness of his signature to the agreement, and asserted that it was a forgery.

Plaintiff claimed: (1) a declaration that the name of defendant subscribed to the agreement was in defendant's handwriting and that the agreement was valid and binding on defendant; (2) a declaration of plaintiff's rights and interests in the agreement, and enforcement thereof.

The defendant in his statement of defence: (1) denied the making of the agreement; (3) alleged that if he ever entered into the agreement it was contrary to public policy and void; (4) alleged that he received no consideration; (5) alleged that Ryan was the auctioneer employed for the purpose of conducting the sale of the berths, and was thereby disqualified from making any agreement with defendant for the sharing of the net profits to be derived from the purchase thereof; (6) alleged that defendant, as Ryan well knew, acquired the berths as the agent for and on behalf of the C. Beck Manufacturing Co., and the berths were acquired for the purpose of the business of that company.

E. F. B. Johnston, K.C., and W. N. Ferguson, for plaintiff.

J. Bicknell, K.C., for defendant.

MACMAHON, J.:—The declaration first prayed for would, in effect, be making the action one simply "for the perpetuation of testimony," and where that is sought the action should have been commenced solely for that purpose. . . .

[Reference to Angell v. Angell, 1 Sim. & Stu. 83; Campbell v. Earl of Dalhousie, L. R. 1 H. L. Sc. at p. 464.]

I have, therefore, to consider whether plaintiff can at once bring an action to recover a share of the profits which he alleges would arise from a sale of the timber berths mentioned in the agreement. Defendant said all the berths bought by him now belong to the C. Beck Manufacturing Co., and the berths are now standing in the company's name in the books of the Crown Lands Department. There therefore does not exist any obstacle to the immediate prosecution by plaintiff of his suit for the recovery of any profits to which he may be entitled under the agreement entered into by defendant.

I took evidence as to the alleged forgery of defendant's signature to the agreement, and found that the signature was in defendant's handwriting; that finding may stand, but it can bind only the parties in this action as as present constituted. . . .

Then . . . a declaratory judgment is asked as to the rights and interests of plaintiff under the agreement set out in the 2nd paragraph of the statement of claim.

The Court may make binding declarations of right, whether consequential relief is sought or not: Judicature Act, 57 Vict. ch. 12, sec. 57, sub-sec. 5. But a declaratory judgment should be pronounced only in case where it is necessary and proper so to do. It appears on the face of the agreement . . . that some of the timber berths were purchased on account of the C. Beck Manufacturing Co., and for their use—defendant when in the box said that they were all purchased for the company; and until the company are made parties to the litigation, no declaration as to the rights and interests of plaintiff could be made. And, as plaintiff is entitled only to a one-fourth share of the profits which would be payable to Ryan under the agreement, Ryan is a necessary party plaintiff to the action.

It appears to me that no case has been presented in which I could properly exercise the power to make a declaratory judgment. No consequential relief is sought, nor could it be asked on the record as at present framed. I refer to Thomson v. Cushing, 30 O. R. 123; Stewart v. Guibord, 6 O. L. R. 262, 2 O. W. R. 168, 554; Bunnell v. Gordon, 20 O. R. 281.

Plaintiff should have leave to amend his statement of claim, as advised, within one month, and I will hear counsel as to the terms on which amendment should be made.

NOVEMBER 3RD, 1906.

C. A.

PRESTON v. TORONTO R. W. CO.

Street Railways—Injury to Person Bicycling on Highway—Crossing behind Car — Approach of Car from Opposite Direction — Failure to Sound Gong — Negligence — Contributory Negligence—Nonsuit—New Trial.

Appeal by defendants from order of a Divisional Court, 6 O. W. R. 786, 11 O. L. R. 56, setting aside a nonsuit entered by BOYD, C., at the trial at Toronto, and directing a new trial, or a verdict for plaintiff for $1,000, in an action brought by Ernest E. Preston, a telegraph messenger, for injury caused to him by one of defendants' cars running on Yonge street, in the city of Toronto, by the alleged negligence of defendants' servants in charge of the car.

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

W. Nesbitt, K.C., and D. L. McCarthy, for defendants.

Shirley Denison, for plaintiff.

Moss, C.J.O.:—In my opinion, this appeal fails, and should be dismissed.

Plaintiff was lawfully using the part of the highway on which he was proceeding, following the south-bound car down Yonge street towards his destination. He was also entitled to use the part of the highway between the tracks on the east side, provided he did not unnecessarily interfere with the traffic upon that part, or knowingly or recklessly expose himself to imminent and apparent danger by going upon it. According to the evidence, he was following the south-bound car, keeping at a distance of 15 or 20 feet behind it, until it came to a standstill on the north side of Wellington street. As it did not move on by the time he had arrived at a distance of about 4 feet from it, it became necessary for him to avoid it by turning either to the right or left. His way to the right was obstructed by a ridge of snow at the west side of the track about 8 or 10 inches in height. Deeming it impossible to force his bicycle over this obstruction, he looked to the left or east side of the car. He saw nothing and heard no sound to indicate that there was any approaching car or other traffic to obstruct his way on the east track, and he turned to go upon it. As a matter of fact, there was a car crossing Wellington street from the south, going at a rapid pace, and it was within 10 feet of him when he came on the devil strip. He made an effort to avoid a collision by turning straight across the track and throwing himself off, but failed, and was struck and injured.

The Chancellor . . . did not deal with the question whether there was evidence to submit to the jury of negligence on the part of defendants—except on one point, to be noticed presently—but held that plaintiff should not have turned in upon the east track, but should have turned to the right, and because he did not do so, but, instead, turned to the left, he was guilty of negligence which occasioned the injury. He was also of opinion that there was no obligation on the part of defendants, or their motorman, to sound the gong when crossing the street or approaching another car. But in this he overlooked the testimony of defendants' roadmaster, that there is a rule requiring the ringing of the gong when passing cars. The omission to give the customary signal was a factor in support of the

charge of negligence, which should not have been withdrawn from the jury: per Hagarty, C.J.O., in Beckett v. Grand Trunk R. W. Co., 13 A. R. at p. 183.

There was, in my opinion, evidence upon which the jury might reasonably find that the gong was not sounded, and that the car was moving at a rapid rate. Then the question whether plaintiff had acted reasonably under the circumstances, or whether he had, by his own negligence and want of proper care and caution, either brought the accident upon himself, or contributed to it, was for the jury. I am not prepared to hold, nor do I think the authorities compel me to hold, that it is per se negligent, reckless, or unreasonable conduct for the rider of a bicycle, riding between the rails of one track of the railway, to turn upon the space between the rails of the other track, when he finds his way on the first obstructed. It must be for the jury to decide whether, in all the circumstances, he acted in a reasonable manner in doing so. And, in my judgment, the view taken by the Divisional Court was right and should be affirmed.

OSLER, J.A., concurred, for reasons giving in writing, in which he referred to Dublin, Wicklow, and Wexford R. W. Co. v. Slattery, 3 App. Cas. at p. 1183; Basso v. Grand Trunk R. W. Co., 6 O. W. R. 893; Skelton v. London and North Western R. W. Co., L. R. 2 C. P. 631.

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

MEREDITH, J.A., dissented, for reasons giving in writing. He was of opinion that the Chancellor was right in withdrawing the case from the jury upon the ground of the plaintiff's own negligence or recklessness, referring to Logan v. London Street R. W. Co., not reported: Phillips v. Grand Trunk R. W. Co., 1 O. L. R. 28; Gallinger v. Toronto R. W. Co., 8 O. L. R. 698, 4 O. W. R. 522. Upon the question whether there was any reasonable evidence of negligence on the part of defendants causing plaintiff's injury, he expressed no opinion.

Appeal dismissed with costs; MEREDITH, J.A., dissenting.

NOVEMBER 3RD, 1906.

C.A.

KING v. TORONTO R. W. CO.

Street Railways—Death of Person Driving Across Tracks—Collision with Motor-car—Negligence — Recklessness of Deceased — Findings of Jury — Evidence to Support — New Trial.

Appeal by defendants from judgment of MEREDITH, C.J., upon the findings of a jury, in favour of plaintiffs for $4,500 damages.

The action was brought under the Fatal Accidents Act, by Mary King and her daughter Ethel King, to recover damages for the death of the husband and father of the respective plaintiffs, who was killed, as alleged, by the negligent management of one of defendants' motor-cars.

It appeared that about 7 o'clock in the morning of 21st December, 1904, the deceased was engaged in driving a bread delivery van in an easterly direction along Adelaide street, in the city of Toronto. While crossing Yonge street, the van came into collision with a car of defendants, going north on the easterly track of their railway. The van was struck about the middle, pushed along for a short distance, and the deceased was thrown out and killed by the fall. The car was said to have been going at a moderate rate of speed—5 miles an hour—between King street and Adelaide street, but when it arrived at a point between 2 and 3 car-lengths from the south side of Adelaide street, its speed was slightly accelerated. The deceased, who was driving at the rate of 8 or 9 miles an hour, drove his van directly in front of the car, which was in full view of any one in his situation from a point some distance west of the west side of Yonge street, apparently without looking round or attempting to turn his vehicle.

The usual contest was waged over the questions of defendants' negligence and the contributory negligence of deceased, and whether the motorman had been negligent in not observing the approach of the van before increasing the speed of the car as it neared Adelaide street.

The questions submitted to the jury and their answers were as follows:—

Q. 1. Was the injury to the deceased caused by the negligence of (1) the motorman alone? A. Yes.

(2) The deceased alone? A. No.

Q. 2. Was it due to the negligence of both of them? A. No.

Q. 3. In what did any negligence which you find consist? A. We find the motorman negligent, after slowing up at Adelaide street, in again putting on power at this point without observing the approach of deceased's waggon.

Q. 4. Could the motorman, after the danger of collision being imminent became apparent to him, have avoided the accident by the exercise of reasonable care on his part? A. Yes.

Q. 5. Ought the motorman, if he had exercised reasonable care, to have apprehended sooner than he did that a collision was imminent? A. Yes.

Q. 6. If you answer yes to question 5, could the motorman, when, in your opinion, he should have apprehended that a collision was imminent, have avoided the accident by the exercise of reasonable care on his part? A. Yes.

Q. 7. Damages? A. The widow, $3,000; the daughter, $1,500.

It was said that the trial Judge was asked but declined to submit to the jury the further question whether the deceased could by the exercise of reasonable care have avoided the collision.

Judgment was directed to be entered for plaintiffs in accordance with these findings, the trial Judge being of opinion that there was some evidence of negligence on the part of the motorman in putting on power when he came to Adelaide street, though he said that he would not himself have found for plaintiffs had he been trying the case without a jury.

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

W. Nesbitt, K.C., and D. L. McCarthy, for defendants, contended that the action ought to have been dismissed at the trial, on the ground that there was no evidence of negligence on the part of the motorman, but, on the contrary, the accident was proved to have been due to the deceased van-driver's own negligence, and that after it became apparent that a collision was imminent, the motorman did everything in his power to stop the car. They asked also for a new trial, on the grounds that the question above mentioned ought to have been submitted to the jury, and that the damages were excessive.

A. J. Russell Snow, for plaintiffs.

MEREDITH, J.A.:—Plaintiffs do not suffer from any lack of findings of the jury, or any uncertainty as to the character or purpose of such findings; they are very clear and more than enough to support the judgment directed to be entered in their favour. . . .

The case is a plain one and the facts simple; and there is little, if any, contradictory testimony.

No reasonable and unprejudiced man could say that the deceased acted with ordinary care, or that the accident would have happened had he taken such care. He knew the locality well; he knew that he was about to cross the tracks of the railway in the very heart of the city, where cars were constantly passing up and down, and that it was a busy hour of the morning, when many were hurrying to their work; and that he was in a bread waggon, which much obscured his view. In these circumstances he drove rapidly along until his waggon had almost, if not quite, crossed the down track, and was upon the up track, when it was struck by a car moving on the up track, and he was thrown down upon the pavement, falling upon it in such a manner as to cause of his death.

When approaching the place of the accident, the car was going at less speed than the waggon, and there was nothing to have prevented the deceased seeing the car, except in so far as the construction of the cover of his waggon may have done so. He therefore must have seen and risked the danger, or else have neglected to look, and so, with perhaps as great fault, also risked the danger, taking his chances of injury or death. The facts of this case make con-

cise logic of this character applicable and unanswerable, though it may be found fault with—as it was—in cases in which other circumstances intervene, or as a rule of general application. It may be said that the man may have seen the car, and not unreasonably though mistakenly, have thought that it was about to stop, or that if its speed were not increased, he would have time to cross; but there is nothing in the evidence to indicate this, and it was a want of care to risk hurt or loss on conjecture as to what the driver of the car would do.

There was, therefore, no reasonable evidence to support the finding of the jury to the effect that the deceased was not guilty of any negligence.

There was evidence to go to the jury on the question of negligence on the part of the driver of the car in not seeing the deceased approaching, and the jury have found defendants guilty of negligence in this respect.

There being, then, negligence on both sides, plaintiffs' action fails, unless, in the circumstances of the case, the driver of the car became aware of the man's danger, and notwithstanding the latter's negligence, might, by the exercise of ordinary care, have avoided the accident.

The trial Judge was of opinion that there was no evidence to go to the jury upon the question, but submitted it to them, and they have very plainly found it in plaintiffs' favour. I am not quite able to agree in that opinion; but the whole of the findings of the jury, including the assessment of the damages, satisfy me that plaintiffs had not a fair and unprejudiced trial, and that the judgment and verdict should be set aside, and a new trial awarded.

MOSS, C.J.O., and MACLAREN, J.A., concurred in the result.

OSLER, J.A., was of opinion for reasons stated in writing that the appeal should be allowed and the action dismissed.

GARROW, J.A., agreed with OSLER, J.A., for reasons also given in writing.

Judgment set aside and new trial directed; costs of the former trial to be costs in the action; costs of the appeal to be costs to defendants in any event of the action; OSLER and GARROW, JJ.A., dissenting.

NOVEMBER 3RD, 1906.

C.A.

LESLIE v. TOWNSHIP OF MALAHIDE.

Estoppel—Accounts of Municipal Treasurer—Giving Credit for Balance Due to Municipality from Estate of Former Treasurer—Recovery from Municipality of Moneys Paid by Treasurer out of his own Pocket—Statements of Account—Audit—Dividends on Insolvent Estate of Former Treasurer—Neglect to Proceed against Sureties—Laches—Inquiry as to Loss—Reference.

Appeal by defendants from judgment of TEETZEL, J., in favour of plaintiff, in an action tried without a jury. Action to recover from the township corporation $4,349.65, the balance of an amount said to have been advanced by plaintiff for use of defendants when plaintiff was township treasurer. Plaintiff, on assuming the duties of treasurer, entered as received the amount in the hands of the former treasurer, but the latter died, and his estate proved to be insolvent, and plaintiff received only a part of the amount due, and used his own money for township purposes.

W. R. Riddell, K. C., and E. A. Miller, Aylmer, for defendants.

G. C. Gibbons, K.C., and W. E. Stevens, Aylmer, for plaintiff.

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

OSLER, J.A.:— . . . When defendants on 20th February, 1899, confirmed the appointment of plaintiff as treasurer "pro tem.," and gave him the order on "the treasurer of the township of Malahide" for $5,799.52, the balance in the hands of Murray, their former treasurer, it was known to all parties that the treasurer was dead, and, therefore, that it could only be obtained from his estate in due course of administration. The order (so to describe it) was probably given and taken as a convenient way, or deemed to be

such, of enabling plaintiff to obtain payment, as the estate was then supposed to be solvent.

In his accounts with the township plaintiff has nowhere debited himself with the receipt of the amount of the order after the confirmation of his appointment as treasurer "pro tem." on 20th February (for he was not appointed treasurer until 8th April.) He has merely carried forward in the old cash book the balance shewn on a previous page to be in the hands of the former treasurer, making no reference to the order. His statement of receipts and expenditure for the year ending 31st December, 1899, was prepared and audited as if there had been no change in the treasurership, commencing with balance on hand on 1st January of $6,028.28, and ending with balance to the credit of the township of $4,228.77. Plaintiff had, however, believing the estate of the deceased treasurer to be solvent, and anticipating an early liquidation of the debt due therefrom to defendants, gone on paying the orders given by them from time to time, on the same assumption, out of his own moneys, and, although long before the end of 1899 the estate proved to be insolvent, he continued from year to year thereafter to pursue the same course, rendering his yearly statements of receipts and expenditure, which were duly audited, shewing balances in favour of the township which were non-existent, except upon the footing of his having actually received the whole amount of the late treasurer's indebtedness, an assumption which the most casual examination of his cash book by the auditors must have shewn to be unfounded. During 1899 he proved the debt against Murray's estate in the name, though, as it is said, without the knowledge, of the council, and received thereon dividends, two in 1899 and a third in March, 1901, amounting in all to $1,481.56, which he credited, though not in the books of the township, against his advances. He did not, however, bring the facts directly to the notice of the council, or make any claim against the township, until January, 1905. Except the dividends referred to, nothing was recovered from Murray's estate, and, unless it may be inferred, as perhaps it ought to be . . . that the council knew from their clerk, to whom plaintiff had communicated it, that the order had not been paid, and that their claim against Murray's estate had been filed, they remained in ignorance of the fact until shortly before action brought.

Plaintiff's only explanation is that having carried forward in the cash book, as continued by him, to the credit of the township, the amount due by Murray, and having rendered his statement of receipts and expenditure for 1899, and having allowed this and subsequent statements to be audited as if he had actually received it, he conceived the impression that he had made the debt his own, and had lost the money.

The question is whether, in these circumstances, he is now entitled to recover from the township the moneys so paid by him; and on the whole, subject to the inquiry hereafter directed, I think that he is.

The case is not one for the application of the rule as to voluntary payments, and, indeed, a defence on that ground was but faintly, if at all, pressed.

The grounds chiefly relied on were that plaintiff had agreed to accept the order of 20th February as cash, and to account for it on that footing, or that by his conduct and silence, defendants had lost certain remedies against the estate of their former treasurer and his sureties.

It is clear upon the evidence that the first of these grounds of defence is not made out, and that the finding of the trial Judge in that respect cannot be disturbed. There was no understanding or agreement between the parties that plaintiff should charge himself with the amount of the order, nor is there any apparent reason why he should have done so.

The business between the parties, therefore, began by the payment of orders given upon him by defendants for the payment of sums which they could have had no reasonable ground for supposing that he had then in his hands. I can see no reason why, after the end of his first year of office, he could not have recovered for the advances made during that year, notwithstanding the delivery of the statement of receipts and expenditure, and their audit; and, in the absence of any direct representation that the order of February had been actually paid, I think the advances during the subsequent years should be treated on the same footing, as they were all made upon orders given from time to time by defendants in respect of the ordinary debts and expenditures of the township, which must have been incurred and paid in any case. Defendants have had the

benefit of these payments, and have incurred, so far as appears, no debts or liabilities and have entered upon no expenditures or undertakings which they could not have incurred or entered upon if they had received the clearest notice at the earliest moment that their late treasurer's estate was insolvent. For these reasons, I think the case distinguishable from the class of cases of which Cave v. Mills, 7 H. & N. , is an example. London Chartered Bank v. McMillan, [1892] A. C. , may also be referred to.

Defendants have, however, just reason to urge that they may have been prejudiced by the laches of plaintiff in respect of what might have been recovered from Murray's estate or from his sureties. This was a matter of defence not raised by the pleadings, and, though opened at the trial, it was manifest that neither party was prepared to deal with it there in a satisfactory manner. The trial Judge, therefore, while giving judgment in favour of plaintiff for the amount of his claim, directed that it should be without prejudice to any action defendants might afterwards be advised to bring against plaintiff for damages in respect either of things done or omitted by plaintiff in proving the claim against Murray's estate, or by reason of their rights against the late treasurer's sureties having been impaired or lost through the act or delay of plaintiff.

As the case was presented at the trial, this was probably the full measure of relief to which defendants were entitled.

It appears to us, however, on full consideration, that it would be more satisfactory if the rights of all parties in respect of these matters were disposed of in the present action, so that plaintiff shall have judgment for, if anything, no more than upon the investigation of the claims on both sides shall appear to be due to him. The amount of plaintiff's claim, therefore, being taken to be as found at the trial, it should be referred to the Master at St. Thomas to make the inquiries mentioned in the 3rd paragraph of the judgment, and to report whether and to what extent any damage or loss has resulted to defendants in respect of the matters above referred to, and in respect of any payment which it may appear plaintiff has improperly made to the representatives of the deceased treasurer's estate; reserving further directions and costs, except the costs

of the appeal, which must be costs to the respondent in any event of the cause.

NOVEMBER 3RD, 1906.

C.A.

McCARTHY v. KILGOUR.

Master and Servant—Injury to Servant—Negligence—Defect in Machine—Findings of Jury.

Appeal by defendant from order of a Divisional Court, 7 O. W. R. 44, dismissing appeal by defendant from judgment of ANGLIN, J., upon the findings of a jury, in favour of plaintiff in an action at common law and under the Workmen's Compensation Act, to recover damages for injuries sustained by plaintiff while employed by defendant in working at a die press or cutter called "Colt's Armoury Press." Plaintiff had several of his fingers cut off, owing, as alleged, to defects in the construction or condition of the machine. The jury found that the machine was defective "by reason of the imperfect working of the lever;" that the defect was known to defendant's foreman, and was the cause of the injury; that plaintiff was not guilty of contributory negligence; and they assessed the damages at $1,500.

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

E. E. A. DuVernet and R. H. Greer, for defendant.

L. V. McBrady, K.C., for plaintiff.

OSLER, J.A.:—Upon the evidence it seems clear that there could be no recovery at common law. No negligence could, in the circumstances, be imputed to defendant by reason of the absence of a guard or of a clutch or notch or some other device to arrest the lever at "neutral" or dead centre. As to the former, the finding of the jury in answer to the 7th question expressly exonerates defendant, while as to both the evidence is conclusive that there was

no machine on the market or known to the trade in which such contrivances or any substitute for them were used or applied. The right of plaintiff to recover must rest, therefore, upon the Workmen's Compensation Act, and upon proof of some defect in the condition of the machine arising from or not discovered or remedied owing to the negligence of defendant or of some one intrusted by him with the duty of seeing that the condition of the machine was proper: secs. 3 (1), 6 (1). The answer to the 3rd question exonerates defendant personally from any breach of duty in this respect, but says that the defect was known or should have been known to his foreman. Answers to questions 1 and 2 find that the machine was defective in respect of the imperfect working of the lever, but what particular defect of those relied on by plaintiff is wholly matter of conjecture. The jury may have meant to refer to the absence of a clutch or notch, or to a looseness in the working of the lever at some particular point in its play, and both of these matters, as well as the absence of a guard, were left to them by the Judge to pass upon in dealing with the fact of negligence. It the absence of the notch is meant, that would not support a verdict, for the reasons already mentioned. If the looseness of the lever, the jury have not said so, and this uncertainty in their finding, if there were nothing else in the case, would call for the new trial which Britton, J., differing from the other members of the Court, thought should be granted. Even if looseness in the working of the lever be assumed as what the jury meant by saying that it worked imperfectly, no one can say from the evidence that this was not the looseness which ought to exist and was proper where the lever was not being moved for the purpose of engaging the friction clutch where it ought to work, and did work, stiffly. The jury, it is true, had a view of the warehouse, but nothing in the case suggests that the lever then failed to work as it ought to do.

But, upon an examination of the whole of the evidence, I am quite satisfied that there is nothing on which the jury could properly have found neglect on the part of the foreman—no evidence of his omission to perform any duty, whether of inspection or otherwise, which he ought to have exercised in respect of this machine, or of knowledge or even suspicion that there was anything amiss with it . . The case was left to them generally to say whether, as re-

gards whatever they might find to be the defect, the foreman knew or should have known of it. Some default on his part should have been proved to warrant an answer in the affirmative, and I have been unable to discover any. No complaint had ever been made of the machine or of its having acted in an unexpected or irregular manner. No accident had ever happened to any one while using it, and there is a considerable body of expert testimony that there was nothing amiss in its manner of working, and no defect to be remedied.

The evidence, in truth, points very strongly to the conclusion that plaintiff was the cause of his own injury by giving the lever the push which he admits he gave it, but which was unfortunately so forcibly applied as to send it over neutral or dead-centre, and thus start the machine.

In my opinion, plaintiff's case fails altogether, and the appeal should be allowed and the action dismissed.

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

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred in the result.

Appeal allowed and action dismissed with costs, if costs are asked.

NOVEMBER 3RD, 1906.

C.A.

LOVELL v. LOVELL.

Husband and Wife—Alimony—Cruelty not Amounting to Personal Violence—Threats—Wife Leaving Husband—Justification—Findings of Trial Judge—Appeal.

Appeal by defendant from order of a Divisional Court, 7 O. W. R. 303, 11 O. L. R. 547, affirming judgment of BOYD, C., 6 O. W. R. 621, 11 O. L. R. 547, declaring plaintiff entitled to alimony.

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

G. H. Watson, K.C., and W. W. Denison, for defendant.

J. King, K.C., for plaintiff.

Moss, C.J.O.:— . . . The question is whether plaintiff has established a case of cruelty, apart from actual violence or adultery, sufficient to entitle her to a judgment for alimony.

A great deal of testimony has been taken, and the greater part of the conjugal life of the parties has been exposed. The Chancellor, who tried the case, ... after hearing the evidence, and after, as he says, the most anxious and serious consideration, came to the conclusion that there had been such a course of conduct on the part of defendant as to justify plaintiff in refusing to live longer with him, because to continue to do so would be permanently to injure and affect her bodily health and seriously endanger her mental balance. A Divisional Court affirmed the decision, the late Mr. Justice Street dissenting, and defendant has appealed.

Throughout the case it has been strenuously argued for defendant that according to the law of England there can be no cruelty sufficient to entitle a wife to a divorce and alimony as incident thereto, unless there is shewn danger to life, limb, or health, bodily or mentally, or a reasonable apprehension of it, and that the danger must be founded on some physical facts such as actual violence or threats of violence leading to an apprehension that, if continued, danger to life, limb, or health will ensue, or to an apprehension that the fear of the continuance of such a course of conduct will affect the health and bring about serious bodily and mental suffering to such an extent as to incapacitate the spouse so affected for the performance of the duties of the marital state. But the decisions, many of which have been referred to and discussed in the judgments in the Courts below, do not so confine the definition of legal cruelty. And while it is recognized that violence and personal danger are far the most common ground, the cases do not rest there. They shew that in a proper case relief will be given where there is no personal violence and no threats of it, but where there is conduct of such a kind as to under-

mine health. No doubt, such cases are comparatively rare, and should be admitted with great caution. But that the law recognizes them and is prepared to give relief where the facts justify it, is beyond question. It is said that by the decision arrived at in Russell v. Russell, [1897] P. 315, and [1899] A. C. 395, the definition of legal cruelty has been limited to cases of violence, actual or threatened, and the mental effects thereby produced. The actual decision in that case was that the conduct charged against Earl Russell by his wife, odious and abominable though it was, had not, in fact, affected her bodily or mental health. But the absence of this element even was not, in the opinion of Rigby, L.J., in the Court of Appeal, and Halsbury, L.C., and Lords Hobhouse, Ashbourne, and Morris, in the House of Lords, a sufficient reason for withholding relief. And the speeches of the majority of the Lords do not shew an affirmation of the proposition that the test of injury to health, or a reasonable apprehension thereof, is confined to fears occasioned by actual violence, bodily hurt, or threats thereof. This is manifest from the observations of Lord Shand, at p. 463, and of Lord Davey, at p. 465. The case is not to be taken as overruling the numerous cases preceding it which recognize the propriety of relief in cases of cruelty not depending on violence actual or threatened.

The present case, then, resolves itself into a question on the facts, whether plaintiff has shewn that defendant has subjected her to treatment likely to produce, and which did produce, physical illness and mental distress of a nature calculated permanently to affect her bodily health and endanger her reason—and that there is a reasonable apprehension that the same state of things would continue.

It is shewn that at the time of the marriage plaintiff, though somewhat delicate and predisposed to weakness of the back, was otherwise in good health and of a cheerful, pleasant disposition. It is shewn that up to the time when they gave up housekeeping and went to live at a boarding house, although there had been differences between them and some indefensible acts on the part of defendant—such as the introduction of his mother and sister into the household in violation of his solemn promise not to do so, his insistence upon the separation of plaintiff and her child in the summer of 1902, while she was at the Island, his re-

fusal to permit plaintiff to take the child with her on a contemplated trip to the south, thereby putting an end to the trip, his refusal to engage a nurse for plaintiff and her child at a time when both were ill, and threatening to remove the child from her because she was unfit to be intrusted with his care—they had lived on comparatively affectionate terms. At the time when plaintiff left the boarding house on 23rd January, 1904, and went to her father's house, the evidence shews her to have been in a very serious condition both physically and mentally. She was weak and ill, nervous and depressed, so much so that her father and others feared that her mind was going. Her father says she was much worse, more excited, in January, 1904, than in May, 1903; she was almost a wreck; she could hardly stand alone; he could see that her mind was going, and that her constitution was breaking down. And her mother and sister observed the same things, and shared his apprehensions. That their fears were not imaginary or unfounded appears from the testimony of Dr. Musgrave, who describes her condition at the time when she went to her father's house. He says she was in a very nervous, almost broken down condition, physically and mentally—chiefly mental in nervous system. Harshness or ill-treatment in her case would so affect her system as to lead to a break-down finally, and she was afraid of defendant and in dread of living alone with him. And when, while in this state of collapse, she was suddenly informed by defendant that he had, without consultation with her, rented a house, and that he desired her immediately to get ready to go there with him, but that none of her friends were to be permitted to go to see her, she felt afraid to go, and told him so. He did not endeavour to reassure her or to remove her fears, but repeated his command.

There can be no doubt that her health, physical and mental, was in a very critical state, and that a continuance of the then conditions would have led, almost inevitably, to the most serious if not fatal consequences.

To what causes is this marked and serious change to be attributed?

The evidence must be regarded as a whole. The nature of the case does not permit of a separation of the incidents and an inquiry whether, taken singly, there is conduct

amounting to cruelty. Rather the questions are whether upon the whole of the facts shewn there is not disclosed that defendant's conduct was responsible for plaintiff's condition, and whether it was not reasonable to conclude that it was likely to be continued, and whether, if continued, it was not altogether probable that it would entail the gravest consequences to plaintiff.

A perusal of the testimony leads to the conviction that the Chancellor reached a proper conclusion as regards these questions. Testimony outside of that of plaintiff's family shews that after the removal to the boarding house there was a marked change in defendant's attitude towards and treatment of plaintiff, and of this he attempts no explanation, but contents himself with general denials. These, however, cannot be accepted, in the face of independent testimony supporting plaintiff's statements. There is a marked contrast between plaintiff's manner of testifying and that of defendant, which justified the Chancellor in accepting her testimony upon any disputed point in preference to defendant's. One cannot fail to note the candid and unguarded way in which plaintiff gave her evidence, speaking without any reserve or apparent care as to its effect, in contrast to defendant's studied, evasive, and elusive methods, so that, even reading it, one can well understand how disinclined the Chancellor on hearing it must have been to attach weight to it, much less to accept it as against plaintiff's, corroborated as the latter was in so many material particulars.

Plaintiff's conduct in making notes of some of defendant's sayings and doings has been commented on, but this, though a practice not to be commended, as she candidly admits, is satisfactorily explained. Defendant had made use of language implying that she was unfit to have the care of her child, and claimed the right, and threatened to exercise it, of taking him from her custody and care. She was afraid he would attempt to carry out his threat, and she did not know what he would do, and she noted what he said and did in order to prepare in case he took action. His frequent hints and threats concerning the child and his removal from her custody were a great source of disquietude and unhappiness to her, and it undoubtedly preyed upon her mind, and had its part in bringing about

the final unhappy condition into which their marital relations drifted.

It would serve no useful purpose to go over in detail the whole of the evidence. Suffice it to say that it amply supports the Chancellor's finding. . . .

Plaintiff has established such a case of harsh treatment, threats, and intimidation, producing all the effects described by the Chancellor, as to bring it well within the definition of cruelty occasioning injury to health, and there being danger of the same line of conduct continuing, the case is one for the intervention of the Court for plaintiff's protection.

Emphasis has been laid on the Chancellor's well-intentioned attempt to bring about a reconciliation, and plaintiff's refusal to accept his recommendation. But the very fact that plaintiff, after hearing his strong appeal and after a night's reflection, was unable to nerve herself to undergo the risk of resuming life with defendant, feeling and knowing that she was unable to place any reliance on the sincerity of his promises, must have strongly impressed the Chancellor, as it cannot fail to impress every one, with the reality of her experiences and the strength of her apprehensions.

Appeal dismissed with costs.

OSLER and GARROW, JJ.A., each gave reasons in writing for the same conclusion.

MACLAREN, J.A., also concurred.

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

NOVEMBER 3RD, 1906.

C.A.

McAULIFFE v. COUNTY OF WELLAND.

Negligence—Navigable River—Erection of Bridge—County Corporation—Leaving Sunken Piles in River—Injury to Ship—Contributory Negligence—Conflicting Evidence—Findings of Trial Judge.

Appeal by defendants from judgment of CLUTE, J., 6 O. W. R. 819, in favour of plaintiff in an action for dam-

ages for injuries received by their tug "Michael Davitt" whilst navigating the Welland river at or near a place known as Montrose Bridge.

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

H. S. Osler, K.C., and L. C. Raymond, for defendants.

W. M. German, K.C., for plaintiff.

MOSS, C.J.O.:—. . . The main ground of objection to the judgment was . . . that the acts of defendants did not amount to negligence or misfeasance, but at most they amounted merely to nonfeasance, for which defendants would not be liable. But this argument appears to be based upon a fallacy. It assumes that defendants did nothing actively to obstruct or interfere with the navigation of the stream or to make it dangerous for vessels to use the waters of the river at the point where plaintiff's vessel was injured. The evidence, however, shews that the piles which were cut off below the surface of the water were originally placed in the water by or under the authority of defendants in constructing a former bridge, and that in removing that bridge in order to construct the present swing-bridge, these piles were exposed and separated from the north pier forming the rest for the end of the swing-bridge on that side of the river. In this position they were an obstruction to the stream, but would probably not have been so dangerous to navigation if they had not been further dealt with. But, again, the evidence shews that by defendants' direction and under their authority the tops of the piles were cut off some 5 or 6 feet below the surface of the water. By this act their presence in the stream was concealed from persons navigating or using the stream on that side of the river, and they thus became dangerous to vessels of greater draft than their tops were below the surface.

It was argued that this work was done by the contractor for the construction of the new bridge, contrary to the terms and specifications of the contract, which provided that the contractor was to remove any old piles or timber projecting beyond the bottom of the river in the vicinity of the bridge, leaving the entire channel of the river free from

obstructions, and that the change from or neglect to perform the terms of the contract and specifications were not known to or acquiesced in by defendants. It is plain from the terms of the specifications that defendants considered that piles in the position of those in question would be an obstruction, and that it was proper to remove them in such way as to leave the entire channel free from such obstruction. Probably defendants could not, by intrusting the removal of the obstructions to a contractor, thus relieve themselves of responsibility, but the evidence shews that . . . the cutting below the surface, instead of removal, was agreed upon with the knowledge, sanction, and approval of defendants' engineer and inspector in charge of the work to be done by the contractor under the contract. there was in effect a direction to cut them down instead of removing them, and the cutting down created the dangerous situation.

It was also argued that the cutting below the surface was done under the authority and by the direction of the government of the Dominion, who have a certain control over the Welland river as forming part of the Welland canal system between Port Robinson and Chippewa. But the evidence shews that the government of the Dominion took no part in the construction of the bridge and gave no orders or instructions with regard to it, or any work in connection with it. The bridge was entirely a municipal work done and paid for by defendants. The utmost that can be said to have taken place was the expression of an opinion by the superintending engineer of the Welland canal, when the question whether the piles were to be removed or cut down by the contractor was being discussed between the latter and defendants. It would rather seem that this took place after the piles had been cut down, and the witness was asked by the contractor whether they were a menace to navigation, and he said no. It does not appear that he had any authority from the government to make any order or direction or to express an opinion on its behalf upon the question.

The further point was the conduct of the captain in charge of the tug in using the channel to the north instead of the south of the centre pier of the bridge. The evidence fully supports the view of the trial Judge that he was justi-

fied in assuming from what he saw that the north channel was an open channel for use by vessels navigating the stream, and that he adopted the course ordinarily taken by captains in going to the right or north of the centre pier, in the absence of any plain and unmistakable notice or indication that that was not a navigable channel.

Appeal dismissed with costs.

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

MEREDITH, J.A., concurred in the result, for reasons stated in writing.

NOVEMBER 3RD, 1906.

C.A.

WILSON v. HAMILTON STEEL AND IRON CO.

Negligence — Contributory Negligence—Findings of Jury—Disagreement — Nonsuit — Master and Servant—Injury to Servant.

Appeal by defendants from order of a Divisional Court dismissing an appeal from the judgment of MABEE, J., at the trial, refusing to nonsuit plaintiffs or to enter judgment for defendants upon the findings of the jury. The action was brought by John Wilson, an infant of 19, and by his father, William Wilson, to recover damages for injuries sustained by the infant plaintiff while in the employment of defendants as a craneman, owing to the alleged negligence of defendants. The infant plaintiff fell from a height of 30 feet, and alleged that the fall was caused by the defective condition of a pulley. Questions were put to the jury, and they answered that there was a defect in the condition of defendants' works, viz., broken flange and pulley; that plaintiff was guilty of negligence which caused or contributed to the accident, his negligence consisting in not moving the crane closer to the platform. The jury disagreed as to and did not answer the 7th question, which was, whether there was any defect in the planking in question that caused or contributed to the acci-

dent, and they did not assess the damages. The Courts below regarded this as a disagreement, and held that there was evidence which could not have been withdrawn from the jury.

The appeal was heard by Moss, C.J.O., Osler, Garrow, Maclaren, Meredith, JJA.

E. E. A. Du Vernet and W. B. Raymond, for defendants, contended that the 7th question was immaterial in view of the other findings; and that the action should be dismissed.

M. J. O'Reilly, Hamilton, for plaintiffs.

Osler, J.A.:—The answers of the jury to the 4th and 5th questions clearly disposed of the case. It is found that plaintiff was guilty of negligence which caused or contributed to the accident, and that this negligence consisted in not moving the crane closer to the platform. Both answers are supported by the evidence. It may be assumed that the 7th question, which the jury could not agree in answering, was answered in favour of plaintiff, viz., that there was some defect in the planking of the platform which caused or contributed to the accident, but this would not better plaintiff's case. The accident would then appear to have been caused by the joint negligence of both parties, and this also would shew that the action was not maintainable. I do not see that the case admits of anything more being said except that the appeal must be allowed and the action dismissed with costs, if defendants ask for costs.

Moss, C.J.O., Garrow and Maclaren, JJ.A., agreed in the result.

Meredith, J.A., also agreed in the result, for reasons stated in writing.

November 3rd, 1906.

C.A.

GIBSON v. GARDNER.

Account — Reference — Executor — Trustee — Stated Account—Audit by Surrogate Judge—Consent Judgment—Effect of—Re-opening Account.

Appeal by plaintiff from order of Boyd, C., 7 O. W. R. 474, dismissing appeal by plaintiff from the ruling of the

Master in Ordinary in the course of a reference under a consent judgment to take the accounts of defendant Gardner as executor and trustee. The Master certified that he had adopted the result of an accounting before a Surrogate Court Judge up to the time of such accounting. The Chancellor held that the audit of the accounts before the Judge was equivalent to a settled account, and that by the practice of the Court the Master was to have regard to settled accounts.

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

F. Arnoldi, K.C., for plaintiff.

A. H. Marsh, K.C., for defendant Gardner.

OSLER, J.A.:—The language of the consent judgment of 22nd November, 1905, directing accounts between the parties, must be interpreted in the same way as similar language used in a judgment in invitum would be. The parties consent that certain accounts shall be taken, adopting the language of the common form of a judgment for that purpose. Are not the usual rules of law and procedure, statutory and otherwise, to be applied in taking such accounts? I have no doubt that they are, and that if the parties meant anything else, they should have said so. If this be so, the whole argument against the judgment of the Master in Ordinary, and of the Chancellor affirming it, fall to the ground.

The defendant Gardner is the executor of Mahala Gibson, deceased, and as such is also executor of S. B. Burdett, deceased. He filed accounts of his dealings with both estates in the office of the proper Surrogate Court, where, after a contested examination before the Judge, extending, as it would seem, over 9 months, and at a cost of some $1,700, they were approved. All parties except the infant defendant were represented by counsel.

Section 72 of the Surrogate Courts Act, R. S. O. 1897 ch. 59, enacts that where an executor has filed in the proper Surrogate Court an account of his dealings with the estate of which he is executor, and the Judge has approved thereof in whole or in part, if the executor is subsequently required to pass his accounts in the High Court, such approval, except so far as mistake or fraud is shewn, shall be binding upon

any person who was notified of the proceedings taken before the Surrogate Judge, or who was present and represented thereat, and upon any one claiming under such person. A similar provision now exists in the case of trustees under a will: (1900) 63 Vict. ch. 17, sec. 18, which was in force when the proceeding now relied upon was taken.

Nothing in the judgment suggests that in taking the accounts thereby directed, the right of defendant Gardner, whether as trustee or executor, to avail himself of these provisions as against plaintiff was intended to be excluded, and so long as the order of the Surrogate Court stands unimpeached the accounts filed by defendant and approved by the Judge are binding upon plaintiff, except in so far as she may be able to shew mistake or fraud therein.

It was urged that this defence was one of estoppel or res judicata, and that defendant could not avail himself of it, as he had not pleaded it. It is enough to say that, even were this the real nature of the defence, the action was conducted without pleadings, and that the defence arises for the first time on the evidence when the accounts are investigated in the Master's office. The effect is then that which is given to it by statute or the general rules of law relating to settled accounts. It is unnecessary to refer to any other authorities than those cited in the judgments below.

Appeal dismissed with costs.

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

MEREDITH, J.A., concurred in the result for reasons stated in writing.

NOVEMBER 3RD, 1906.

C.A.

HAVERSTICK v. EMORY.

Negligence—Injury to Bicyclist by Motor-car—Evidence for Jury—Setting aside Nonsuit—New Trial.

Appeal by defendant from order of a Divisional Court, 7 O. W. R. 799, setting aside a nonsuit entered by ANGLIN, J., and directing a new trial of an action for damages for injuries sustained by plaintiff, when riding a bicycle on a public highway, by being run into by defendant's motor-car.

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

H. E. Rose and J. E. Cook, for defendant.

J. M. Godfrey, for plaintiff.

Meredith, J.A.:—Nothing turns upon the character of the vehicle which defendant was driving; if it had been a donkey cart or a bicycle or any other of the more common means of conveyance, a like accident might just as well have happened; the injury might have been less, but it is possible that it would have been greater; and it is safer, whether with Judge or jury, to consider the case without arousing the natural antipathy of pedestrians and horsemen against the modern horseless carriage. Defendant was quite as much within his rights in driving such a carriage as plaintiff was in riding her bicycle. Each was bound to take reasonable care to avoid injury, and even unnecessary inconvenience to each other and to all others exercising their rights upon the highway; and in her own interests, as well as having regard to the rights of others, the fact that she was carrying a parcel in one hand, and could use the other only in controlling her bicycle, called for greater caution on her part than if she had not been so incumbered.

Plaintiff's case at the trial was put upon two grounds: (1) that defendant should not have turned at the place where he did; and (2) that he should have sounded his horn. If these were the only grounds upon which plaintiff can base a claim, I am by no means sure that the nonsuit was wrong. There is no rule or regulation requiring vehicles to turn only at certain places. Defendant was quite within his right in turning where he did, but was bound to take that care which was reasonable, in all the circumstances, including the place of turning, to avoid injury to others or other unnecessary interference with their rights. It is difficult to perceive what would have been gained by sounding the horn. Plaintiff had seen defendant's car, and knew, as well as any sound could inform her, that it was there. A sound from the horn would have indicated, doubtless, that it was, or was about to be put in motion. But what gain would that knowledge bring? It would probably have rather misled plaintiff to think that it was going, or about to go, ahead, and so away from her. And if it had kept on sounding, what could she

have done to have prevented being run down? She was proceeding on her way, hampered by her bundle; it might only have confused her and made the accident more likely.

But upon other grounds a prima facie case seems to me to have been made out, however the subject of sounding the alarm is to be dealt with. Defendant was doing that which must always be done with care, that which, upon such a highway as that in question, is pretty sure always to interfere more or less with the traffic; the time of the day made greater caution necessary; it was in the uncertain and deceptive middle light betwixt day and night, and no warning was given, if any could have been given, to indicate that the car was being turned around. It was plainly defendant's duty, upon turning, to see, as well as he could, whether he could then turn with safety to others as well as himself, and if he could not plainly see, to be the better on the look-out, and the more cautious in turning. All the circumstances of the case seem to me to entitle plaintiff to an answer from defendant, and, upon the evidence as it now stands, to go to the jury, contending that if defendant did not see plaintiff and avoid injuring her, he ought to have done so, and so was guilty of negligence; or else that he did see her and did not so act, as he might, that no injury would have been inflicted, whatever the jury might think and find upon such contentions—quite apart from any right to go to the jury on the question of sounding a warning or alarm. If the jury should find that the proximate cause of plaintiff's injury was neglect to sound the horn, it will be time enough to consider whether there was any reasonable evidence to go to the jury on that question, which may, of course, if plaintiff relies upon it, be supported by further and better evidence at the next trial.

The statute 3 Edw. VII. ch. 27, sec. 5, provides only that the alarm shall be sounded whenever it shall be reasonably necessary to be sounded for the purpose of notifying pedestrians or others of the approach of a motor vehicle.

OSLER, J.A.:—I agree with the judgment of the Divisional Court, for the reasons given by them, that the case should not have been withdrawn from the jury, and that there must be a new trial.

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

Appeal dismissed with costs.

NOVEMBER 3RD, 1906.

C.A.

RE CANADIAN TIN PLATE DECORATING CO.

MORTONS' CASE.

Company — Winding-up — Contributory — Application for Stock—Withdrawal—Absence of Allotment and Notice—Notice of Call.

Appeal by the liquidator of the company in a winding-up proceeding from order of FALCONBRIDGE, C.J., affirming the order of the local Master at Hamilton removing the names of the respondents from the list of contributories.

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

J. M. McEvoy, London, for the appellant.

W. E. Middleton, for the respondents.

OSLER, J.A.:—The grounds upon which the Courts below proceeded in holding that the respondents were not liable are not before us; but of the numerous objections which were taken in their behalf to the liquidator's proceedings against them, I find it necessary to notice but one, viz., that stock in the company had never been allotted to them, so that they never in point of fact became shareholders. The liquidator contented himself with proving that on 19th August, 1904, the respondents had signed an application not under seal—I will assume that it is a joint application, though in the view I take of the case this is not material—by which they subscribed for 25 shares of the common stock of the company at the par value of $100 per share, for which they agreed to pay "dollars par upon the delivery of the regular stock certificate." The stock ledger of the company was produced, in which, under the names of the respondents and the heading "common stock," under date 19th August, is the entry, "Allotted Bought Dr. 25 shares, amount $2,500, balance 25 shares, Dr. $2,500."

The application was canvassed for by one Hesson, an agent of the company, who, in order to induce the respondents to subscribe, made certain statements of fact as to other named persons having already subscribed for stock in the company—statements which were shewn to have been absolutely false to his knowledge. He took the respondents down to the company's factory, and there introduced them to one Thompson, the manager. They were shewn through the factory by both of them and pressed to subscribe. They were disposed to take 5 or 6 shares, but Hesson, in Thompson's presence, said that they could not take less than $1,000 worth. The respondents told them they had no money on hand, and if they took anything they would have to raise money by parting with some stock Mrs. Morton held in another company, called the Carter-Crume Company, and if that was sold as high as Hesson assured them it could be sold, they would take 25 shares. Both parties understood that the shares would be paid for by their means, and the respondents signed the application, and handed it to Thompson. Thompson and Hesson then demanded a payment on account, and they were told that if they would come to the respondents' house they would be given a cheque for $100. Hesson hastened there at once, and on the arrival of the respondents they handed him the cheque. In the afternoon of the same day the respondents began to suspect from what they heard from other persons that they had been defrauded, and went back to the factory and saw Thompson, who endeavoured to reassure them, but on the following morning they determined to withdraw from their application, and went to the office of the company on which their cheque was drawn and stopped payment of it. It had in fact been already presented and payment refused for want of funds. Later on the same morning Hesson called at the respondents' house to get Mrs. Morton to sign a power of attorney to sell the Carter-Crume shares, which she refused to do, and told him emphatically that they would have nothing more to do with the stock they had applied for; in short, as plainly as possible that they repudiated the application.

Neither Thompson nor Hesson was called as a witness before the local Master on the motion to settle the list of contributories, and the minute book contains no note or entry of any resolution of the directors allotting stock to the respondents or directing notice of allotment to be sent to them,

nor was a formal notice of allotment ever sent to either of them. No attempt was made to enforce payment of their cheque, and they received no further communication on the subject of the shares now said to have been allotted to them until the middle of the following November, when Thompson, the company's manager, sent them notice of a call and demanded payment.

It may plausibly be contended as being the fair result of the evidence that the respondents, as they had a right to do, withdrew their application for the shares, and that this came to the notice of the company on the day after the application was signed. This would be an answer to the liquidator's demand: Truman's Case, [1894] 3 Ch. 472. But I think a plainer ground is that the company never allotted the stock subscribed for or gave notice of its allotment to the subscribers: Homer v. District Consolidated Union, 39 Ch. D. 546 . . .Robinson's Case, L. R. 4 Ch. at p. 322.

The entry of the respondents' names in the stock ledger is not conclusive: Gunn's Case, L. R. 3 Ch. 40; and the absence of any record in the minute book of any resolution of the directors dealing with the respondents' application, and the silence of the persons who ought to know whether it was ever brought before or passed upon by the board, strongly supports the inference that the stock never was allotted, and that the entry of 19th August was merely the unauthorized act of Thompson or of some clerk acting under his instructions.

It was pressed on us by Mr. McEvoy that on 1st November and again on 15th December, 1904, the directors passed resolutions declaring a call of 10 per cent. on "the unpaid capital stock," and on 23rd January, 1905, passed another resolution calling up "the balance of the unpaid capital stock of the company," and that notices of these calls had been sent to and probably received by the respondents.

I do not think that this assists the appellant. Whether the mere notice of a call can be regarded as equivalent to notice of allotment is perhaps questionable: Nasmith v. Manning, 5 A. R. 126, 5 S. C. R. 417. It may perhaps be so framed as to be sufficient for that purpose, but I do not decide it. The appellant's difficulty arises at the earlier stage. There never was, as I hold, any appropriation of specific

shares to the respondents. The resolutions making the calls certainly cannot be regarded as such. These deal with stock which has been already allotted, and with nothing else, and the fact that Thompson sent notices of such calls to the respondents amounts to nothing if the stock had not been already allotted to them by the directors. There having therefore been no response by the company to the respondents' application, they never became shareholders, and have been properly struck off the list of contributories.

Appeal dismissed with costs.

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

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

NOVEMBER 3RD, 1906.

C.A.

REX v. SAUNDERS.

Criminal Law—Keeping Common Betting House—Bookmakers in Charge of Betting Booth on Race-course of Incorporated Association—"House, Office, Room, or Other Place"—Movable Structure—Criminal Code, secs. 197, 198, 204.

The defendants were brought before one of the police magistrates for the city of Toronto upon an information charging them with keeping a disorderly house, to wit, a common betting house. They elected to be tried summarily, and pleaded not guilty. Evidence was adduced, and they were found guilty and fined.

It appeared that during the month of May, 1906, the Ontario Jockey Club, an incorporated association, held their annual spring race meeting at their race-course and grounds known as "The Woodbine." On part of the grounds was situate a stand with lawn in front known as the members'

stand and lawn. On another part of the grounds, to the east of the members' stand and lawn, was erected a stand known as the public stand, with a lawn in front forming a large space separated by a fence from the members' lawn. East of and adjoining the public stand was a building or structure of wood wholly walled in on the north side, partly walled in on the east and west sides, but open on the south, and covered with a projecting shingled roof. Under the roof of this building were a number of what the witnesses called betting boxes or booths. They were not stationary, but stood on castors, by means of which they could be moved from one part of the building to another. In rainy weather they were left under the roof. In fine weather they might be, and usually some of them were, moved out on the lawn in front of the building. These were rented by book-makers, the rent payable for each one during the race meeting in question being $100 a day. During a portion of the time while the race meeting was in actual progress, that is to say, between 19th and 28th May, 1906, defendants were in possession of one of the booths, and were engaged in making bets with other persons attending the races. They exhibited on a board the names of the horses named to start in a race, and betted with persons desirous of backing any one of them for first or second place. The backer paid his stake to one of the defendants, and received a ticket shewing the terms of the bet. If he won, he was paid by one of the defendants on presentation of the ticket. In this way defendants made bets with large numbers of the public during each of the above specified days of the meeting.

Upon the trial defendants' counsel objected that defendants could not be convicted under sec. 198 of the Criminal Code, because a booth such as was used was not a house, office, room, or other place within the meaning of sec. 197 of the Code, and further because the offence, if any, was against the provisions of sec. 204 of the Code, and defendants were entitled to the benefit of the saving clause or proviso contained in sub-sec. 2 of that section.

At defendants' request the magistrate stated a case for the opinion of the Court of Appeal.

The facts as found by him on the evidence, which was made part of the case, were set forth as follows:

1. That the Ontario Jockey Club is a duly incorporated race association.

2. That the common betting house herein referred to was opened, kept, and used by defendants during the actual progress of a race meeting.

3. That defendants kept a betting booth placed in that part of the grounds of the Ontario Jockey Club specially set apart for betting purposes.

4. That such betting booth was opened, kept, and used by defendants for the purpose of betting with persons resorting thereto.

5. That all the defendants were engaged in conducting the business of the said betting booth, which was leased by defendant Saunders and under his immediate superintendence.

6. That a very large number of bets were made by defendants against certain horses winning the different races, with persons resorting to said booth.

7. That in the enclosure specially set apart by the Ontario Jockey Club for betting purposes as aforesaid there are 36 betting booths, including the one above mentioned, known as "two dollar books," which were leased to persons called "book-makers" for the purpose of betting as aforesaid.

8. That defendants conducted and managed a betting booth as aforesaid during the whole of the race meeting, and defendant Saunders paid therefor and for the betting privilege $100 for each day.

9. That the betting booths in question are of the following dimensions: 6 feet 2 inches in length; 5 feet 2 inches in width; and 4 feet 7½ inches high; and are equipped for the purpose of carrying on betting therein, and are supplied with castors, so that in fine weather they may be moved from under the covered part of the betting section of the grounds to a distance of a few feet from the roof.

10. Defendants' position was changed daily from booth to booth, there being a daily drawing for position among the book-makers, but during each day these defendants occupied the same booth, where they made bets with persons resorting thereto.

The questions submitted by the magistrate were:—

(a) Am I right in holding that a betting booth as aforesaid falls within the terms of sec. 197 of the Criminal Code as a house, office, or other place?

(b) Am I right in holding that the provisions of subsec. 2 of sec. 204 of the Criminal Code do not apply to the offence of which the defendants are found guilty?

The case was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

J. M. Godfrey, for defendants.

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

Moss, C.J.O.:—There is once more raised the question so much debated in Rex v. Hanrahan, 3 O. L. R. 659, 1 O. W. R. 346, and Rex v. Hendrie, 11 O. L. R. 202, 6 O. W. R. 1015, as to the extent and meaning of secs. 197, 198, and 204 of the Criminal Code, and the relation of the latter to the two former.

It will, however, be more convenient to deal seriatim with the questions as submitted. In view of the findings and evidence, the first question presents no serious difficulty. Much light is afforded by the cases decided in England under the Imperial Act 16 & 17 Vict. ch. 119, as well as by our own decisions.

Whether the booth in question here was a house, office, or other place, within the meaning of sec. 197, is largely, if not entirely, a question of fact. The point to be determined is whether the nature of the structure, its position on the race grounds, the manner of its occupation by defendants, and the uses to which it was being put, justify the conclusion that it was a house, office, or other place, opened, kept, or used for any of the purposes specified in the section.

The English cases develop two lines of decisions depending upon the facts in each case. They turn chiefly on the point whether there was or was not such a fixity or localization by the persons charged of structure or ground as to constitute a "place" within the 16 & 17 Vict. ch. 119.

The Courts have declined to define a "place" in general terms, but they recognize the principle that a "place" must

be in some sense fixed and ascertained, and the inquiry is whether the facts of the particular case shew that the person charged was making such use of a house, office, room, or other place, in which he was operating, as to bring him within the Act. . . .

[Reference to Shaw v. Morley, L. R. 3 Ex. 137; Bows v. Fenwick, L. R. 9 C. P. 339; Liddell v. Lofthouse, [1896] 1 Q. B. 295; Brown v. Patch, [1899] 1 Q. B. 892, 19 Cox C. C. 330; Powell v. Kempton Park Racecourse Co., [1897] 2 Q. B. 242, [1899] A. C. 143.]

Are the facts of the present case sufficient to justify an inference similar to that drawn in Brown v. Patch? The defendants were in charge of a definite localized place, and occupying and using the structure for the purpose of carrying on the business of betting with all persons who might resort thereto for the purpose of betting with them. It was so situated and marked out that any one wishing to bet could readily find defendants there. The booth, though open to the air, had some of the characteristics of a room and many of those of an office. It was enclosed by walls of a considerable height, and it contained the usual fittings or accessories of an office, such as desks, tables, and chairs. Business was transacted there in connection with bets made and the money received and paid in respect of such bets. It was as much an "office" and a "place" as the structure described in Shaw v. Morley, supra. The magistrate was, therefore, right in holding that the betting booth so used by defendants fell within the terms of sec. 197 of the Code. If it was not an "office," it was certainly a "place," but it was probably both.

The first question should, therefore, be answered in the affirmative.

The answer to the second question depends . . . upon a consideration of the relation, if any, of sec. 204 to secs. 197 and 198.

Reading the former, it is not easy to see what it has in common with the other two, except in respect of the general ground that each is directed to the suppression of methods adopted for enabling persons to indulge in the practice of betting. Each seeks to prevent or end means adopted for giving persons who are minded to bet an easy opportunity

of doing so. But they do not deal with the same cases or class of cases. Without going the length of saying that proof of the commission of some of the acts prescribed by sec. 204 would not be any evidence to support a charge of keeping a common betting house under secs. 197 and 198, it may safely be said that it is not easy to conceive a case in which a person charged under sec. 204 could be convicted on proof merely of the facts necessary to support a charge under secs. 197 and 198.

In the present case there is nothing in the findings of the stated case or the evidence to bring defendants within the scope of sec. 204. The most plausible argument used in favour of the view that this was a case falling within sec. 204 was that defendants were keeping, exhibiting, or employing a device or apparatus for the purpose of recording bets or wagers. But it seems plain that the device or apparatus referred to in sec. 204 (b) is something entirely different from a betting booth to which the public resort for the purpose of betting with a person who appears to be the owner, occupier, keeper, or manager thereof, or the ordinary equipment of such a booth. . . .

[Reference to People v. Weithoff, 93 Mich. 631; State v. Shaw, 39 Minn. 153.]

The provisions of sec. 204, except the words "or made on the race-course of an incorporated association during the actual progress of a race meeting" at the end of sub-sec. (2), were first enacted by Parliament in 1877 by 40 Vict. ch. 31. In 1892, when the Criminal Code was first enacted, the latter words were added to sub-sec. (2). At the same time secs. 197 and 198 were for the first time introduced into our law, being taken from the Imperial Act 16 & 17 Vict. ch. 119. There was then no more doubt than there is to-day that these provisions prohibited the keeping of a common betting house on a race-course, even though the betting carried on was during the actual progress of the races. If it was the intention of Parliament to sanction the existence of betting houses at race-courses at such times and in such circumstances, one would have expected that when it enacted these sections it would have introduced into them a clause similar in import to the words added to sec. 204. Instead of so doing, it expressly confined the operation of these words to the provi-

sions of the latter section. In face of the clear language of sub-sec. 2 of that section, it does not seem possible to extend the saving clause to any other sections, or to say that their provisions are inapplicable to every form of betting carried on upon a race-course during the actual progress of a race meeting. And in Regina v. Giles, 26 O. R. 586, a Divisional Court, the then ultimate court of appeal in criminal cases, seems to have been of the opinion that secs. 197 and 198 and sec. 204 (1) did not relate to the same matters: see Boyd, C., p. 592, and Meredith, J., p. 594.

For the above reasons the answer to the second question should be in the affirmative. Indeed it might have sufficed to refer to the reasons given in Rex v. Hanrahan, supra. But the earnestness with which it was argued that this case was not governed by the decision in that case may afford some reason for again traversing the same ground.

The questions should be answered in the affirmative, and the conviction affirmed.

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

MACLAREN, J. A., also concurred.

GARROW, J.A., dissented, for reasons stated in writing. Briefly his opinion was that secs. 197 and 198 have no application to the case of betting carried on upon the race-course of an incorporated association during the actual progress of a race meeting, whether or not such betting takes place within or without doors, or in any particular "house, office, room, or other place," so long as it is within the boundaries of the race-course, and so long also as the betting is confined to the races then in progress upon that race-course.

MEREDITH, J.A., also dissented, being of the like opinion.

NOVEMBER 3RD, 1906.

C. A.

GOODWIN v. CITY OF OTTAWA.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court — Special Grounds — Assessment and Taxes.

Motion by plaintiff for leave to appeal from order of a Divisional Court, ante 77, affirming judgment of TEETZEL, J., 7 O. W. R. 204, after trial without a jury at Ottawa, dismissing the action.

H. S. Osler, K.C., for plaintiff.

W. E. Middleton, for defendants.

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

MOSS, C.J.O.:—The action is, in form, one to restrain defendants from collecting or enforcing payment of taxes upon an assessment for income in respect of dividends from shares held by plaintiff in the Ottawa Electric Railway Company.

The question, so far as monetary value is concerned, is whether plaintiff is liable to pay a sum of about $25 a year for the next 17 years at the furthest, or about $425 in all. It is said that there is a special feature, in that there are other shareholders of the railway company resident in Ottawa who are in the same plight.

But there are other shareholders resident in other parts of Ontario who, when assessed in the several municipalities in which they reside, could not avail themselves of the agreement sought to be set up against defendants. Plaintiff himself could not do so if he went to reside in another municipality.

It cannot be said that the litigation is one affecting the rights of the whole body of shareholders. In point of fact, all the shareholders, including plaintiff, are obtaining an incidental advantage from the exemption given the company,

inasmuch as the saving of outlay thus effected presumably enhances the amount of the dividends on the shares. Neither on this branch of the case, i.e., the effect of the agreement set up in the pleadings, nor on that touching the claim to exemption under sub-sec. 7 of sec. 10 of the Assessment Act—the provisions of which as affecting the shares and dividends in question must be read in connection with sub-clause (i) of sub-sec. 1 of the same section—does the case seem to be of such importance or to present such special reasons for treating it as exceptional as to justify the allowance of a further appeal.

Motion refused with costs.

ERRATUM.

In Munro v. Smith, ante at p. 456, 9th line from the top and following lines, strike out all the words from "but it is very obvious" to the end of the paragraph. These words were inserted owing to a misapprehension.