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BOYD, C. OCTOBER 1ST, 1906.

TRIAL.

WILLIS v. BELLE EWART ICE CO.

Master and Servant—Injury to Third Person by Negligence of Servant—Responsibility of Master—Servant in Charge of Master's Vehicle, but Departing from Course of Employment—Negligence.

Action for damages for injuries sustained by plaintiff, owing to the alleged negligence of a driver of an ice waggon in the employment of defendants, resulting in a collision with a motor-bicycle upon which plaintiff was travelling in a public street in the city of Toronto.

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

B. H. Ardagh, for defendants.

BOYD, C.:— . . . The waggon was driven by a man called Leslie, who had been for some days in defendants' employment, and was accounted a sober, steady man. The accident occurred between 8 and 9 p.m. on 10th October, 1905.

The main business was to take a load of ice and distribute it to customers of defendants, who lived on a fixed route in the western part of the city south of Queen street. The driver's duty was to start from defendants' barns on the east side of Jarvis street, south of the Esplanade, about 8 in the morning, and to return after delivering the ice along his beat, which in due course would take till about 4 or 5 in the afternoon.

On this day all the ice had been delivered apparently, but no trace is given of the driver's movements from the completion of his day's trip in delivery till a short time before the accident. But shortly before the collision, about 8 p.m., he was seen driving his waggon (at a good gait, galloping) west along College street towards the Junction. He drove past Clinton street and past Montrose avenue, and then turned round, crossing College street, and made a sharp, rapid cut to the north at the west corner of Montrose avenue, when his shaft struck plaintiff and his motor, as he was going west along the north side of College street. The driver was on the wrong side of the road, and should have made the crossing by a wide turn to the south of College street so as to reach the east side of Montrose avenue. He was far gone in liquor, cantankerous and full of fight. Next morning he could give the defendants no account of what had happened, and was discharged.

The defence relied on is, that defendants are not responsible for the act of the servant, as he had ceased to be acting in the course of his employment at the time of the disaster. In my opinion, all the circumstances point in this direction. The driver had forgotten the call of duty, failed to go back to the barns with his team after the day's work, drove elsewhere in search of liquor, and was seen befuddled and bellicose on a street entirely out of the homeward course, and hurrying away from his proper destination just upon the happening of the accident. The terse language of Parke, B., in Joel v. Morrison, 6 C. & P. 501, fits the situation: "He was going on a frolic of his own without being at all on his master's business." The governing law is given in the modern leading case of Storey v. Ashton, L. R. 4 Q. B. 476, which has been followed and applied in Sanderson v. Collins, [1904] 1 K. B. 628, and Cheshire v. Bailey, [1905] 1 K. B. 237, 245.

Any departure of the servant for his own purposes from the discharge of his ordinary duties would relieve the master from responsibility. From the time that the driver (having disposed of the load of ice) delayed returning to defendants' stables, and drove about to enjoy himself, he had in effect discharged himself. He was then at large on a drunken bout, and himself alone liable for his tortious acts.

Merritt v. Hepenstal, 25 S. C. R. 150, cited for plaintiff, is broadly distinguishable. There the driver, though he had

for a time abandoned the master's business, had returned to it before and at the time of the accident.

The action must be dismissed, and the $30 in Court returned to defendants, but I hope they will be soulful enough not to ask for costs.

OCTOBER 1ST, 1906.

DIVISIONAL COURT.

CITY OF TORONTO v. GRAND TRUNK R. W. CO.

Costs—Taxation between Party and Party—Charges for Searches for Documents—Allowances for.

Appeal by defendants the Grand Trunk R. W. Co. from order of BOYD, C., ante 310.

R. C. H. Cassels, for appellants.

W. Johnston, for plaintiffs.

Shirley Denison, for defendants the Canadian Pacific R. W. Co.

The Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), dismissed the appeal with costs.

OCTOBER 1ST, 1906.

C.A.

McBAIN v. WATERLOO MANUFACTURING CO.

Master and Servant—Injury to Servant—Dangerous Machine—Absence of Guard—Factories Act—Proximate Cause of Injury—Negligence—Damages.

Appeal by defendants from order of a Divisional Court affirming judgment of MACMAHON, J., after a trial without a jury, awarding plaintiff $1,200 damages for injuries received while working in defendants' employment.

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

E. E. A. DuVernet and J. C. Haight, Waterloo, for defendants.

W. M. Reade, Waterloo, for plaintiff.

MOSS, C.J.O.:—On the argument of the appeal defendants alleged that, acting on the intimation of the trial Judge given at the trial, that, if possible, he would, before disposing of the case, make a personal examination of the machinery which caused the injury, they abstained from giving evidence as to the condition of the machinery before and at the time of the accident. We thought it proper to afford them an opportunity of producing such evidence, and we directed that defendants be at liberty to adduce it before the Judge of the County Court of Waterloo. The evidence was not taken, and defendants now intimate that, owing to changes in the buildings and machinery which they have made since the trial, they are unable to produce any useful evidence, and that the case will have to stand for decision as it was when argued.

It remains, therefore, to dispose of the case upon the present record.

By a somewhat singular combination of circumstances, plaintiff was thrown backwards into the gearing of a machine and roller for the bending of boiler plates. There is no doubt that he was lawfully working in the place where he was, near by the unprotected side of the machine into which he fell. At the moment of his fall the gearing was not in motion, but in his efforts to extricate himself he set the gearing in motion to an extent sufficient to inflict the injury of which he complains.

The trial Judge came to the conclusion that the machine was a dangerous one, and should have been guarded on the side where the accident happened, as in fact it was guarded on the other side, and that it could easily have been guarded at a small cost.

Upon the evidence as it stands there is no good ground for interfering with the findings of the trial Judge, affirmed as they have been by the Divisional Court.

Nor is there any sufficient reason for thinking that the absence of the guard was not the proximate cause of the

accident. The guard might not have prevented plaintiff from being taken off his feet as he was, but with a guard he could not have fallen into the gearing or got his arm entangled in and squeezed by it in the way shewn.

There appears no fair escape from the . . . conclusion that the blame for the accident rests upon the defendants' neglect to comply with the provisions of the Factories Act. And upon the authorities it follows that plaintiff is entitled to claim compensation from defendants for the injury which he sustained by reason of such negligence on their part: Sault Ste. Marie Pulp and Paper Co. v. Myers, 33 S. C. R. 23; Moore v. Moore, 4 O. L. R. 167, 1 O. W. R. 290; McIntosh v. Firstbrook Box Co., 8 O. L. R. 419, 3 O. W. R. 924, 10 O. L. R. 526, 6 O. W. R. 237.

The damages awarded are not excessive, having regard to the nature of the injuries and their effect upon the permanent usefulness of the arm. The medical gentlemen who testified at the trial as to its condition were unable to hold out hopes of its ever becoming as strong or as useful as before.

Appeal dismissed with costs.

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

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

OCTOBER 1ST, 1906.

C.A.

McLEOD v. LAWSON.

Damages—Interlocutory Injunction—Dissolution—Time for Applying for Reference—Evidence—New Agreement—Costs—Stay of Proceedings—Appeal.

Motion by defendant Lawson to vary judgment of 29th June, 1906 (ante 213), by directing a reference as to damages occasioned by interlocutory injunctions, and by reserving

Lawson's right to claim a renewal agreement from defendant Thomas Crawford, and also as to costs.

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

W. M. Douglas, K.C., for defendant Lawson.

J. B. Holden, for plaintiffs.

R. McKay, for defendant John McLeod.

W. N. Ferguson, for defendant Crawford.

MOSS, C.J.O.:—I. Where in an action the plaintiff obtains an interlocutory injunction on the usual undertaking as to damages, and the injunction is afterwards dissolved or the action is dismissed at the trial, there is no absolute rule as to the time within which an application should be made for a reference as to the damages, if any, the defendant has sustained. But it is good practice to make it either at the time the injunction is dissolved or at the trial: Kerr on Injunctions, 4th ed., p. 592, and cases cited; Holmested & Langton, 3rd ed., pp. 94, 95, and cases cited.

Here no application was made at the trial, but if it had been made it would not have been successful, for the trial Judge did not dissolve the injunction.

As the result of the appeal is to dissolve the injunction, it is now proper for defendant Lawson to apply to this Court, and this Court may, if the case is a proper one, direct the inquiry in the usual form.

There seems no good reason why this should not be done. The proper form of reference seems to be, whether defendant Lawson sustained any, and what damages, by reason of the orders of 20th and 27th July, 1905, having been made, which plaintiffs ought to pay according to the undertakings contained in the orders.

The inquiry ought not to be confined to the first order owing to the slip or omission in the notice of motion.

II. There can now be no alteration of the record by the introduction of further evidence. If it be the case that the question of a new agreement between defendants Lawson and Thomas Crawford was not in issue, or if the conclusions of fact upon that question on the record as it now stands be erroneous, it is open to defendant to point that out in his

appeal to the Supreme Court of Canada. If what has been put forward on this application is all the proposed further evidence, it does not appear to be distinct or definite enough to effect any change in the findings. But in any event defendant is not prejudiced by leaving the record in its present condition.

III. As to the costs of the application to remove the stay of proceedings and the appeal from the order made, the course taken by the Court of expediting the hearing of the main appeal obviated the necessity for any discussion upon the lesser. And there should be no order except that there be no costs of the application or the appeal.

IV. The costs of the appeal should remain to be borne by plaintiffs as directed. The appeal was against the judgment in their favour obtained in their action. One of the respondents (John McLeod) is a person of unsound mind, and Thomas Crawford was maintaining a separate appeal, for the costs of which he has been made liable. They were necessary parties to Lawson's appeal, but he does not ask any variation of the direction as to costs.

No costs of this application.

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

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

OCTOBER 1ST, 1906.

C. A.

AMES v. CONMEE.

Broker—Purchase of Shares for Customer on Margin—Moneys Advanced to Keep up Margins—Recovery—Instructions—Usual Course of Dealing—Practice of Brokers—Discharge of Customer—Obligation of Broker to Sell—Several Orders Included in One Contract — Interest — Hypothecation of Shares by Broker—Commission.

Appeal by defendant and cross-appeal by plaintiffs from order of a Divisional Court, 10 O. L. A. 159, 6 O. W. R. 89,

affirming judgment of BOYD, C., 4 O. W. R. 460, in favour of plaintiffs.

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

C. Millar, for defendant.

W. N. Tilley, for plaintiffs.

OSLER, J.A.:—The ground of defence chiefly relied upon before us is that which Anglin, J., considers in his written judgment, namely, that there was a conversion by plaintiffs of defendant's stock by the pledging of it not merely for the amount which remained unpaid thereon by defendant, and which plaintiffs had advanced on his account, but also for their own general indebtedness to the bank. This, if true, would not be an answer to the action, though it might result in considerably reducing the amount which plaintiffs have been held entitled to recover, if the stock was, at the date plaintiffs pledged it, of any substantial value.

I do not think that there is any real difference between the Judges of the Divisional Court on the point of law. Their diverse conclusions seem to have arisen from the different views they took of the effect of the evidence, the majority holding it to have substantially proved that plaintiffs, notwithstanding the hypothecation referred to, were always ready and able to deliver his stock to defendant, had he come in to redeem it, while Anglin, J., thought the evidence was not sufficiently clear and definite to warrant that conclusion.

On the whole, after a careful consideration of the evidence, I see no reason to differ from that view of the facts which commended itself to Britton, J., who delivered the prevailing judgment in the Divisional Court.

Defendant did not, either by his pleadings or at the trial, clearly set up that there had been a conversion of his stock by the manner in which plaintiffs had dealt with it. That contention was really first put forward in the Divisional Court. Had it been distinctly raised at the trial while plaintiffs' witnesses were under examination, it is quite probable that the precise terms under which the stock had been pledged to the bank would have been so fully brought out as to have left no room for the suggestion that plaintiffs were not in a position to control the bank to the extent of having the right

to free the stock from the pledge on payment merely of what was due by him thereon. The fact that plaintiffs were always in a position to hand over the stock without going into the market and buying for that purpose, is expressly deposed to, and, in the absence of any qualification or weakening of the statement by cross-examination, I do not see why the statement should not be accepted.

It was for defendant to prove a conversion by some unauthorized dealing with his stock which would have deprived him of the right or affected his right to redeem it, and this, I think, he has not succeeded in doing. The stock may have been improperly pledged, but plaintiffs say that, notwithstanding this, it remained so far under their own control that they could always have procured its release, had defendant come in to redeem it.

As regards the other questions of fact dealt with at the trial and in the Divisional Court, I am in accord with the findings and dispositions below, and would, therefore, dismiss the appeal.

Plaintiffs' claim for additional interest and commission on the sale of defendant's shares has been properly disallowed. They are entitled to no more than the legal rate of interest, 5 per cent. At all events they have not proved that they are entitled to more than that, and no authority has been cited to shew any right to charge commission upon a sale of defendant's shares made without instructions from him and for their own protection.

The cross-appeal will also be dismissed with costs.

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

STREET, J., died while the case was standing for judgment.

CARTWRIGHT, MASTER. OCTOBER 2ND, 1906.

CHAMBERS.

COLLIER v. HEINTZ.

Writ of Summons—Order for Service on Defendants Resident out of the Jurisdiction—Service on Agent in Ontario—Substitutional Service—Cause of Action—Rule 162—Carrying on Business in Ontario—Irregularities in Service—Conditional Appearance.

By the indorsement of the writ of summons plaintiff claimed delivery of 20 shares of stock purchased by defendants for plaintiff on 23rd December, 1905, or damages for non-delivery. The statement of claim alleged that defendants were stockbrokers, carrying on business at Peterborough, but having their head office at Buffalo, and repeated in substance the claim as indorsed.

An affidavit of plaintiff stated that he was desirous of commencing action against defendants for delivery of 20 shares of Union Pacific stock and for damages for breach, within the jurisdiction of the High Court of Justice for Ontario, of a contract to deliver the same to him; that defendants had assets within the jurisdiction to the amount of $200; that he was advised and believed that he had a good cause of action against the defendants, who resided at Buffalo, and were not British subjects, but carried on business at Peterborough by their manager there, one J. H. Barber.

On this the local Master at Peterborough made an order for service of notice of the writ and of the statement of claim on defendants under Rule 162, and for service thereof on Mr. Barber at Peterborough.

Defendants moved to set aside the order, and the service effected thereunder.

Grayson Smith, for defendants.

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

THE MASTER:—The grounds taken in support of the motion were as follows: (1) no cause of action shewn; (2) insufficient material; (3) alleged business not carried on in

Ontario and service on Barber therefore irregular; (4) that copies served on defendants were imperfect. (5) It was asked that defendants might at least enter a conditional appearance.

I have considered the material, and do not see how the order and service can be set aside.

As to (1) and (2), I think that the Rules were complied with, and that a sufficient cause of action is alleged under Rule 162 (e) and (h). As to this latter it is admitted that the defendants have offices in Toronto and Hamilton, so that it may be safely assumed that they have assets of $200 at least in the province, when they have not ventured to deny this.

As to (3) I think that service could properly have been made on Barber under either Rule 157 or 159, and therefore the order for substitutional service, being within the discretion of the local Master, should not now be interfered with, seeing that this motion is made on behalf of the defendants themselves. I refer to what was said by the Chancellor in Taylor v. Taylor, 6 O. L. R. 545, 546, 2 O. W. R. 953, on this point.

(4) The copies were in some respects no doubt defective. But defendants were not in any way prejudiced by these omissions, as the order gave the whole matter correctly, and a full copy of this was served.

(5) It is, however, doubtful whether the delivery was to be made in Peterborough so as to bring the action within Rule 162 (e). Following the decision in Dominion Canister Co. v. Lamoureux, 7 O. W. R. 272, 378, and cases cited, I think defendants may enter a conditional appearance, and should do so within 10 days (as well as deliver their statement of defence), if so advised. But, in the view I take of Rule 162 (h), it would not perhaps avail them greatly to do so. Having regard to the defects in the papers served, as well as the other circumstances, the costs of the motion will be in the cause.

I think it allowable to say that in my own practice I always ask to see the writ and statement of claim (where one is to be served) so as to form an opinion of whether a prima facie case is shewn. And I would not have hesitated to make the order which was made here.

Whether an order for substitutional service was necessary to allow service on Barber or not, it is not now useful to consider, and I express no opinion on that point.

OCTOBER 2ND, 1906.

DIVISIONAL COURT.

JONES v. NIAGARA NAVIGATION CO.

Carriers—Breach of Contract to Carry Passengers to Point in United States—Act of Congress Requiring Payment of Poll Tax—Payment by Carriers—Collection from Passenger—Unlawful Detention—Damages—Findings of Jury.

Appeal by plaintiff from judgment of senior Judge of County Court of York, after findings of the jury in favour of the plaintiff, dismissing the action, upon the ground that there was no evidence proper to be submitted to the jury. Action for damages for breach of a contract to carry plaintiff from Toronto to Buffalo.

W. T. J. Lee, for plaintiff.

J. Bicknell, K.C., for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., MAGEE, J., MABEE, J.), was delivered by

MABEE, J.:—On 30th June, 1905, defendants sold to plaintiff a ticket from Toronto to Buffalo and return, by the terms of which the plaintiff was entitled to travel by the defendants' line of steamers from Toronto to Lewiston, and from there to Buffalo, via the New York Central and Hudson River Railroad, and to return within 5 days over the same route.

The Senate and House of Representatives of the United States, on 3rd March, 1903, enacted as follows: "There shall be levied, collected, and paid a duty of $2 for each and every passenger not a citizen of the United States, or of the Dominion of Canada, the Republic of Cuba, or the Republic of Mexico, who shall come by steam, sail, or other vessel from any foreign port to any port within the United States . . . The said duty shall be paid to . . . by the master, agent, owner . . . of every such vessel or transportation line." The section further provides that this duty shall be a debt in favour of the United States against the owner of such vessel, and elaborate provisions are made

for its enforcement by lien upon the vessel; provisions of a penal character are also directed against the master of the ship, the owners, and others, for breach of the provisions of the Act. This Act and various other regulations connected with its enforcement are known to defendants, and the general manager of defendants' line had instructed the pursers of the boats to collect the $2 from each person who came under the provisions of the Act, and in the event of the passenger declining to pay the tax, such person was to be returned free of charge to the point from which he embarked, if the immigrant officer so demanded. Plaintiff on 30th June proceeded by boat to Lewiston, and he says when about half way across the lake he was interviewed by the United States officer, who questioned him as to his nationality, the length of time he had been in Canada, and the result of the interview was that this officer told plaintiff he was liable to pay the head tax of $2, and to go to the purser and pay him, that if he (plaintiff) returned to Canada within 48 hours he would get his $2 refunded. Plaintiff states that upon this understanding he went to the purser, the defendant Schmitendorf, and told him he had come to pay the $2, and wanted a receipt, and that the purser told him he was not giving receipts. The plaintiff also says he offered the $2. He afterwards attempted to leave the boat without paying the $2, and says that, when on the gang plank, the purser and the United States government officer told him he would have to return and pay the $2 before he could go on; that he then returned to the purser's office and again offered to pay the $2; that the purser asked to see his ticket, and upon plaintiff giving the ticket to him he kept it, told him he was detained, and would be taken back to Toronto; that he (plaintiff) did his best to get the purser to accept the $2 and give him a receipt, so that he could get his refund, and let him go about his business. Plaintiff's statement of what occurred did not at all agree with that of the purser or the government officer.

The following are the questions and answers of the jury:—

1. Was plaintiff while on a journey to Buffalo in June last prevented from entering into the United States? Ans. Yes.

2. If so prevented, then state by whom was he so prevented and at what place. Ans. He was prevented by the purser, at

Lewiston, when the purser retained possession of Jones's ticket.

3. Also state on what grounds he was so prevented from entering the United States. Ans. By the refusal of the purser to give Jones a receipt for the $2 tendered for the head tax by which he would obtain a refund on his return trip.

The jury assessed damages at $100 in favour of plaintiff.

The trial Judge, notwithstanding the findings of the jury, gave effect to a motion for a nonsuit made by the defendants.

In this I think he was wrong. Much evidence was given as to whether plaintiff fell within the class covered by the United States Act, but I do not regard that as material. Defendants had contracted to carry plaintiff to Lewiston. If plaintiff was within the class of persons covered by the Act, then defendants, and not plaintiff, were liable to pay the $2. The Act states that this tax shall be paid by the carrier. The United States government officer could not demand the tax from the passenger; it was not his debt; the government looked to the carrier for payment.

Defendants' purser had no right to demand payment of the $2 from plaintiff, and make its payment a condition of his being allowed to land, nor had he any right to retain possession of plaintiff's ticket, and by so doing broke defendants' contract to carry plaintiff to Lewiston. No hardship results in so holding. Defendants could by a few words printed upon their tickets—upon which there is ample room—have made their contract with plaintiff subject to this payment of $2, if plaintiff fell within the Act, and have thereby relieved themselves of making the payment, and cast that liability upon plaintiff; but, in the absence of such a provision, defendants were themselves alone liable to pay this head tax, and their interference with plaintiff and their retention of his ticket were improper. The purser was acting under express instructions from defendants' manager, and so the latter are liable for the purser's acts.

I think the appeal must be allowed and judgment entered for plaintiff for the damages assessed by the jury, with costs of action and of the appeal.

CARTWRIGHT, MASTER. OCTOBER 3RD, 1906.

CHAMBERS.

BAIRD v. McLEAN CO.

Writ of Summons—Service on Agent of Defendant Company —Proof of Agency—Notice to Company.

Motion by a solicitor to set aside service of the writ of summons made upon him in Ontario as supposed agent of defendants, under Rule 195.

A. C. McMaster, for the solicitor.

H. Cassels, K.C., for plaintiff.

THE MASTER:—. . . Plaintiff was the Toronto agent of the defendant company until 5th September last. As such he occupied their office at No. 34, Victoria street.

The defendants were incorporated in Ontario, and their head office is at Toronto, but the main office seems now to be at Winnipeg.

The defendants became dissatisfied with plaintiff, and sent him the following letter of 28th August, 1906:—"Dear Sir:—The bearer (the solicitor-applicant) has full authority to take over from you at once our Toronto office. Be good enough to turn him over the two office keys and all records and papers and property of this company now in the Toronto office."

After some negotiations between plaintiff's solicitor and the solicitor-applicant, it was agreed that plaintiff should give up possession of the office. This was done on 8th September. . . . The solicitor-applicant retained possession, and attended at the office at least twice, and forwarded to Winnipeg such letters as he found there addressed to defendants. On one Fisher's appointment as plaintiff's successor, the keys and possession were given to Fisher; this was on 27th September.

On 15th September plaintiff began this action, claiming $300 for commissions, and damages for wrongful dismissal. The writ of summons was served on 17th September on the solicitor-applicant as agent for defendants.

The applicant has made affidavit that he acted for defendants only in receiving the keys and locking up the office, and reported this to defendants' president, but that he does not represent defendants in connection with any other business, and never did. He was cross-examined at some length. He was authorized to take ejectment proceedings, if necessary, but no legal measures were necessary. All therefore that the applicant did was not, as it would seem, qua solicitor.

The motion was supported by Murphy v. Phœnix Bridge Co., 18 P. R. 495. No doubt, if defendants here had discontinued business in Toronto, that case would have exactly applied. . . .

Here the facts are quite different. Unless there was an interregnum during which no business was being done, the applicant was certainly the agent of defendants. He is so treated by defendants in their letter of 28th August. By that he was clothed with authority to assume possession of defendants' office, and he retained it until Mr. Fisher's appointment, who received the keys and possession from him on defendants' authorization.

In the Murphy case, at p. 500, Osler, J.A., said: "The object of the Rule is that the company shall have notice of the writ." In the present case it is clear from the material that the company have had such notice.

Unless there was no agent and no business, the applicant must be considered to have been the agent. The business was, perhaps, to be considered as being in a state of suspended animation between the dismissal of plaintiff and the appointment of Fisher. But in all that period the applicant did what was necessary to preserve the continuity of defendants' matters.

It also appears that the writ has not only come to defendants' notice, but also that defendants have sent to plaintiff's solicitors what defendants admit to be due to plaintiff for commissions claimed by him in the writ. . . .

In view of all the admitted facts, I think the service was good, and should be affirmed, and the motion dismissed with costs. The defendants should appear forthwith. . . .

(Affirmed by FALCONBRIDGE, C.J., in Chambers, 5th October, 1906.)

TEETZEL, J. OCTOBER 3RD, 1906.

WEEKLY COURT.

RE MUFFITT AND MULVIHILL.

Mortgage—Power of Sale—Notice of Exercising—Omission to Serve on Mortgagor and Wife—Conveyance of Equity of Redemption—Vendor and Purchaser—Objection to Title.

Motion by Charles Muffitt, vendor, for an order under the Vendors and Purchasers Act, declaring that the objection to the title of the vendor to certain lands in the city of Toronto made by the purchaser, on the ground that notice of exercising the power of sale contained in a mortgage drawn in pursuance of the Short Forms Act, should be served on the mortgagor and on his wife, notwithstanding the fact that the mortgagor had parted with his equity of redemption, and his wife released her dower to the purchaser of the equity, did not constitute a valid objection to the title.

W. B. Milliken, for vendor.

M. H. Ludwig, for purchaser.

TEETZEL, J.:— . . . I think the omission to serve notice of exercising the power of sale upon the mortgagor and his wife is no objection to the vendor's title. Both joined in a conveyance of all their interest in the equity of redemption before the mortgagee began proceedings under the power of sale. Irrespective of such conveyance, Re Martin and Merritt, 3 O. L. R. 284, decides that the mortgagor's wife need not be notified. That case and Re Abbott and Medcalf, 20 O. R. 299, are authorities for the proposition that the question upon whom the notice is to be served is to be determined according to the circumstances existing at the time notice is given. When the notice was given in this case the mortgagor had no interest whatever in the equity of redemption. By the conveyance he conveyed all his estate to the grantee, who then became entitled to all the rights incident to the equity of redemption, including the right of the mortgagor to notice of the mortgagee's intention to exercise his power of sale. To obtain title by foreclosure the

mortgagee would not in this case have been required to make the mortgagor a party: see Kinnaird v. Trollope, 39 Ch. D. 636, 642.

Declaration will be that the purchaser's objection is invalid.

MABEE, J. OCTOBER 4TH, 1906.

TRIAL.

CANADIAN PACIFIC R. W. CO. v. CITY OF TORONTO.

Railway—Protection of Public at Highway Crossings—Gates and Watchmen — Liability of Municipality — Orders of Railway Committee of Privy Council and Board of Railway Commissioners—Acquiescence.

Action to recover from defendants $4,677.11, being the proportion that it was alleged defendants were liable to pay towards the maintenance of gates, etc., of certain city streets crossed by plaintiffs' line of railway.

Angus MacMurchy, for plaintiffs.

J. S. Fullerton, K.C., for defendants.

MABEE, J.:—The liability arises under orders of the Railway Committe of the Privy Council, dated 8th January, 1891, and 16th December, 1893, both of which were made rules of Court on 28th February, 1895. Plaintiffs provided the gates and watchmen as ordered, and rendered defendants from time to time proper accounts of the expenses connected with their compliance with these orders, and defendants paid their share each year, pursuant to the orders, down to 31st December, 1901, since which date they have paid nothing, although accounts were regularly rendered.

Defendants plead that the streets in question were highways prior to the construction of plaintiffs' line of railway; that the Railway Committee had no authority or jurisdiction to order or direct defendants to pay any portion of the cost of protecting such crossings; and that these orders are not binding upon defendants. It is also pleaded that the clause or clauses of the Railway Act purporting to give the Committee power to make orders such as those in question, are

ultra vires of the Parliament of Canada, and the notices provided for by sec. 60 of the Judicature Act were duly served. In the 6th paragraph of the statement of defence it is alleged that the Bathurst street and Dufferin street crossings are not witnin the municipality of the city of Toronto, and the Avenue road crossing was not within the municipality of the city of Toronto until 10th March, 1905.

The following admissions were signed by counsel:

1. The line of the Canadian Pacific Railway runs along part of the north limit of the city of Toronto, and at its intersection with Dufferin and Bathurst streets, mentioned in the orders of the Railway Committee in question in this action, the south limit of the railway lands is the north limit of the city of Toronto, and the protection ordered is upon a portion of the highway in the township of York. The intersection of the said line of railway with Avenue road was at the date of the said orders of the Railway Committee, and still is, wholly within the city of Toronto.

2. Dufferin and Bathurst streets and Avenue road run from south to north throught the city of Toronto or part thereof, and these continue northwards through the township of York and adjacent townships of the county of York, and are public roads or highways under the jurisdiction of and maintained by the different local municipalities in which the parts thereof respectively lie, that is to say, as to the parts in question here, by the township of York as to the Dufferin and Bathurst streets intersections, and by the city of Toronto as to Avenue road intersection.

3. Dufferin and Bathurst streets are highways laid out by the original Crown survey, and, with Avenue road, were all in existence as highways prior to the construction of the plaintiffs' railway.

4-5. Accounts have been rendered, as stated in the 6th paragraph of the statement of claim, the amount of which is not disputed, and the said accounts are unpaid at this date. Of the said accounts the amount of $2,135.65 relates to the Avenue road crossing, the amount of $1,261.65 to the Bathurst street crossing, and the amount of $1,279.81 to the Dufferin street crossing.

No evidence was given upon the hearing, and by consent a brief was handed in subsequent to the trial shewing vari-

ous applications made to the Railway Committee and to the Board of Railway Commissioners in conection with these orders. The fact that defendants adopted or acquiesced in these orders by making payments for several years, does not expressly appear in the signed admissions, but it was alleged by counsel during argument, and not denied, that defendants had paid all the sums claimed by plaintiffs as payable by them from the date of the orders down to 31st December, 1901. In 1904 the township of York (that municipality being a party to the orders of 8th January, 1891, and 16th December, 1893), made an application to the Board of Railway Commissioners to rescind or vary the foregoing order; all parties concerned appeared, and the matter was argued at great length. This application was, on 16th May, 1906, dismissed, and the order dismissing that application was made a rule of the High Court on 19th May, 1906.

I am of opinion that defendants are concluded by authority upon all the points raised by them as reasons why they should not continue paying under these orders—indeed it was arranged at the hearing that I should delay judgment until the defendants had an opportunity to move in the Privy Council for leave to appeal from the judgment of the Supreme Court in the Grand Trunk case, which motion I am advised was made, but without success. Holding the opinion that the questions in issue have all been resolved against defendants, no good would be accomplished by an expression of my view upon these issues.

The cases governing are: Terrault v. Grand Trunk R. W. Co., 36 S. C. R. 671; Re Canadian Pacific R. W. Co. and County of York, 27 O. R. 559, 25 A. R. 65; Grand Trunk R. W. Co. v. City of Toronto, 4 O. W. R. 450, 6 O. W. R. 27; Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co., 7 O. W. R. 814.

There must be judgment in favour of plaintiffs for $4,677.11, together with interest from the date at which the various amounts were due and payable by defendants, with costs of suit.

CARTWRIGHT, MASTER. OCTOBER 5TH, 1906.

CHAMBERS.

HAMILTON v. HODGE.

Venue—Change—Convenience—Action to Set aside Tax Sale.

Motion by defendants to change the venue from Toronto to Port Arthur in an action to set aside a tax sale of lands in the district of Thunder Bay.

T. D. Delamere, K.C., for defendants.

J. W. Bain, for plaintiff.

THE MASTER:—The plaintiff has been for some time past out of the province, and has not been examined for discovery. His solicitor makes an affidavit that the only evidence that can be given by the defendants (sic) is documentary, and that the case has been on the peremptory list here three times. He does not say anything about his own witnesses, which, if it were necessary to rely on this ground, would seem to bring this case within the decision in Gardiner v. Beattie, 6 O. W. R. 975, affirmed on appeal, 7 O. W. R. 136. For the defendants say that it will be necessary for the trial of the action to call a majority at least (if not all) of the officers of the municipality, who are all residents of Thunder Bay; that all the records must be produced, and that some have been burnt at a recent fire, and must be supplemented by oral testimony. This seems to be very reasonable. In the converse case it would not be satisfactory to have an action to set aside a tax sale of land in Toronto tried at Port Arthur, just because the plaintiff was living there. Such cases as the present seem to come within the principle of McDonald v. Park (a motion to change the venue from Toronto to Chatham), 2 O. W. R. 812 and 972 (cited with approval in Saskatchewan Land and Homestead Co. v. Leadley, 9 O. L. R. 556, 5 O. W. R. 449). In affirming the order to change the venue in that case, Osler, J.A., said that "each case must be judged by its own facts, and that this was eminently a case for trial at Chatham."

In the present case the statement of claim alleges no less than 22 distinct irregularities in the actions and records of

the assessor, clerk, collector, and treasurer, at various dates, of the municipality, and further that "the said sale was not conducted in a fair, open, or proper manner." All this evidence is to be had, if at all, at Port Arthur. It is out of the question that plaintiff should be allowed to bring persons down at an expense of at least $50 or $60 each, and then seek to charge this large sum to the defendants if the action succeeds. Two of the defendants live at Port Arthur. The other resides at London, but is willing to have the venue changed.

This seems to me "eminently a case for trial at" Port Arthur, and the order will go with costs in the cause. There should be time enough before the 19th of next month to have the plaintiff examined and the case ready for trial.

MACMAHON, J. OCTOBER 6TH, 1906.

TRIAL.

HOGABOOM v. HILL.

Husband and Wife—Moneys Borrowed on Insurance Policy on Life of Husband of which Wife is Beneficiary—Separate Property of Wife—Business of Wife—Interest of Husband — Moneys Derived from Business — Execution against Husband as Member of Partnership—Property Liable to Satisfy Execution — Declaratory Judgment—Inquiry—Reference—Costs.

Action by the executors of the will of George R. Hogaboom, deceased, against Byron John Hill, and his wife, Annie Kirkbride Hill, for a declaration that certain real estate and chattels standing in the name of the latter were really the property of the former and liable to satisfy the judgment and execution of plaintiffs against the former, or that he had an interest therein liable to execution, and for consequent relief.

I. F. Hellmuth, K.C., and W. N. Ferguson, for plaintiffs.

G. H. Kilmer, for defendants.

MACMAHON, J.:—In August, 1893, the testator George R. Hogaboom recovered a judgment for . . . $261 debt

and $32.59 costs against the firm of Hill & Weir (composed of defendant Byron John Hill and one Weir), then carrying on business in Toronto as printers. An execution against goods was issued on that judgment and returned by the sheriff nulla bona. Execution against lands was subsequently issued, which was renewed from time to time as required by law, the last renewal being on 18th July, 1905. . . .

In January, 1894, another judgment was recovered by Hogaboom against Hill & Weir for $1,490.96 debt and $25.24 costs. That judgment was set aside during the present year.

The firm of Hill & Weir got into financial difficulties in 1893, and were unable to continue in business.

In 1892 defendant Byron J. Hill was married to Annie Kirkbride (co-defendant) without any marriage settlement. At the time of his marriage he held a policy of insurance on his life in the Ontario Mutual Life Ins. Co., on which he had in January, 1890, borrowed $950. After his marriage he, by indorsement on the policy, named his wife as beneficiary thereunder. As Hill was not in a position to go into business on his own account, his wife on 17th January, 1894, obtained a loan of $654.15 from the insurance company on the policy, and with this money commenced a printing business under the name of "The Hill Printing Company," of which her husband was the manager.

Byron J. Hill, just before his marriage, had furnished a house with the usual household furniture, and he and his wife went to live there immediately after their marriage. On 18th January, 1894, Mrs. Hill mortgaged the household furniture to her mother, Elizabeth Kirkbride, to secure payment of a loan of $300 with interest at 7 per cent., repayable at the expiration of 3 months. Although there was in the house at the time this mortgage was given a piano valued at $300 belonging to Mrs. Hill—a gift to her by a relative—it is not specifically mentioned in the mortgage.

The $300 said to have been received from Mrs. Kirkbride was put into the business which Mrs. Hill had started, but the amount does not appear to have been credited in the bank where Mrs. Hill kept her account in the name of the Hill Printing Co., although the $654.15 received by her from the insurance company was credited therein on 16th February, 1894.

It is, I consider, clear that the $654.15 borrowed from the insurance company was Mrs. Hill's own money, she being the beneficiary named by the indorsement on the policy. According to the rules of the insurance company, where a beneficiary not named in the policy desires to obtain a loan from the company on the security of the policy, the beneficiary and the insured are required to make a joint application for the loan; and the cheque issued by the insurance company was made payable jointly to Hill and his wife; but, as I have said, the money was her separate property, and was put into the business of the Hill Printing Co.

The $300 obtained on the chattel mortgage stands, I think, in a totally different position. The furniture belonged to Hill; his wife had no right to mortgage it; and the husband seems to have been a party to obtaining this loan from his mother-in-law for the purpose of putting it into the business, which he says was his wife's. Although it does not appear from the books what became of this $300, according to the statement of both defendants it went into the business; and, as the property forming the security for the money advanced was Byron J. Hill's property, it must be regarded as having been put into the business by him, and he, therefore, has a proprietary interest in the business. I think his conduct during his management of the business shews that he considered that he had an interest in it, because he paid off several small liabilities of the old partnership of Hill & Weir. If I am correct in the conclusion that he had a proprietary interest in the business, then the house in Lowther avenue, purchased from the Canada Permanent Mortgage Corporation, being paid for by monthly instalments out of the business of the Hill Printing Co., his interest therein must be held liable to satisfy plaintiffs' execution.

Another matter indicating that Mrs. Hill was using her husband's property presumably in connection with the printing business, is shewn in connection with the giving by her of a mortgage on the contents of a livery stable of which he was the owner, the livery business being carried on in Yonge street, in the city of Toronto. On 25th October, 1894, the whole of the livery outfit, consisting (amongst other things) of a cab, a brougham, one coupé, a top carriage, 2 buggies, 5 sleighs, cutters, cabs, 6 horses, fur and other coats, robes, harness, etc., were mortgaged by Mrs. Hill to the Imperial Loan Co. to secure the repayment of $346.60 with interest

at 7 per cent. . . . Mrs. Hill said her husband had told her of the existence of the livery business, but she did not remember the occasion of giving the mortgage, or what became of the money borrowed from the loan company. Hill was not examined as to the destination of the money.

Counsel for defendants urged that on an execution against the firm of Hill & Weir, a levy could not be made on the goods and chattels of one of the partners to satisfy the firm's debts. Under the Bankruptcy Acts a creditor of a bankrupt firm cannot rank against the separate estate of a member until the member's creditors have been paid in full. But no such condition exists here, and plaintiffs, having an execution against the firm of Hill & Weir, can realize out of the separate estate of any member composing it.

I direct judgment to be entered (1) declaring that defendants Byron John Hill and Annie Kirkbride Hill are respectively interested in the business of the Hill Printing Co. . . . and in the lands and premises on Lowther avenue, in the proportions in which they have respectively contributed to the moneys invested therein; (2) declaring that the share of Byron J. Hill in such properties is liable to satisfy plaintiffs' claim; (3) directing a reference to the Master in Ordinary to ascertain the interest of defendant Byron John Hill in the said business and property, having regard to the declaration aforesaid, and to sell the same, and directing the purchase money to be paid into Court, and all proper parties to join in conveyances, and directing the money paid into Court to be applied in payment of costs of action and then in payment of plaintiffs' claim. . . .; (4) also declaring that the goods and chattels put in the house in Lowther avenue . . . by Byron J. Hill are his property, and that the same (save such part thereof as is by law exempt from execution) are liable to satisfy plaintiffs' claim; (5) directing the Master to ascertain and state what portion of the said goods and chattels is liable to be sold in execution, and directing the same to be sold with the approbation of the said Master, and the proceeds to be paid into Court and applied in payment of plaintiffs' costs of sale, and then in payment of plaintiffs' claim and such part of the costs of the action as may not be recovered from defendants; (6) and ordering defendants to pay costs of action up to and including this judgment.

OCTOBER 6TH, 1906.

DIVISIONAL COURT.

RE GEROW AND TOWNSHIP OF PICKERING.

Municipal Corporations—Local Option By-law — Submission to Electors — Voting by Non-resident Tenants—Majority Procured by Bribery—Treating—Supporter of By-law Acting from Personal Motives—Extent of Treating—Influence upon Majority.

Appeal by the township corporation from order of MEREDITH, C.J., in Weekly Court, 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 in a vote of more than 1,200.

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

J. E. Farewell, K.C., and J. M. Godfrey, for the corporation.

E. E. A. DuVernet, for the applicant Gerow.

FALCONBRIDGE, C.J.:—The original notice of motion sets forth 12 grounds of objection to the by-law. All of these, save one, were technical in their nature, and Meredith, C.J., properly refused to give effect to any of them. He, however, thought that one branch of them was somewhat serious. It was alleged that a large number of tenants who were non-residents, and therefore not entitled to vote, cast their ballots. The evidence, he remarked, was not very satisfactory on this point, and it now appears that there were only 4 persons so disqualified who voted at this election, and we give the township leave to file the certificate of the clerk to this effect.

There remains, therefore, only one ground of objection to be considered in the present appeal, viz.: "10. The majority of the votes for the by-law was procured by bribery, corruption, and undue influence practised on the electors at said

election." It is evident that the draftsman had well in his mind the provisions of sec. 381 of the Consolidated Municipal Act, 1903, "Any by-law the passage of which has been procured through or by means of any violation of the provisions of sections 245 and 246 of this Act, shall be liable to be quashed. . . . ."

. . . . The Court must be satisfied that the violation of the sections referred to was the means of the passing of the by-law.

The particular offence charged is that of treating, which is not specifically mentioned in sec. 245 or 246. Meredith, C.J., has, however, manifestly regarded treating as a form of bribery or undue influence, and therefore within the mischief aimed at by the statute.

The person whose alleged lawless acts have caused the trouble is one W. E. Vanstone, and there is no pretence that he was an agent of those who were supporting or promoting the passage of the by-law in question, which is a local option by-law. Vanstone is neither in principle nor in practice what is known as a "temperance man" (i.e., total abstainer as distinguished from a temperate man). On the contrary, in the pursuit of his ordinary business, which is that of a drover, he spends money "a little all the time" in drinks and treating. His custom is, "we" (he and "the boys") "generally have a drink when we can get any place handy." He admits that the temperance party probably looked at him askance as being a "whisky man." He does not claim to have supported the by-law on account of any principle involved, nor from any desire to suppress the traffic in liquor, but in order to "get even" with a local publican who had ordered him out of his hotel, and Vanstone accordingly tried to "put him out of business."

Thus is presented a very complete paradox. A temperance by-law is in question. This supporter is not a temperance man. And it is charged that he procured the passage of the by-law by corrupt methods, which are not supposed to be those of temperance people.

The whole case is in Vanstone's evidence. He is manifestly quite willing to pose as one who "went out to win" the election, and won. But he does not prove any condition of general drunkenness throughout the township so as

to produce obvious demoralization to an extent which might influence the election: The Tamworth Case, 1 O'M. & H. 85. On the contrary, there is no evidence of the treating of one elector, and no evidence of any intoxication.

The order appealed from must be set aside with costs here and below.

BRITTON, J., gave written reasons for the same conclusion, referring to The Bradford Case, 1 O'M. & H. at pp. 39, 40, 41; The Drogheda Case, ib. at p. 259.

CLUTE, J. also concurred.