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CARTWRIGHT, MASTER. APRIL 9TH, 1906.

CHAMBERS.

YOUNG v. HYSLOP.

Discovery—Inspection of Motor Car—Allegation of Uselessness.

This action was brought to recover $850 paid by plaintiff to defendants for a second-hand automobile, which plaintiff alleged was useless.

The defendants moved for an order under Rule 1096 allowing them to inspect the machine and take it apart in presence of their witnesses and if desired make trial of it.

A. Fasken, for defendants.

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

THE MASTER:—It appears that defendants' experts have on two or three occasions made examinations of the machine since its purchase. On the last of these inspections there was "a complete overhauling of it." . . . Since that time plaintiff only took it out once. The result, he says, was so unsatisfactory that he has never taken it out since.

Plaintiff's examination for discovery was taken on 10th March, so that defendants then knew the position taken by him. It was not until 3 weeks later that this motion was launched. As the assizes commence on the 17th instant it may not be easy to agree on a time convenient to both parties.

In King v. Toronto R. W. Co., 7 O. W. R. 37, an order was made allowing plaintiff to inspect defendants' car, because the plaintiff might derive some assistance therefrom. For the same reason it seems better to allow defendants in this case to make a further examination and trial of their automobile, if they really wish to do so, and expect to be aided thereby.

In cases of this kind their business reputation is to some extent at stake. In view of the satisfaction expressed by plaintiff at first, and the subsequent history of the machine, I have finally decided that it is more in accordance with justice to grant the motion than to refuse it.

I have not been wholly free from doubt. I think, however, that each case must be determined solely on its own facts, and that here the order should be made.

The costs will be in the cause of the motion; those of the examination will be dealt with on taxation unless disposed of by the trial Judge.

BRITTON, J. APRIL 9TH, 1904.

TRIAL.

JOSEPH v. ANDERSON.

Specific Performance—Agreement for Lease—Rent to be Fixed by Percentage on Cost of Building to be Erected—Amount of Rent—Consent of Lessees to Extra Cost of Building—Architect—Burden of Proof.

Action to compel specific performance by defendants of their part of an agreement made between the parties, dated 5th August, 1904.

I. F. Hellmuth, K.C., for plaintiffs.

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

BRITTON, J.:—The plaintiffs, other than Elizabeth Joseph, are, as trustees under the will of the late H. A. Joseph, owners of premises No. 76 on the west side of Bay street in Toronto. Their building was destroyed in the great fire of 1904. Plaintiffs desired to rebuild, and, for

any satisfactory tenant, were willing to erect a substantial building such as would be valuable for business purposes, and could be erected at a comparatively moderate expense. Plaintiffs and defendants commenced negotiations in the summer of 1904, at a time when there were no plans or specifications prepared for any building upon the land in question, but there were plans, more or less complete, for a building upon land immediately to the north. This building was spoken of as of the same size, and it was suggested that changes could be made in the proposed building to suit. In the result, an agreement was arrived at, reduced to writing, and signed by the parties early in October, 1904. What preceded the written agreement is material, in view of the particular dispute which has arisen between the parties. Plaintiffs understood that defendants wanted a building, and with a view to negotiating obtained from their architects a letter dated 13th August, 1904, stating that a 4-storey and basement building would cost $18,000, and a 5-storey and basement would cost $22,000. The architects then suggested to plaintiffs, irrespective of building for any person any special edifice, going down with their party walls an additional depth of 2 feet beyond the then present depth, and thus get the advantage of a "higher cellar."

On 15th August plaintiffs' solicitors wrote to the architects agreeing to the suggestion about going deeper with party walls, and say they think the price for building "rather high," but they will submit the estimate to Anderson and MacBeth (the defendants), and on the same day plaintiffs' solicitors did write to defendants as to the cost of a building. . . . On 20th August plaintiffs' solicitors had prepared and submitted to defendants a memorandum of agreement for lease. On 26th August plaintiffs' solicitors wrote again to defendants suggesting restrictions as to sub-letting. On 8th September plaintiffs' solicitors pressed for return of agreement, and on the same day defendants' solicitors returned draft agreement, objecting to it and suggesting changes. On 9th September plaintiffs' solicitors wrote refusing to agree to $21,000 as limit of cost. On 12th September . . . plaintiffs' architects by letter asked defendants for particulars as to requirements of building . . . and on this letter, in pencil, is what must be considered as defendants' reply. . . . On 28th September plaintiffs' solicitors sent to defendants' solicitors the draft agreement

as finally revised and completed, and apparently as afterwards signed. The building was then so far under way as to be above the joists of the first floor. . . .

The agreement was signed after 28th September, 1904. Plaintiffs agreed to erect a 5-storey and basement warehouse and office building in accordance with plans to be prepared by plaintiffs' architects to the satisfaction of both parties; the building to be in accordance with city by-laws, to be laid out and furnished in such manner, with the approval of plaintiffs, as is desired by defendants. . . . Plaintiffs were to proceed rapidly, complete with despatch, and rent to defendants for 5 years from date of completion. Defendants agreed to occupy when completed and to pay a rental upon the following basis: 4 per cent. on value of land, fixed at $10,800; and 8 per cent. on total cost of construction, excavations, and architects' fees, as certified to by the architects; and to pay taxes; and a lease was to be entered into in accordance with that agreement. Then a special, and apparently a controlling, clause was inserted, that the building to be erected should be finished in as plain a manner as consistent with ordinary wear and tear and the uses for which it was intended, "the desire of both parties being to give the party of the second part the greatest amount of accommodation possible consistent with building a substantial, safe structure, with the approval of the parties of the first part, and in accordance with the requirements of the city by-laws and the needs of the party of the second part. The parties of the first part agree that they will not expend or authorize the expenditure upon the said building of a greater sum than $21,000, without the consent of the party of the second part."

The building has been completed and at a cost greatly in excess of the $21,000 named, and plaintiffs say they are entitled to get from defendants rent, so far as rent is governed by cost of construction, at the rate of 8 per cent. upon $32,459.10.

Upon the evidence I find that plaintiffs and defendants are acting in perfect good faith, and have been all through in this matter. Plaintiffs have erected a building, at great expense, apparently admirably adapted for the purpose desired by defendants, but plaintiffs have, beyond question, been greatly misled or not kept fully advised by their architects. Plaintiffs were the builders. The architects were in

the employ of and responsible to plaintiffs. Plaintiffs supposed they could rely and did rely upon the architects, and it seems a most extraordinary thing that, after the estimate of $20,500 and the additional allowance of $500 as an outside limit of cost, the architects should, without the fullest knowledge and clearest understanding on the part of both plaintiffs and defendants, have caused an expenditure by plaintiffs of $32,459.10.

Plaintiffs' contention is, that, upon the true construction of the agreement, they are entitled to 8 per cent. upon the actual cost of the building, etc., and that defendants must either accept the lease at the rental so fixed or refuse it, and, if they have any claim for damages, assert it by suit upon plaintiffs' covenant to erect a building at a cost not to exceed the $21,000, and to lease such building to defendants. I do not agree with this. The covenants are not, within the meaning of plaintiffs' contention, independent covenants. The agreement must be considered as a whole, and it is to lease the building to be erected, and when completed, to defendants. Defendants are entitled to occupy the building and to have a lease of it, and the question is as to the rent defendants should pay. This question of rent should be determined in the present action, and, if the pleadings require any amendment to define the issue, such amendment should be made. It would not be in accordance with present day practice to send defendants out of Court without the building and to have them told that their remedy is to look for damages sustained by reason of their not getting the premises at the rental stipulated for.

Upon what amount, as the cost of construction, should defendants pay the 8 per cent. as part of the rental, within the true intent and meaning of this agreement? . . . The architects say, taking the figures as approximate, that the total cost was $32,459.10, and they mention items of extras amounting to $7,400, leaving $25,059.10, or an excess of $4,059.10 above the $21,000. In order to bind defendants to pay percentage as rental upon any greater sum than $21,000, they must have known of and consented to such excess-expenditure, and the burden of shewing this is upon plaintiffs. . . .

I find, on the evidence, that on no part of this $4,059.10, except on a part of the architects' fees, . . . should defendants be charged the 8 per cent. As to no part of this

sum of $4,059.10 were defendants asked to consent, nor did they consent in any such way as was intended to make them liable or as did make them liable under the agreement. . .

The amount on which the 8 per cent. should be computed I find to be $25,761.75. . . .

Defendants' rent will, therefore, be 4 per cent. on land, $10,800, that is, $432.00; 8 per cent. on building, $25,761.75, that is, $2,060.94; in all, $2,492.94.

Judgment declaring that plaintiffs are not entitled to have specific performance of the agreement by defendants paying or agreeing to pay as rent $3,028.70 yearly, payable quarterly in advance; that defendants are entitled to possession and to a lease from plaintiffs with rent reserved at $2,492.94 a year, payable quarterly in advance; and directing payment by defendants to plaintiffs of rent from 1st April, 1905, at the rate of $2,492.54 a year, with interest at 5 per cent. from due dates. No costs.

BOYD, C. APRIL 9TH, 1906.

TRIAL.

SMITH v. SMITH.

Will—Interest in Partnership—Trustees under Will—Sale of Partnership Interest to Surviving Partners—Discretion of Trustee—Adequacy of Price—Goodwill—Beneficiaries under Will—Attack on Sale—Account—Costs.

Action by the widow of John B. Smith and her children (all but one) against Robert Jaffray and W. J. Smith, two of the executors of John B. Smith's will, and others.

The testator died on 7th March, 1894. His will was dated 25th August, 1893. Probate issued on 4th December, 1894, to Robert Jaffray, William Jaffray Smith, and Francis A. Smith, the executors.

The testator was married 3 times. The issue of the first marriage was an only son. The second wife had 3 sons and 3 daughters, who, with the eldest son and the executors and one of the children of the widow, were the individual defendants in the action. An incorporated company was organized to carry on the business conducted by the testator in his lifetime.

By his will the testator devised all his estate to his 3 executors. His 3 elder sons had been taken into the business some years before his death, and by his will (clause 8) he directed that, "as my son James has been long connected with the business . . . Robert Jaffray shall be satisfied what is one-ninth of my estate, and such one-ninth shall be placed to his credit in the business, and I desire that he be admitted as a partner in it." He then dealt with the rest of his estate, directing that one-half of the income was to be divided among his children (other than the 4 sons in the business), and the remaining half to go to his widow. After her death the principal was to be divided among his children, except the 4 sons already named.

By the 12th clause the testator provided as follows: "In all cases where any question may arise as to the intention or construction of this will, or under the carrying out of the trust, such question shall be decided by Robert Jaffray, whose decision shall be absolute, uncontrolled, and final."

In September, 1903, it was decided that the interest of the estate in the business could be safely withdrawn; and an agreement to that effect was drawn up, fixing the share of the estate at $40,000. This plaintiffs would not accept without further information, which was not given to such an extent as to satisfy plaintiffs, who thereupon requested inspection of the partnership books. This defendants refused to permit.

Before this, and some time in 1902, defendant Jaffray, assuming to act under the power given in the 12th clause of the will, had agreed to transfer the interest of the estate to the partnership for $40,000. This was after the passing of the executors' accounts before the Surrogate Judge on 3rd November, 1902, when he found the capital of the estate in the business to be $26,000.

This action was brought to have the interest of the estate in the business ascertained, and the transfer for $40,000 set aside, and for a declaration that plaintiffs were entitled to follow the assets of the business into the hands of the company into which the business was changed after the transfer.

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

W. Cassels, K.C., for defendants Jaffray and W. J. Smith.

E. E. A. Du Vernet, for the other defendants.

BOYD, C.:—Under the provisions of the will the members of the continued partnership, of whom the trustees of the will formed a part, agreed in 1902 that the time had come when the share of the capital held as of the testator's estate might be safely withdrawn. This method of stopping the partnership business was also in conformity with the stipulation made in the memorandum of agreement entered into by the three sons who had been the father's partners before his death, as evidenced in the writing indorsed on the original partnership agreement, viz., to carry on the business after the father's death for 10 years or for such shorter term "as may be necessary to enable his capital to be withdrawn without injury to the business." That appears to be the controlling idea, to realize on the father's share as soon and as safely as possible, in order that the business (divested of such share) might be carried on by the sons alone. No doubt, the will indicates an alternative, either to withdraw the father's capital after his death, when it might be safely done, or to turn the whole concern into a joint stock company. The latter alternative given by the will was not adopted by the partnership and by the trustees under the will, and I do not think it is open for the beneficiaries under the will to seek to control the action of the trustees and the partners. All those immediately interested, that is, the body of partners and trustees, agreed upon the proper course, and they were competent to end the partnership, in the way proposed, by the withdrawal of the father's share. If wrong has been done in this respect, the right of complaint is to be exercised by action against the trustees for dealing improperly with that share of the estate in the partnership of which they were trustees. And such is not the frame or scope of this action—which is to follow the partnership assets into the hands of all the partners, as if there had been no stop put to the partnership as continued after the death of the testator. That method of relief I do not think to be open after the transaction by which the share of the estate was valued and withdrawn for the separate benefit of the beneficiaries.

One of the main matters discussed was the right of the partners and trustees of the estate to agree that a lump sum of $96,000 should be charged against all the partnership assets at the date of withdrawal, or rather at the date when the executors' accounts were passed by the Surrogate Judge—of which the proper proportion of $27,000 was attributed

to and deducted from the share of the estate in the partnership assets. It was a proper thing to bring in this item in order to obtain the correct conclusion as to the financial position of the estate, according to the holding in Kline v. Kline, 3 Ch. Ch. 137.

But the contest arises in this, that by the terms of the original partnership (article 8) it was provided: "The partners shall be entitled to draw out of the business for living expenses as follows: J. B. Smith (father) $2,000, J. M. Smith $700, R. Smith $700, and W. J. Smith $700, but such drawings shall be charged against them individually in ascertaining the profits." And by articles 15 and 16 provision is made for the preparation yearly of a balance sheet, and thereafter "such portion of the profits of the year shall be carried to the credit of each partner as shall be deemed prudent after making all proper allowances for outstanding liabilities." By article 5 it was provided that the interest of the parties in the assets and the profits should be three-eighths to the father and to the 3 sons five-eighths in equal shares.

It may be assumed that the drawings mentioned in article 8 were for each year, though it is not so specified. There was no ascertainment or division of profits by the partners before or after the father's death, and there were none to divide when the father died, but rather it may fairly be said that the estate was practically insolvent. The great gains were made afterwards through the management of the continued partnership by the sons and trustees. Then at the time of ascertainment of the interest of the estate for the Surrogate Judge, the accumulated profits realized were divided by the due apportionment of the lump sum covering the 8 years' business—averaging $12,000 for each year to the 4 active partners.

This, it is contended, cannot be done, for the agreement of August, 1893, and of January, 1895, was to continue the business upon the terms contained in the articles, or as expounded in the later agreement of January, 1895, "the parties hereto shall be interested in the firm subject to the terms and conditions contained in the original articles of partnership as nearly as possible, until the execution of more formal articles." (None such were afterwards entered into.) It is evident that the personnel of the firm was entirely changed by the death; the father, who drew the large portion of

$2,000, was gone, and his estate (representing three-eighths minus one-ninth of the assets) was in the hands of trustees, who, though partners, were as such not active and drew nothing from the business. One of the trustees, the son W. J. Smith, and his two brothers, the old partners, and the new partner the son James, were undoubtedly the managing and working body of the firm, through whose business aptitude and energy and hard work the business was reclaimed from comparative insolvency into a flourishing and valuable property. The conditions as to compensation were changed, and it does not appear at all unreasonable or incompatible with the meaning of the writings, under the new state of affairs, to hold that proper salaries should be conceded and paid to the men who, on the evidence, built up the concern to a prosperous condition when the capital of the estate might be safely withdrawn. It would seem to be a very one-sided arrangement to charge all the salaries against the share of the profits of the working members, and allow the share of the estate to be increased all these years by the aggregate gains, without contributing its proper proportion to this reasonable and even necessary outlay. That appears to be the contention for the estate, but the agreement as to the payment of the salaries out of the gross returns, pursuant to the understanding which existed from the first among the partners and trustees, is more equitable and not in violation of any term of the articles, reasonably construed. I do not think it was seriously contended that the amount allowed per annum was in any degree immoderate for the services rendered throughout the period of 8 years.

Upon the basis given above as to the change of salaries, the Surrogate Judge audited the account, making out that the amount in money coming to the testator's estate for its share was $55,000.

The next and last main matter of contention was that the acquisition and purchase of the share by the sons at the price of $40,000 in cash or its equivalent was an improper and unjustifiable sale. The deduction was arrived at by a system of reducing values of various properties and assets by a skilled accountant employed by Mr. Jaffray to give him guidance on points wherein he desired information. No ignorance of the situation of affairs or improvidence in the adjustment of values appears to be made out, such as might involve or suggest the want of good faith. The estate was

in urgent need of money to meet pressing mortgages and outlays for repairs, and to realize at a fair value seemed, in his judgment, best for both partnership and estate. Mr. Cross stated that a shrinkage of 30 per cent. in estimated values of the assets of a going concern in order to turn them into cash would be a usual diminution, and by that test the estimated value of $55,000 would be brought down to $38,-500 cash. But again, at this point I repeat that if the sale of the share of the estate in the partnership was an unfair and improvident thing—that is a matter for direct attack upon the trustees to make them recoup what has been thus lost to the estate.

I have, however, gone over the salient points of the case because it has been so long and earnestly argued and so much evidence given to impeach what has been done in respect to the two matters in the handling and disposing of the share of the estate in the partnership. Looked at in the large, the doubtful value of the nominal interest in the estate at the time of the testator's death represented by the figures $26,000, has become a solid amount of $40,000, besides which the family has received during the currency of the business some $29,000. . . .

No charge has been made by the trustees for the management of the estate, nor has any commission been allowed, and they say that no such claim will be made if the accounts are left as they are. On the whole practical aspect of the case, it does not appear to me expedient to open up the account unless some rule of law constrains this to be done, and to the law I will shortly address myself.

The testator knew the condition of his own affairs when he made his will; he knew the dual character with which Mr. Jaffray would be invested, as executor and trustee and also partner, and he chose to place implicit reliance in him to deal with and dispose of the various points of difficulty which might arise in the administration and the settlement of his estate. In case of dispute in any way connected with the furniture or chattels or money, or the ownership, value, or the division, such dispute was to be left to the final decision of Mr. Jaffray: paragraph 4 of will. So it was left to him to say and be satisfied with what was to be one-ninth of the estate in order that such ninth might be placed to James Smith's credit in the business: paragraph 8.

So in the larger paragraph 12: "In all cases when any question may arise as to the intention or construction of this will—or under the carrying out of the trust—such question shall be decided by Robert Jaffray, whose decision shall be absolute, uncontrolled, and final."

The like words have been construed by the House of Lords in Gisborne v. Gisborne, 2 App. Cas. 305, to this effect, that the power and authority are to be exercised according to the judgment and discretion of the trustee as quasi-arbiter, without check or control from any superior tribunal or the Court, provided always that there is no mala fides with regard to its exercise. And such an imputation has not been made upon the record in this case, and it is not in issue.

The fact that the person selected has an interest known to the testator will not differ the case, for a person interested may still exercise an upright and honest judgment in the affairs intrusted to him: see . . . 2 App. Cas. at p. 310. This was approved . . . in Re Schneider, 22 Times L. R. 223. Mr. Jaffray had the power to say what was the intention of the will as to whether the time had come to safely act in respect of the estate's share of the capital, and to determine that it should be withdrawn when and as it was, and so secured for the separate benefit of the cestuis que trust. So it appears to be within the meaning and scope of the power intrusted that he should be able to settle the question in the partnership as to whether its terms should be so construed as to allow salaries to the surviving and active partners. This is a case in which the observations of Sir James Wigram in Webster v. Bray, 7 Hare 178, may be pertinent. . . . Mr. Jaffray, not being fettered by rules of strict law (even if they be applicable to the situation, which I do not find), may yet rightly rule that the salaries should be paid out of the gross profits, as was done: Airey v. Borham, 29 Beav. 620; Re Aldrich, [1894] 2 Ch. 97.

It is objected in one of the minor details that no value was put upon the goodwill, on the sale of the outgoing estate to the other partners. But it was not contemplated by the testator that there should be a winding-up of the business and a total realization of all the partnership assets. The estate was to withdraw its share on a fair valuation, leaving the goodwill as the asset of the continuing business. It may well be said that the goodwill was attributable to the

exertions of the surviving partners, and not to the capital put in by the estate; and so there was no goodwill to be valued: Page v. Ratcliff, 75 L. T. R. 373 (1896); Smith v. Nelson, 92 L. T. J. 316 (1905).

I do not pursue other matters discussed, upon which there may be a difference of opinion as to values, such as the timber limit and the Angus property and the city leasehold—as to the exact tenure of which in the way of renewal no distinct evidence was given. I think there was an exercise of judgment and discretion in regard to each and all of these matters by the trustee, which exempts his conclusions from being examinable by the Court. See Nunn v. Viger, 187 Mass. 27; Armstrong v. Wilson, 42 Sch. L. R. 286; and Sutherland v. Wick, ib. 313.

I see no other course to adopt but to dismiss the action, but I do so without costs, because there was not before litigation and at an early stage of the inquiry such frank and full disclosure of the details of the composition of the accounts laid before the Surrogate Judge as the situation called for. . . . The executors will get their costs out of the estate; the firm and company will bear their own costs.

APRIL 9TH, 1906.

DIVISIONAL COURT.

BOOTH v. CANADIAN PACIFIC R. W. CO.

Railway—Carriage of Horses—Negligence—Loss of Horses—Special Contract Exempting Carriers from Liability—Construction—Exclusion of Negligence—Findings of Jury—Proximate Cause of Loss—Avoidance of Loss by Reasonable Care of Plaintiff—Finding Against Evidence—New Trial.

Appeal by plaintiff from judgment of Judge of County Court of Carleton, in term, setting aside the judgment at the trial, on the findings of a jury, in favour of plaintiff, and dismissing the action, which was brought to recover damages for the loss of horses by negligence.

Plaintiff shipped at Ottawa by defendants' railway 14 horses, to be carried from Ottawa to Haileybury via North

Bay. When the car in which the horses were arrived at Haileybury, one horse was dead and one severely injured. The one horse died en route between North Bay and Haileybury. The line of railway between North Bay and Haileybury was not completed, but was in possession of and operated by defendant Macdonald. Negligence was charged against both defendants.

The questions submitted to and answered by the jury were as follows:—

1. Were defendants the railway company guilty of negligence in reference to the car-load of horses in question? A. Yes.

2. If so, in what did such negligence consist? A. In not having the car of horses at the Y of connecting line in time for the Friday morning train.

3. Was defendant Macdonald guilty of negligence? A. No.

4. Could plaintiff by the exercise of reasonable care and caution have avoided the accident? A. No.

Upon these findings the County Court Judge directed judgment for plaintiff against defendant company for $130 with costs, and for defendant Macdonald, dismissing the action as against him.

A motion was made in term by plaintiff for judgment against Macdonald, and a motion by defendant company for judgment dismissing the action. The same Judge dismissed plaintiff's motion, but granted defendant company's motion, and the action was wholly dismissed.

The Judge held that defendant company were exempt from liability for the particular damage proved by reason of the terms of the special contract under which the horses were shipped.

Plaintiff appealed, but only as against the defendant company.

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

W. E. Middleton, for plaintiff.

D'Arcy Scott, Ottawa, for defendant company.

ANGLIN, J.:—It seems unnecessary to consider the scope of the powers conferred by the Dominion Railway Act upon

the Board of Railway Commissioners, because, upon the true construction of the special contract ratified by the Board and set up by defendants the Canadian Pacific Railway Company in this action, it should be held that, however effective as to matters to which it applies, it does not cover negligence of the railway company or their servants: St. Mary's Creamery Co. v. Grand Trunk R. W. Co., 5 O. L. R. 742, 2 O. W. R. 328, 8 O. L. R. 1, 3 O. W. R. 472.

The ground upon which the County Court Judge, sitting in term, set aside the judgment in plaintiff's favour, which he had at the trial entered upon the findings of the jury, is, in my opinion, therefore, untenable.

But defendants urge that the findings of the jury are not warranted upon the evidence, and, if sustained, do not suffice to support a judgment in plaintiff's favour. The learned County Court Judge in term did not give effect to these contentions when pressed upon him, and, had plaintiff not been forced to come to this Court by reason of his judgment being set aside upon the other ground above alluded to, we could not have entertained a motion by defendants by way of appeal upon alleged insufficiency of evidence to warrant the jury's findings, or upon any insufficiency in the findings to set aside the original judgment in plaintiff's favour.

But, inasmuch as the case is in this Court upon plaintiff's appeal, all grounds urged by defendants against the restoration of the original judgment must be considered.

Counsel for defendants stated at bar that he had, before the case went to the jury, strongly urged the County Court Judge to submit specifically the question whether any negligence which might be found against defendants was the cause of the loss of plaintiff's horses. This was not done. The notes of the proceedings at the trial do not contain any allusion to such a request by defendants' counsel. It is difficult to account for the omission of anything so important. The recollection of counsel has, however, been confirmed by a memorandum of the County Court Judge. In view of the pointed decision of a Divisional Court in Hillyer v. Wilkinson Plow Co., 9 O. L. R. 711, 5 O. W. R. 748, which was brought to the attention of the Judge, it is somewhat surprising to find that counsel's request was not acceded to. The result is a finding by the jury of certain negligence on the part of defendants, but no explicit finding that such negligence was the real cause of the death of plaintiff's horses.

Upon looking at the charge of the Judge, it is manifest that he was careful, more than once, to tell the jury that negligence of defendants would not suffice to give plaintiff a cause of action, unless the injury sustained by him was directly attributable to such negligence; and, in discussing with the jury the acts of negligence charged against defendants, the learned Judge always dwells upon their possible or probable effects upon plaintiff's horses. Then, in dealing with the question, "Were defendants the Canadian Pacific Railway Company guilty of negligence in reference to the car-load of horses in question?" the Judge said: "If you find there was negligence on the part of the railway company causing this injury to Mr. Booth's horses, you will answer the first question, 'No.'" And again: "If you find there was negligence causing the injury to the horses, you will answer that question 'Yes.'"

These instructions distinguish this case from Hillyer v. Wilkinson Plow Co., and, though an explicit finding of causation by the jury would have been more satisfactory, read in the light of the charge the findings made must be taken to mean that defendants were guilty of negligence which caused the damage sustained by plaintiff. Were I free to pass upon the evidence now before us, as I might if sitting as a trial Judge without a jury, it is quite possible that I might reach a different conclusion. But it is, in my opinion, impossible, without unduly interfering with the functions of the jury, now to disturb their finding that defendants were negligent "in not delivering the car of horses at the 'Y' of the connecting line in time for the Friday morning train." Neither do I think it can be said that there was not some evidence that this was the cause of the injuries to the horses. Findings to the contrary would, I think, have been well warranted by the evidence, and, if made, could certainly not have been disturbed.

But the finding that plaintiff's servants could not by the exercise of reasonable care and caution have avoided the accident is, upon the admitted facts, most unsatisfactory. The charge upon this branch of the case was clear and explicit. That the duty of caring for the horses in transit was by the terms of the contract undertaken by plaintiff is indisputable. Plaintiff's evidence is that horses travelling should be rested for several hours after they have been en route for from 28 to 30 hours. To leave them without such rest for over 30 hours is by all his witnesses regarded as dangerous. This

car-load of horses had been, on the Friday morning, 36 hours en route, having left Ottawa on Wednesday evening. The horses had not been rested. The car was between 9 and 10 o'clock placed in the Canadian Pacific Railway stock yards at North Bay. Plaintiff's men knew it was to remain there for about 8 hours. They found it so placed that a manger, which plaintiff had caused to be put in the car, blocked the only convenient door for unloading the horses. They knew, or should have known and realized, the necessity for such unloading and rest. They knew that the car could not leave before the following morning for Haileybury, and that the journey to that point was over 100 miles of uncompleted railway, still operated by the construction contractors. They say they applied to the yard-master to have the car turned to permit of the unloading of the horses without removing the manger erected in the car, or some part of it, and were told this could not be done, and that they thereupon, rather than remove such manger or part of it, decided to leave the horses in the car, though they should have known—would certainly have learned had they inquired—that there would be no further opportunity to unload before reaching Haileybury on the following Saturday night or Sunday morning. There is a great deal of evidence—uncontradicted—that the removal of the manger, or of so much of it as might be necessary to permit of the unloading of the horses as the car stood, would have been easily accomplished and would at the most have taken half an hour. The horses could thus have at least 5 or 6 hours' rest in the Canadian Pacific Railway Company's stables, which stood empty and ready for them in the stock yard. But, as stated by Mr. Young, plaintiff's agent at North Bay, the men in charge for plaintiff—Patrick Carroll and Thomas Carroll—told him, when he asked if the horses should not be taken out, that "it was just as well to leave them in." Though the Carrolls themselves admit that the manger could have been removed in half an hour, they attempt to excuse their failure to unload by saying that "by the time we got that manger out we would not have time to take them (the horses) out." They also admit that they were at the car about 9 or 10 o'clock, and knew it was to remain at the stock yards for at least 7 hours. They say further that they did not think it worth while to take the horses out for that time. The evidence of the witness Bell—plaintiff's foreman in charge of the shipping of the horses—is that even

two hours' rest would have considerably improved the condition of the horses.

Upon the whole evidence it seems reasonably plain that the Carrolls failed to unload the horses solely because of the little difficulty caused by the manger blocking the door of the car, and shirked this plain duty to avoid the trouble of removing and replacing part of the manger. Had they done what appears to have been their obvious duty, the rest which the horses would thus have obtained would have largely, if not wholly, counteracted any ill effects attributable to the delay of the car in the Canadian Pacific Railway yards over the previous night.

The finding that plaintiff's servants could not by the exercise of any reasonable care and caution have avoided the consequences of the only negligence found against defendants seems therefore to be wholly unwarranted by the evidence. It must, I think, be set aside and a new trial ordered upon the whole case. Costs of the former trial and of this appeal should abide the result of such new trial.

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

BRITTON, J., also gave reasons in writing for the same conclusion, and cited Price v. Union Lighterage Co., [1903] 1 K. B. 750, [1904] 1 K. B. 412; The "Pearlmoor," [1904] P. 286; St. Mary's Creamery Co. v. Grand Trunk R. W. Co., 5 O. L. R. 742, 2 O. W. R. 328, 8 O. L. R. 1, 3 O. W. R. 472.

CARTWRIGHT, MASTER. APRIL 10TH, 1906.

CHAMBERS.

SMITH v. MATTHEWS.

Third Party Procedure—Indemnity or Relief over—Application to Bring in Third Party—Lateness of Application—Postponement of Trial.

Action by a farmer who sold grain to defendant's agents between 1898 and 1900, to recover the price. The agents were made parties by the writ of summons, but after appearance the action was discontinued as against them.

The defendant now moved to be allowed to serve a third party notice on them. He alleged that he supplied the

money to pay plaintiff, and that his agents said they did pay him.

The motion being made late (for sufficient reasons) and the action being on the list for trial, defendant also moved for a postponement of the trial.

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

J. E. Jones, for plaintiff.

THE MASTER:—As at present advised, I do not think it is open to plaintiff to object to the issue of the third party notice. But I would require further consideration before expressing a positive opinion on the point.

Assuming that plaintiff can be heard at this stage, I still think the order should go. It will not, however, be considered as res judicata as against the third parties.

Mr. Jones contended that this was not a case for any relief over to defendant as against his own agents. He argued that if plaintiff proved he had not been paid, then this might open the accounts between defendant and his agents, which were settled between them nearly 4 years ago. This, he said, shewed that there was no ground for third party procedure, under Miller v. Sarnia Gas Co., 2 O. L. R. 546, as, if the accounts were taken, there might be a larger balance shewn to be due to defendant. That, however, was an action of tort, and it might well be that the corporation, if liable to defendants, would have to pay damages which would be far in excess of what plaintiff might recover from the gas company.

Here the action is not of that character. The only issue as between plaintiff and defendant is payment or not. Defendant says he gave the money to his agents, and they represented to him that plaintiff had been paid.

In this state of affairs it seems that defendant has prima facie a right to relief over against his agents, within the terms of Rule 209, and is entitled to have them bound by the result of plaintiff's action against him as their principal. If plaintiff recovers anything against defendant, he will be entitled to judgment against them for that same amount on proof of his case as against them.

I refer to Wade v. Pakenham, 2 O. W. R. at p. 1185. I see no reason to recede from what I there said was the test of the proper application of the Rule, and I think this case comes within the right to "indemnity or other relief over."

The order will go as asked, and the trial must be postponed. As the last of the plaintiff's sales were made 5 years before action brought, he cannot complain of delay to enable defendant to meet a stale claim. The costs of this motion will be in the cause.

MEREDTIH, C.J. MARCH 30TH, 1906.

CHAMBERS.

REX EX REL. CAVERS v. KELLY.

Municipal Elections—Irregularities—Declarations of Qualification—Saving Clause of Statute—Compliance with Statute—Subscription—Commissioner.

Appeal by relator from order of Master in Chambers, ante 280, dismissing a motion to set aside the election of the defendants as mayor and councillors of the town of Oakville, upon the ground that the declarations of qualification made by defendants were invalid.

W. R. Riddell, K.C., and A. F. Lobb, for the relator.

W. E. Middleton and D. O. Cameron, for defendants.

MEREDTIH, C.J.:—I do not think that anything will be gained by further consideration of this matter. If I had any doubt at all, I would certainly reserve judgment, as my decision is final.

I have come to the clear conclusion that the amendment of sec. 129 of the Municipal Act is not to be read further than the provisions of the amendment expressly require it into sec. 311, and that sec. 315 of the Act is not applicable to the statutory declaration which the amendment requires to be taken.

It is plain that it was not intended to be a substitute for the declaration of qualification which a person elected or appointed to an office is, under the Municipal Act, required to take. If the legislature had intended that, they would have said that, in lieu of the declaration required by sec. 315 to be taken after election or appointment, the declaration for which it was providing should be taken.

By the very terms of sec. 311, its application is limited to a person elected or appointed to an office, and sec. 315 had reference in the original Act to the declaration of qualification which was required by sec. 311.

Then by the Act of 1904, sec. 129 was amended so as to provide that at the time mentioned in the section "a statutory declaration in accordance with the form contained in section 311 of this Act, or to the like effect, that he possesses the necessary qualification for office"—that is, that the candidate or person nominated shall file such a declaration, and that in default of his so doing he shall be deemed to have resigned.

My view is that that is something in addition to what was provided for by sec. 311, and that the reference to sec. 311 is only for the purpose of indicating the form in which the statement was to be made.

The provision that it is to be a statutory declaration, I think is important as indicating that it was to be a declaration of a well-known character made in accordance with the provisions of the Dominion Act and before the officers entitled under that Act to take such declarations.

It may be that it is hard that this gentleman, who obtained his seat by acclamation, should hold it when others, who did not know of the recent change which had been made, were prevented from becoming candidates owing to their having failed to make the necessary declaration. That, of course, must not be made an occasion of straining the law so as to meet a hard case. It must be left entirely to the conscience of the defendants as to the course they shall take when by this decision they are confirmed in their seats.

The appeal is dismissed with costs.

MARCH 12TH, 1906.

DIVISIONAL COURT.

WOOD v. LONDON STREET R. W. CO.

Damages—Trial without Jury — Finding of Judge — Action under Fatal Accidents Act—Expectation of Benefit—Nominal Damages—Dismissal of Action without Costs—Appeal.

Appeal by plaintiff from judgment of MEREDITH, C.J., at the trial, dispensing with a jury, and dismissing without costs an action under the Fatal Accidents Act to recover damages for the death of his son by the negligence of defendants. Defendants did not dispute the liability, but defended upon

the ground that plaintiff had no reasonable expectation of pecuniary benefit from the continuance of his son's life.

W. E. Middleton, for plaintiff.

I. F. Hellmuth, K.C., and C. H. Ivey, London, for defendants.

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

BOYD, C.:—Under Rule 110 the Judge at the trial may proceed to assess damages when that is the only matter to be disposed of (as in a case like the present, where defendants admitted liability for the death of the son), and his decision upon the evidence and credibility of witnesses should not be disturbed unless there has been clearly a miscarriage of justice. The expectations of the family from the son must have been slight at the highest, and it cannot be said that the Judge (as a jury) might not reasonably find that, in the circumstances of this case, there was no sufficient evidence to justify more than nominal damages. I think there was some evidence which could not have been withdrawn from a jury: Hetherington v. North Eastern R. W. Co., 9 Q. B. D. 160. But with a Judge alone, sitting as a jury, it was competent for him to disbelieve the witnesses or to consider that there was no reasonable expectation of any pecuniary benefit. A verdict for nominal damages is not to be given in these cases under the Act: Boulter v. Webster, 11 L. T. N. S. 598: and if no damage is proved to the satisfaction of the Judge, dismissal of the action is the proper course.

Appeal dismissed. No costs.

MABEE, J. APRIL 12TH, 1906.

CHAMBERS.

RE MCDERMOTT v. GRAND TRUNK R. W. CO.

Division Courts—Trial of Plaint by Jury—Motion for Nonsuit — Reservation till after Verdict — Jurisdiction of Judge—Indorsement of Verdict and Costs on Record—Inadvertence — Judgment—Execution — Stay — Prohibition.

Motion by plaintiff to prohibit proceedings under an order made by the Judge of the County Court of Simcoe on

20th March, 1906, in an action in the 1st Division Court in that county, staying proceedings until judgment should be given upon a pending motion for a nonsuit made at the trial, or until further order.

The action was tried with a jury on 2nd March, when, at the conclusion of plaintiff's case, counsel for defendants moved for a nonsuit, and the Judge certified that he then stated to defendants' counsel that he would allow the case to go to the jury, the witnesses all being present, and that he would hear the motion for a nonsuit in Chambers.

The defence was thereupon proceeded with, the motion not being renewed at the close of the case, and the jury answered certain questions submitted to them in plaintiff's favour, except one the answer to which was not, defendants contended, very clear, and also found a general verdict in favour of plaintiff, the parties agreeing that, if plaintiff was entitled to recover, the damages should be $60.

At the close of the trial the Judge indorsed upon the summons, "Verdict for plaintiff for $60, certificate for costs to plaintiff," and signed the memorandum.

Matters so stood until 20th March, when plaintiff caused execution to issue, and upon the same day the order in question was obtained, upon the application of defendants.

In fact, the motion for a nonsuit was never disposed of, and the Judge certified that the indorsement for costs was made inadvertently, and that at the moment he did not think of the undisposed of motion for a nonsuit, and had no intention of determining that motion without hearing the argument of plaintiff's counsel.

Plaintiff's counsel regarded the case as disposed of, and did not understand that there was to be any further argument, and, the Judge having given him the costs of the action, he believed the case was at an end, unless defendants moved for a new trial within the 14 days.

Upon the motion for prohibition, C. W. Plaxton, Barrie, for plaintiff, contended that there was no power, upon a Division Court trial with a jury, for the Judge to reserve a motion for a nonsuit, permitting the jury to pass upon the facts, the Judge still being seised of the case, and at some

convenient time after the trial dispose of the motion, irrespective of the findings of the jury, in so far only as they had no bearing on the reserved motion.

W. A. Boys, Barrie, for defendants, contra.

MABEE, J.:— . . . The practice adopted by the Judge is a convenient one, and I am unable to see anything in the Division Courts Act or Rules that prevents it being followed.

Then, did the indorsement upon the summons certifying costs to plaintiff dispose of the motion and deprive the trial Judge of jurisdiction over it? It is clear that he intended no such result. He has never adjudicated upon the motion made by defendants' counsel; he states that he expected to have the matter argued afterwards in Chambers. It may be that the motion for a nonsuit should succeed; as to this, of course, I say nothing, as I am in no way to be considered as dealing with the merits. But, assuming that the motion should succeed, plaintiff has got execution for a claim that was not adjudicated in his favour, and defendants have been deprived improperly of the right they had to have the judgment of the trial Judge upon the question as to whether the case should have been submitted to the jury at all.

Many cases were cited by counsel, but I am unable to find anything to prevent the trial Judge from yet disposing of this motion; and the order of 20th March I regard as one quite within his jurisdiction to make—it appearing to be intended to operate only until the motion is argued and disposed of.

It may also be . . . that no judgment should have been entered by the Division Court clerk upon the indorsement. The Judge recorded the verdict of the jury, which was proper for him to do, even had it been present to his mind that he had not disposed of the motion for a nonsuit; he did not direct judgment to be entered in favour of plaintiff, except by implication in giving him the costs of the action. . . .

Motion dismissed without costs.