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OCTOBER 31ST, 1903.

DIVISIONAL COURT.

STANDARD LIFE ASSURANCE CO. v. VILLAGE OF TWEED.

Correction.

In the report of this case, ante 922, it is stated that defendants appealed from the order of FERGUSON, J., ante 747, allowing an appeal from the order of the Master in Chambers, ante 731, and that the appeal was dismissed.

The statement is incorrect. The parties stated a case for the opinion of a Divisional Court, and it was upon the case so stated that the judgment reported ante 922 was given.

The question whether it was a proper case for a summary judgment was, therefore, not before the Divisional Court, who dealt with the merits of the case upon the facts as agreed upon by the parties.

BRITTON, J. NOVEMBER 14TH, 1903.

WEEKLY COURT.

RE PAKENHAM PORK PACKING CO.

Company—Winding-up—Action—Refusal of Leave to Proceed—Refusal of Leave to Appeal.

Motion by William Gorrell for leave to appeal from order of BRITTON, J. (ante 951), affirming order of McAndrew, Official Referee, dismissing application for leave to proceed

with action and counterclaim notwithstanding winding-up order.

George Bell, for applicant,

S. B. Woods, for liquidator.

BRITTON, J., held that no harm could happen to applicant by proceeding in accordance with order already made, while greater delay and more expense would necessarily result from an appeal. The action should not be allowed to proceed unless that is the only way open to applicant to get in his defence as set out in the statement of defence and counterclaim. Leave to appeal refused. No costs.

CARTWRIGHT, MASTER. NOVEMBER 16TH, 1903.

CHAMBERS.

STONE v. OTTAWA ELECTRIC CO.

Particulars—Statement of Claim—Action for Negligence—Defects in Electrical Appliances—Postponement till after Examinations for Discovery.

In August, 1903, the plaintiff's husband was instantly killed (as alleged in the statement of claim) by taking hold of an electric lamp, part of the service of the defendants.

It was further charged that the wires, conductors, and appliances were out of repair and without proper and sufficient insulation, and that the transformers and their appliances were also defective and out of repair and without proper insulation; by reason whereof an electric current of 2,000 volts was conducted to the aforesaid lamp.

The defendants demanded particulars of these alleged defects. None being given, a motion was made.

J. E. Jones, for defendants.

H. M. Mowat, K.C., for plaintiff, relied on the cases cited in Holmested & Langton, at p. 483, under heading of "Particulars not Ordered."

THE MASTER.—An examination of the authorities satisfies me that the defendants can safely plead to the statement of claim. They have only to traverse generally the allegation of the plaintiff and put her to proof thereof.

If at a later stage they are really in doubt as to what is going to be set up at the trial, and if, after the examinations for discovery, the matter is still left in doubt, they can renew

their motion. In the meantime it must be dismissed with costs to the plaintiff in the cause.

I would refer to my observations in Becker v. Dedrick, 2 O. W. R. 786, and Fuller v. Appleton, ib. 829, on the question of when particulars should be given, that each case must largely depend on its own facts. Here the matters can only be understood and explained by experts in electricity. The defendants themselves are more likely to know what, if any, defects existed than anyone else, though I admit that is not decisive.

MEREDITH, J. NOVEMBER 16TH, 1903.

TRIAL.

CRAIG v. BEARDMORE.

Sale of Goods—Property Passing—Loss of Goods—Default of Vendee—Action for Payment—Unconditional Contract for Sale of Specific Goods in Deliverable State—Postponment of Delivery and Payment—Construction of Contract—Intention of Parties.

Action for the price of goods sold, tried at Lindsay.

R. J. McLaughlin, K.C., for plaintiffs.

H. J. Scott, K.C., for defendants.

MEREDITH, J.—The plaintiffs confine their claim to one for money payable by defendants to them for goods bargained and sold by them to defendants. They do not claim in the alternative damages for breach of contract to buy; and the one question presented by them for consideration is whether the property in the goods passed to defendants at the time of the contract for the sale of them.

The contract is in writing. A general form, prepared and generally used by defendants, was used in this instance, and altered by the parties with the intention of fitting it to the facts of the actual transaction.

Had the transaction been really such an one as was contemplated by the framers of the form, the plaintiffs could hardly hope to succeed on the ground upon which their claim is based; but it was not; it was a very different transaction, as the added words plainly, but not so plainly as the whole facts and circumstances, shew.

Before the writing was signed the defendants, through their purchasing agent,had measured and classified the goods. The parties were dealing in regard to the certain specific tan

bark so measured and classified; the contract could have been satisfied by the delivery of that bark only; other bark, even if of the like quality, would not have done, because not so measured and classified.

Unless a different intention appears from the terms of the contract, the conduct of the parties, and the circumstances of the case, it is a general rule that when there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed.

That rule is quite applicable to this case, so far as the 550 cords of bark in question is concerned.

The words "agree to sell," which were a part of the prepared form, and the added words "or more," do not take the case out of the rule, or shew a different intention. According to the testimony the words "or more" were inserted so as to cover an additional small quantity of bark of the plaintiffs, which had not been measured and classified, and the contract in reality was one evidencing an actual sale of the 550 cords, and an agreement to sell the additional quantity, if the words "or more" had any legal effect at all. Had the words "agree to sell" been added by the parties instead of being part of the form, the same result would be reached; they are quite applicable to the "or more" quantity; and the parties were not persons from whom literary exactness could be expected.

There is indeed but one circumstance pointing against the passing of the property, and that is the fact that plaintiffs had yet to haul the bark from the place where it was measured and classified to the railway and to load it upon the railway company's cars. The whole contract was fully completed, as to the 550 cords, on both sides, except as to the delivery of the goods, in that manner, and the payment of the balance of their price. . . .

Cases may be imaginable in which the fact that the seller is yet to deliver the goods would indicate an intention that the property was not to pass until delivery; but here the general rule applies, and there is really nothing to indicate a different intention.

It is satisfactory to know that this conclusion is in accord with the testimony of the persons who made the contract, as well as with the entries made by defendants in their books giving plaintiffs credit, at the time of the making of the contract, for the full price of the 550 cords of bark.

That the loss of the goods was occasioned through defendants' default is quite clear, but whether that alone would make them liable, according to the law of the Province, upon the principle adverted to by Blackburn, J., in Martineus v. Kitchen, L. R. 7 Q.B. 436, at p. 456, a principle which seems to have been embodied in the Imperial Act, 56 & 57 Vict. ch. 71, codifying the law relating to the sale of goods (see sec. 20), need not be now considered.

There will be judgment for plaintiffs with costs; the damages will be the balance of the price of the tan bark hauled to the railway, less what would have been the additional cost to the plaintiffs if they had been able to and had put it on board the cars, as the contract required.

NOVEMBER 16TH, 1903.

DIVISIONAL COURT.

AMERICAN COTTON YARN EXCHANGE v. HOFFMAN.

Sale of Goods—Part of Goods not as Ordered—Retention of Goods—Waiver—Conversion.

Appeal by defendants from judgment of MACMAHON, J. (ante 416), in favour of plaintiffs in action to recover $365.56, the invoice price of four parcels of cotton yarn supplied by plaintiffs at Boston, Mass., to defendants at Stratford, Ont. Defendants received the yarn on 16th September, 1901, and at once wrote objecting to the color of parcels 2 and 4, invoiced at $169.89, and were told by plaintiffs to return it to be redyed. As this would involve further payments of duties, defendants suggested that they could have it redyed in Canada. Some further correspondence took place, and finally plaintiffs on 28th November, 1901, wrote to defendants suggesting that defendants should "take the matter up at their end and straighten it out." Defendants made no reply to this letter; they used all the yarn in parcels 1 and 3, invoiced at $195.67; they were told on 28th December, 1901, by the Forbes Co. at Hespeler, Ontario, to whom they had written about redyeing the yarn, that the Hamilton Cotton Co. would be able to redye it; but defendants endeavoured to have it done by some local men of no experience, with unsatisfactory results, using part of it from time to time. During this time plaintiffs frequently wrote asking defendants what they were doing, and why they sent no money, but no replies were made by defendants to any letters.

Finally, on 22nd May, 1902, plaintiffs succeeded, through an agent, in obtaining an oral explanation from defendants. Then they wrote defendants again asking them to send back the yarn or what was left of it, and that they would pay freight and duty on it, but no notice was taken of this request, and this action was begun on 12th August, 1903.

The trial Judge gave judgment for plaintiffs for the amount of their claim, less $25 allowed for the estimated cost of redyeing. He also dismissed a counterclaim for loss of profits.

G. G. McPherson, K.C., for defendants, appellants.

E. Sidney Smith, K.C., for plaintiffs.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J.—It is clear that the yarn in parcel 2, invoiced at $52.44, and parcel 4, invoiced at $117.45, was not of the color ordered, and that plaintiffs consented to defendants' course of accepting the other two parcels, invoiced at $195.67, and rejecting parcels 2 and 4. The defendants purposed having it redyed in Canada, and to this the plaintiffs . . . practically assented . . . Defendants seem to have gone through a series of experiments for months, all the while refusing to pay for the yarn they had used or to give any answer or explanation to plaintiffs or to return the unused yarn on any terms. I think their conduct amounts to a waiver of the right which they originally had to refuse to accept or pay for the yarn; or, if the yarn is to be treated as the property of plaintiffs, then to a conversion of it, and that plaintiffs are entitled to recover. I can find no evidence upon which the counterclaim can be supported. Appeal dismissed with costs.

NOVEMBER 16TH, 1903.

DIVISIONAL COURT.

RAY v. OLIVER.

Chose in Action—Equitable Assignment—Oral Promise to Repay Overdraft at Bank from Specified Source.

An appeal by plaintiffs from the judgment of the Judge of the District Court of Thunder Bay in favour of defendant in an interpleader issue, tried before him without a jury.

Plaintiffs were private bankers, and defendant was the assignee for the benefit of creditors of Carpenter & Co., contractors. That firm were engaged in unloading steel rails for Mackenzie & Mann, railway contractors, for which they were paid monthly, and they kept an account with plaintiffs. They occasionally overdrew their account, and had more than once made written assignments to plaintiffs of their accruing monthly claim against Mackenzie & Mann to secure advances.

On 17th November, 1902, a clerk of Carpenter & Co., duly authorized, went to plaintiff's bank and asked the manager to allow Carpenter & Co. to overdraw. The manager said that the clerk asked for an overdraft against the moneys due from Mackenzie & Mann on steel account, and promised that he would give a draft for it at the end of the month. One of the clerks in the bank said that he heard the conversation, and that the clerk of Carpenter & Co. asked to withdraw the account; that he "would pay for this out of the moneys coming from Mackenzie & Mann—would take it up at the end of the month—cover it"; but that he could not remember the exact conversation. The clerk of Carpenter & Co. swore that he merely asked to be allowed to overdraw the account, saying nothing as to how it was to be repaid. The overdraft was allowed. On 29th November, 1902, Carpenter & Co. assigned to defendant.

At the end of the month Mackenzie & Mann owed Carpenter & Co. $365 for unloading steel rails, and Carpenter & Co.'s account with plaintiffs was overdrawn $393.55. Both parties claimed the $365, which was paid into Court, and an issue directed.

The Judge of the District Court decided that no equitable assignment to plaintiffs had been proved, and ordered that the money should be paid out to defendant.

Plaintiff's appealed.

The appeal was heard by STREET and BRITTON, JJ.

J. H. Moss, for appellants.

H. L. Drayton for defendant.

STREET, J.—In my opinion the conclusion arrived at was clearly right. Even if we assume that the clerk when asking to be allowed to overdraw the account promised to repay the amount out of the moneys coming at the end of the month from Mackenzie & Mann, this would not be more than an indication of the source from which he expected to obtain the funds with which to repay the advances, and would fall far

short of an assignment of those moneys, . . . Appeal dismissed with costs.

BITTON, J., gave reasons in writing for the same conclusion, referring to Hall v. Prittie, 17 A. R. 310.

NOVEMBER 16TH, 1903.

C.A.

STEWART v. WALKER.

Will—Action to Establish—Evidence af Communications by Deceased to Solicitor—Privilege—Admissibility — Lost or Destroyed Will—Proof of Execution—Proof of Contents—Presumption of Destruction Animo Revocandi—Rebuttal—Declarations of Deceased—Evidence of Principal Beneficiary — Corroboration — Evidence of admissions by Defendant Opposing Will—Cross-examination.

Appeal by the defendant the Attorney-General for Ontario from judgment of MACMAHON, J., 1 O.W. R. 489, in favour of plaintiff in an action brought to establish the will of John Alexander McLaren, made on 28th June, 1897. The deceased was illegitimate and unmarried. The plaintiff was the son of his half-sister (by blood, though not in law). After the death in 1902 no will was found, and an escheat was claimed by the Crown.

MCMAHON, J., held that the making of the will was established, and ordered that a copy of it produced by plaintiff should be admitted to probate.

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

G. F. Shepley, K.C., and A. B. Aylesworth, K.C., for the appellant.

G. H. Watson, K.C., and Grayson Smith, for plaintiff.

W. R. Riddell, K.C., for defendant Minnie Hamilton.

J. Lorn McDougall, Ottawa, for defendant Eliza McIntyre.

S. H. Blake, K.C., for the other defendants.

MOSS, C.J.O.—One objection taken on behalf of the appellant was to the rejection of the evidence of Mr. Francis A. Hall, solicitor, with regard to certain communications said to have passed between him and the deceased during the existence between them of the relationship of solicitor and

client, and which those opposed in interest to the Attorney-General claimed the right to exclude, on the ground that they were privileged. We held that the evidence should have been received, and, acting under Rule 498, directed it to be given orally before the Court. The privilege is not the privilege of the solicitor, but of the client, who may waive it or not as he pleases. The client by whom the communications were made was dead, leaving no heirs or next of kin to stand in his place. No person survived him upon whom the benefit of the privilege devolved, unless it was the Attorney-General, who, in the event of intestacy, would be entitled to obtain letters of administration to the estate: R. S. O. ch. 70. The plaintiff claims the benefit of the privilege as executor of the will, but the existence or non-existence of the will is the question at issue. The mere fact of the death did not destroy the privilege, but the right of the Attorney-General to waive the benefit was at least equal to that of plaintiff. The nature of the case precluded the question of privilege from arising. The reason on which the rule is founded is the safeguarding of the interests of the client, or those claiming under him, when they are in conflict with the claims of third persons not claiming, or assuming to claim, under him. And that is not this case, where the question is as to what testamentary dispositions, if any, were made by the client. (Russell v. Jackson, 9 Hare at p. 392, referred to.) . . . It has been the constant practice to apply the rule here stated in cases of contested wills, where the evidence of the solicitors by whom the wills were prepared, as to the instructions they received, is always admitted. And the application of a different rule in this action would deprive plaintiff of a considerable part of the proof of his case.

Mr. Hall appeared and testified before the Court on the 2nd October, and the case is now to be dealt with upon all the evidence before the Court.

The testimony establishes, and it is not now disputed, that on the 25th June, 1897, the deceased executed, with all the formalities prescribed by the statute, a paper prepared by plaintiff, by the direction of the deceased, purporting to be his last will and testament. We commence, therefore, with that fact well proven. The paper not being produced, the questions are: (1) Have its contents been proved and established with sufficient certainty? (2) Was it revoked or destroyed by the testator animo revocandi or animo cancellandi, or is it to be deemed as still in existence as a valid subsisting will, lost, mislaid, or destroyed, by accident or otherwise,

without intention on the part of the testator to put an end to it as a testamentary paper? . . .

Beyond question the will was drawn by plaintiff from instructions given to him by the deceased. Plaintiff so deposes, and the circumstances support his statement. The plaintiff was at that time the deceased's general solicitor and legal adviser, and it was not unnatural that if he was minded to make a will he would instruct plaintiff to prepare it for him. It was shewn that he was at the plaintiff's office on the morning of the day on which the will was executed, and that he returned in the afternoon and then executed the will in the presence of plaintiff and the two attesting witnesses, Peter McGregor, who was a witness at the trial, and Archibald Elliott, who had died some time before the trial. . .

At the forenoon interview there was some discussion about the custody of the will after it was executed, and the deceased said he would keep it himself. He then went away, and plaintiff immediately prepared the will. . . He also made a copy, intending to keep it. In the afternoon deceased returned. The plaintiff handed him the will he had drawn, and he read it over carefully, and in reply to a question by plaintiff whether it was all right, said yes. The witnesses were then brought into plaintiff's room, and deceased executed the will. After the witnesses left plaintiff's room, he placed the will in an envelope and handed it to deceased, who took it away with him. This was the last plaintiff saw of it. . . . No person but plaintiff ever saw the copy during the deceased's lifetime. . . .

The trial Judge appears to have accepted plaintiff as a truthful witness, and certainly there is nothing in his evidence as reported that ought to lead to a contrary conclusion. In an ordinary case of a contest between two living persons with regard to the contents of a lost deed to which they were parties, the testimony of one who produced and swore to the truth of a copy would, if credited, be sufficient to prove the contents without corroboration. If in a case like the present there is a different rule, it is only by reason of the circumstance that it is the contents of a will that are sought to be established, and that the maker of it is deceased. Undoubtedly, the Court should be more careful in accepting and acting upon the evidence, but if it is completely satisfied with the general truthfulness and veracity of the witness, that his testimony is consistent with the circumstances, and that in general his memory is accurate, the extent of corroboration required may safely be measured by these considerations. . .

[Sugden v. Lord St. Leonards, 1 P. D. 154, referred to.]

In the case at bar, if plaintiff's evidence is to be credited, there is no difficulty as to the exact terms of the will. But plaintiff's evidence is not without corroboration in the circumstances preceding and surrounding the making of the will and in the deceased's acts and declarations as deposed to by other witnesses. . . . The terms of the will, as set out in the paper produced, appear reasonable and in accord with the probabilities. There is further support from acts and expressions of the deceased subsequent to the making of the will. It has been urged that these should not be received as evidence on this branch of the case. It is argued that, although they may be regarded as throwing light on the question of intention to adhere to the will, and as therefore rebutting the presumption arising from non-production, they should not be looked at as evidence in proof of the contents. But while the decision in Sugden v. Lord St. Leonards (supra) stands, it must be accepted as the law that declarations subsequent to the making of a will are admissible as secondary evidence of its contents. . . . .

[Woodward v. Goulstone, 11 App. Cas. 469, and Atkinson v. Morris, [1896] P. 40, referred to.]

Upon the whole the evidence is ample to sustain the finding that the paper produced by plaintiff is a copy of the will executed by the testator on the 25th June, 1897.

The plaintiff's action in making a copy of the will and preserving it without communicating the fact to the deceased, although aware of the latter's aversion to any one becoming acquainted with its contents, was commented upon, and properly so, by counsel for the appellant. . . . His action in this respect has naturally provoked some suspicion, and led to comments upon the weight to be attached to his testimony in other respects. But this error of judgment ought not to outweigh the circumstances and the general effect of his testimony. . . .

There are many circumstances in evidence which go to rebut the presumption of intention to cancel or revoke the will. The appellant complains that plaintiff and these in the same interest were permitted to lead evidence on this branch in a manner calculated to prejudice the appellant, and by means of which he was prejudiced. The objections are chiefly with regard to the reception of evidence of statements alleged to have been made by the defendant Mrs. McIntyre tending to attribute the disappearance of the will to her act, and to the ruling that after Mrs. McIntyre was examined in chief by her own counsel, she could be cross-

examined by counsel for the appellant and afterwards by counsel for plaintiff and others in the like interest. The Judge ruled in the first instance that statements alleged to have been made to or in the hearing of witnesses were admissible as evidence, not only against herself, but against all parties, including the appellant, and also that her depositions taken before trial for purposes of discovery were admissible to the same extent. . . . The evidence was admitted and given in accordance with the ruling. Afterwards on reconsideration the Judge corrected his rulings and held that the evidence was only admissible against defendant Mrs. McIntyre. It is objected that Mrs. McIntyre was in the same interest as plaintiff and her co-defendants, and that the evidence ought not to have been admitted at all. But Mrs. McIntyre had not taken the same position as her co-defendants. She had traversed the allegations of the statement of claim, and plaintiff was entitled to prove them as against her by any evidence which would be binding on her, and to that extent the evidence was clearly admissible, but it could not and should not be permitted to prejudice the appellant's case.

With regard to the order of conducting the cross-examination of Mrs. McIntyre, it would have been more satisfactory if the Judge had directed that her cross-examination by plaintiff and those in the same interest should follow her examination in chief, leaving the final cross-examination in the hands of the counsel for the appellant. But this was a matter entirely in the discretion of the trial Judge. Even if it had directed plaintiff and others to first cross-examine, it would not have been improper for them to have treated her as a witness called by an opposite party, and to put leading questions to her (Parkin v. Moor, 7 C. & P. 409), though if she had appeared very willing to aid plaintiff's case, the Judge might have stopped it, and manifestly it would greatly lessen the value of the testimony. But it cannot be said that Mrs. McIntyre was friendly to plaintiff, or disposed to assist him, and in some respects her evidence tended less to his advantage than to the advantage of appellant.

Making every allowance for any disadvantage the appellant may have been placed in by the rulings, and discarding from consideration all parts of Mrs. McIntyre's testimony and of her alleged statements to others that were not receivable against the appellant, there yet remains ample evidence to support the finding of the testator's adherence to the will up to the time of his death. . . . He was well aware of the consequences of intestacy in his case, and with his well-known desire to prevent the property falling into the hands

of the government, it is not to be supposed that he had done the very act which would bring about that result. The will was taken by him into his own custody. In his home there was a valise which he spoke of as containing valuable papers. The key of this he kept in the pocket of his trousers, and it was found there after his death. On the day of his death the valise was removed, with some boxes and articles of furniture, from the hall or room in the front of the house to a room upstairs. When removed the valise was heavy as if full of paper or other articles. The next morning it was seen with the lock forced open and empty. The contents have not been since discovered or seen. There is no reason to suppose that it had been opened or handled by the deceased from the day he was attacked by his last illness to the time of his death. It is not necessary to ascertain whose was the act of breaking open the valise and abstracting its contents. It is quite evident that it was not done by the directions or with the knowledge of the testator. . . . The conclusion on the evidence must be that up to the time of his death he adhered to the will of 25th June, 1897.

Appeal dismissed. No costs of the appeal.

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

OSLER and GARROW, JJ.A., concurred.

NOVEMBER 16TH, 1903.

HINDS v. TOWN OF BARRIE.

Parties—Joinder of—Separate Causes of Action—Damage by Overflow of Watercourse—Rules 185, 186, 187—"Combined" Acts of Defendants—Election or Amendment.

Appeal by defendants from an order of a Divisional Court dismissing appeal from order of MEREDITH, C.J., in Chambers, refusing application by defendants for order requiring plaintiff to elect whether she would in this action proceed against defendant Reuben Webb, abandoning her claim against the town corporation, or vice versa, on the ground that the statement of claim disclosed that defendants were sued in the same action as separate tort-feasors in respect of separate and distinct torts, and the joinder of the two claims was improper and tended to prejudice and embarrass defendants.

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

A. E. H. Creswick, Barrie, for plaintiff.

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

OSLER, J.A.—The question is, whether, under Con. Rules 186, 187, plaintiff is entitled to retain both defendants in the action, or whether she must not elect against which of the two she will continue it.

Plaintiff sues for the obstruction of a watercourse which passes through her property, thereby causing it to be overflowed and damaged.

The statement of claim alleges: (4) that the plaintiff's premises and those of defendant Webb are nearly opposite each other, separated only by a street or highway of the corporation defendant; (5) that a natural watercourse has long existed which runs easterly and then northerly through the town, passing through plaintiff's premises, and then, after crossing the street, through defendant Webb's premises, and thence to Kempenfeldt Bay; (6) that defendant corporation constructed a culvert over the watercourse crossing the street; (7) that before the grievances complained of the town diverted into the said watercourse large quantities of water which would not but for such act have passed into it and through plaintiff's premises; that the culvert was not large enough to permit the waters running down the watercourse to be carried down to the bay; (8) that defendant Webb contracted the watercourse where the same ran through his premises, by boxing it in with timber and covering it with earth: (9) that defendant corporation likewise diminished and further contracted the watercourse through the culvert constructed by them, by putting in sewer pipes, water pipes, and other pipes, across the culvert, thereby diminishing the capacity for the flow of water through the same; (10) that the effect of putting in the pipes across the culvert, in addition to diminishing its capacity, was to obstruct and collect driftwood, etc., and other floating material as it passed down the watercourse, and to cause it to become lodged against the pipes and thus obstruct the flow of water through them, and the watercourse thereby became obstructed at and for a long time before the time hereafter referred to; (11) that the effect of the combined acts of defendants was, during freshets, to cause the waters flowing down in the watercourse to become obstructed in their flow to the bay and to thereby be dammed back upon and to overflow the lands of plaintiff; (12) that defendant corporation having constructed the culvert and diverted waters to the watercourse which would not otherwise have come there, and having allowed it to become blocked

with driftwood, rubbish, etc., and the watercourse having been further contracted where it crossed the lands of defendant Webb, it became choked and stopped up, by reason whereof the waters and drainage received into it on 4th and 5th July, 1902, overflowed therefrom upon plaintiff's lands, and did the damage complained of.

Plaintiff claimed $1,000 for damage and further and other relief. . . .

The leading case upon the construction and application of the corresponding English Rules is Sadler v. Great Western R.W. Co., [1895] 2 Q.B. 688, [1896] A.C. 450. . . In dealing with our own Rules we ought to follow and apply that decision. It was there held that claims for damages against two or more defendants in respect to their several liability for several torts cannot be combined in one action. . . . (Smurthwaite v. Hannay, [1894] A. C, 494, referred to.)

These Rules (185, 186, 187) were, in short, expounded as Rules dealing merely with parties to an action, and as having no reference to the joinder of several causes of action; a subject which is dealt with or partly dealt with by another group of Rules, 232 et seq.

Our Rule 185 as to the joinder of plaintiffs has been amended substantially in accordance with the amended English Rule, but the rule as to joinder of defendants has not been touched. The reasoning in Smurthwaite v. Hannay and the decision in Sadler v. Great Western R. W. Co. must, therefore, still be regarded here as in England when dealing with the latter rule. Different defendants cannot be brought before the Court in the same action where the real causes of action that exist against them are separate. . . .

No joint cause of action is disclosed. An unlawful act is alleged against each defendant. It is not charged that these acts were done in concert, or that defendants were jointly concerned in their commission. . . . It is charged that the natural effect of the combined acts of defendants is to cause the water flowing through the watercourse to become obstructed and to be damned back upon and to overflow plaintiff's land. "Combined," in this connexion, the wrongful acts alleged being independent of each other, means no more than "concurrent" (Sadler v. Great Western R. W. Co., [1895] 2 Q. B. at p. 694), and does not charge a joint cause of action (S. C., p. 693). Each of these acts being wrongful gives rise to a separate cause of action against each defendant, though their injurious result may be increased, or even sensibly caused by the concurrence of both. I refer to

Lambton v. Mellish, [1894] 3 Ch. 163-6; Blair v. Deakin, 57 L. T. N. S. 522-6; Nixon v. Tynemouth, 52 J. P. 504.

As to the acts complained of and the circumstances under which they may give rise to a joint or several cause of action, I refer to Wallace v. Drew, 59 Barb. 413; Ames v. Dorset, 64 Vt. 10; Bryant v. Bigelow, 131 Mass. 491; Wheeler v. Wheeler, 10 Allen 591, 600, 601.

I decide nothing more than seems to be required upon the construction of the pleading before us. I think the language of the Rules is embarrassing, if it be not presumptuous to say so, and calculated to mislead a litigant, and promote delay and expense. . . . The principal and agent cases stand upon a footing of their own, which is explained in Thompson v. London County Council, [1899] 1 Q. B. 840. So also the company and director cases founded on an improperly issued prospectus. Probably the phrase "cause of action" is not to be strictly read in its former technical sense, so that where persons have been parties to a common act which has caused damage to plaintiff they may be joined in the same action, though the nature and extent of the relief to which he may be entitled against them is different.

I refer also to Gower v. Couldridge, [1898] 1 Q. B. 348; Frankenberg v. Great Horseless Carriage Co., [1900] 1 Q.B. 512; Kent v. Coal Exploration Co., 16 Times L. R. 486; Quigley v. Waterloo Mfg. Co., 1 O. L. R. 606; Evans v. Jaffray, ib. 614.

I have not overlooked Booth v. Ratte, 21 S.C.R. 637. The dictum relied upon, though entitled to all respect, is obiter, and at this stage of the case before us, and the present state of the authorities, I do not see how we can apply it.

The appeal must, therefore, he allowed, and plaintiff must elect against which of the two defendants she will continue the action; but she is to be at liberty to amend by setting up, if she can, a joint cause of action.

The costs throughout may be costs in the cause between the plaintiff and defendant corporation.

NOVEMBER 16TH, 1903.

C. A.

HOLSTEIN v. COCKBURN.

Plans and Surveys—Identity of Island — Description—Acreage—Mistake in Patent.

Appeals by plaintiffs from judgment of STREET, J., in favour of defendants, upon the findings of a referee, in an action for trespass to island "M." in Lake Muskoka.

The point to be determined was whether the island in dispute was "M." or "N." If it was "M.," it was the plaintiff's property. If it was "N.," it belonged to defendant.

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

E. E. A. DuVernet and D. C. Ross, for appellants.

Strachan Johnson, for defendant.

MOSS, C.J.O. (after reviewing the evidence as to the situation, etc., of the islands):—The strong argument made for plaintiffs is that in the departmental map, and in two of the conveyances to them, "M." is described as containing 3 acres, whereas the island awarded to them by the judgment contains only 95-100 of an acre. The patent does not assign 3 acres to "M." . . . But the departmental map may be looked at on the question of acreage: Kenny v. Caldwell, 21 A. R. 110: and, no doubt, the impression in the department was that island "M." contained 3 acres.

But that impression, and even the statement that it contained 3 acres, cannot alter the location nor make the island which the department marked "N." become "M." in order to answer the number of acres. The governing part of the description in the defendant's chain of title is that which designates the parcel as island "M." in Lake Muskoka. That is the specific name under which the whole parcel will pass, and the location and identity of the island having that name being established, the grantee acquires the whole area, whatever it may be, but he can get no greater area or more than it actually contains. . . .

[Iler v. Nolan, 21 U. C. R. 309, and Attrill v. Platt, 10 S. C. R. 425, referred to.]

There are no facts in the present case to create an exception to the general principle, which must, therefore, prevail.

The conclusions of the judgment appealed from are correct, and the appeal should be dismissed.

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

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

NOVEMBER 16TH, 1903

C.A.

RE MCDONALD AND TOWN OF LISTOWEL.

Way—Closing Street Allowance—Amendment of Plan—Registry Act—Petition to County Court Judge—Jurisdiction of Judge of another County Acting on Request—Local Courts Act—Evidence on Petition—Affidavits—Answer to Oral Testimony—Grounds for Closing Street—Motion to open up Proceedings—Refusal—Right of Appeal.

In June, 1902, John Hamilton McDonald applied by petition to the Judge of the County Court of Perth, under sec. 110 of the Registry Act, R. S. O. ch. 136, for an order altering or amending a certain plan of part of a lot in the town of Listowel, by closing a part of the allowance for street called McDonald street in the plan.

The Judge appointed the 3rd July, 1902, and directed service of his appointment to be made on all parties concerned. The hearing was adjourned from time to time until the 28th November, 1902. On that day the matter was proceeded with before the Judge of the County Court of Oxford, sitting for and at the request of the Judge of Perth.

Counsel for Samuel L. Kidd objected that the Judge of the County Court of Oxford had no jurisdiction to try the matter, under sec. 110.

The objection was overruled, and the hearing was proceeded with. The petitioner then supported his petition by viva voce evidence of himself and witnesses called on his behalf. At the close of his case Mr. Kidd testified on his own behalf, and his counsel then tendered in evidence the affidavits of George A. Wattie, Walter A. McCarney, and John A. Askin. Counsel for the petitioner objected, and the Judge refused to receive them. No application was made for an adjournment in order to procure the attendance of the deponents, and the case was argued on the merits. Subsequently the Judge gave judgment in favour of the petitioner, and pronounced an order for the amendment of the plan as prayed.

On the 30th January, 1903, an application on behalf of Mr. Kidd was made to the Judge of Oxford to open up the proceedings and for leave to adduce further and additional evidence. The application was opposed, and after argument was dismissed, the Judge holding that after he had pronounced judgment and made an order; he had no power to act further in the matter.

The appeal was by Kidd from both orders.

W. M. Douglas, K.C., for J. H. McDonald, the respondent, objected that no appeal lay from the latter order, and he moved to quash that part of it. The appeal was allowed to proceed subject to the objection.

D. L. McCarthy, for the appellant, contended: (1) that the Judge acted without jurisdiction; (2) that he ought to have received the affidavit evidence; (3) that on the merits he should have refused to amend the plan; (4) that he should have allowed the motion to open up the proceedings.

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

MOSS, C.J.O.—On the question of jurisdiction the argument was that under sec. 110 of the Registry Act the County Judge does not act for the Court or judicially, but merely as persona designata, and that he could not empower any other Judge to take his place. But the language of sec. 110 does not support this contention. The power given is to be exercised by the High Court or a Judge thereof, or the Judge of the county in which the lands lie. A Judge of the High Court acting under the section, would clearly be representing the Court. His acts would be the acts of the Court, and therefore what he would do would be done in his judicial capacity. And it would be a strange anomaly if the Judge of the County Court should be deemed to be acting in a different capacity. He is performing the duty of a Judge equally with a Judge of the High Court under similar circumstances. . . .

[Waldie v. Burlington, 13 A. R. 104, referred to.]

It is, therefore, one of the judicial duties to be performed by the Judge of a County Court in any case where application is made to him instead of the High Court or a Judge thereof. By sec. 16 of the Local Courts Act, R.S.O. ch. 54, the Judge in any county may, if he sees fit, perform any judicial duties in any county other than his own, on being requested to do so by the Judge to whom the duty for any reason belongs.

This language fully covers the case. By force of it the Judge of the County Court of Oxford, having seen fit to comply with the request of the Judge of Perth to perform the duty belonging to the latter, under sec. 110, was put in the latter's place for the purposes of the application. Being so placed, sec. 18 of the Local Courts Act also applies to him and the duties he may perform.

With regard to the nature of the evidence to be received on the hearing of the petition, it is important to bear in mind the nature and effect of the order sought for under sec. 110. Subject to appeal, the order to be made finally and conclusively settles the rights of the parties concerned. Though the application may be brought before the Court or Judge on petition, and is therefore interlocutory in form, the form of the application does not settle the mode in which the evidence is to be taken. . . . [Gilbert v. Endean, 9 Ch. D. at p. 269, and Attorney-General v. Metropolitan District R. W. Co., 5 Ex. D. 218, referred to.]

In applications under sec. 110 cases may arise in which the Judge might fairly consider it not improper to receive and act upon affidavit evidence, and he might certainly do so upon agreement between the parties, but, in the absence of agreement, the prevailing rule ought to be that when there are facts in dispute the witnesses should give their testimony, viva voce. This is in harmony with the practice under the Judicature Act, and the Con. Rules, except in regard to matters distinctly interlocutory in their nature. See Rules 483, 484, 485, et seq. And as a means of eliciting the truth it is much more satisfactory. In this case the investigation was proceeded with on the testimony given viva voce, and it cannot be said that the Judge erred in giving effect to the objection to the reception of affidavits when tendered in answer to the petitioner's case. If he had permitted them to be read the deponents would have been subject to cross-examination, and neither time nor expense would have been saved. There is, therefore, no ground for interfering with his ruling.

Upon the merits the petitioner established sufficient grounds to justify the order made. The portion of the street in question, though delineated on the plan filed in 1878, was never opened or used as a street or highway. The lands abutting on both sides are owned by the petitioner. There was no opposition by the owners of lots abutting the portion to the west, and Gladstone street—a travelled highway—intervenes between the portion in front of their lots and the portion proposed to be closed; so that they are not cut off from access to the nearest highway. . . .

As to the motion to open the proceedings and receive further evidence, the learned Judge rightly dealt with it. In any case there could be no appeal from his decision on the motion. The appeal to this Court under sec. 110 is from the order made upon the hearing of the application to amend the plan. This does not include every order made in the

course of the proceedings—and more especially should it not apply to an order made after the application was disposed of.

The appeal must be dismissed.

NOVEMBER 16TH, 1903.

C.A.

JOHNSTON v. LONDON STREET R. W. CO.

Street Railway—Laying Double Track on Street—Injury to Abutting Land—Rights of Owner—Injunction—Permission of Municipality—Resolution—By-Law—Altering Grade of Street—Remedy—Compensation—Obstruction—Nuisance—Special Injury.

Appeal by plaintiff from judgment of BRITTON, J., dismissing action with costs.

Plaintiff was the owner of certain town lots in the city of London fronting on the south side of Railroad street. Since the year 1895 defendants had, under an agreement with the corporation of the city of London, maintained a single line of track on Railroad street as part of their trolley system over which they operated their cars.

Plaintiff, by this action commenced on the 6th May, 1902, asked for an injunction restraining defendants from laying or putting down a second track or double line of railway on the street, which the defendants were doing under the authority of a resolution of the city council of London passed on the 17th March, 1902 (since supplemented by a by-law passed on the 19th May, 1902,) permitting defendants to construct and maintain another track on certain terms and conditions.

N. W. Rowell, K.C., and U. A. Buchner, London, for appellant.

I. F. Hellmuth, K.C., and J. O. Dromgole, London, for defendants.

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

MOSS, C.J.O.:—The plaintiff was aware of the resolution and saw defendants commencing to do the work on or about the 26th March, 1902.

The work involved the lowering of that part of the street on which the defendants' single track was laid in front of

plaintiff's premises, east of the street called Johnston street, thereby levelling the roadway in front of that part of the plaintiff's premises. It was also rendered necessary that the roadway in front of that part of his premises to the west of Johnston street should be filled up or heightened so as to make a level grade. Plaintiff saw the work being done, but took no steps to prevent it, nor did he complain of it. And it was not until defendants began to lay their double track that he commenced proceedings.

In his evidence at the trial he admitted that the grading done in front of his premises east of Johnston street was a benefit to him, and it is clear that he is correct in this. When the work as directed to be done by the city engineer is done, there will be a wider and more level highway than formerly, and, although it will be lower at the curb than before, he will be provided with a sloped entrance from the street. And it is quite evident that he was content to allow the whole of the grading to be done from one end to the other of Railroad street, including the filling or heightening of the roadway at the west end of which he made complaint at the trial and on the argument of the appeal. . . . His great cause of complaint is that upon the improved highway the defendants are proceeding to lay a second track. And it is to be noted that in the statement of claim the only complaint made is in regard to the double track. The alleged interference with his access to his property was not thought of until afterwards.

The work which is being done by defendants is being performed under the authority and with the permission of the municipality. Levelling, grading, gravelling, and curbing a street is work which the city may undertake without preliminary by-law. In the circumstances of this case, it must be considered that the work was done by the defendants for the city, although also done for the purpose of the railway, and if the plaintiff can make it appear that by reason of the lowering or raising of the grade his property has been injuriously affected, his right is to claim compensation from the municipality: Pratt v. Stratford, 14 O. R. 260, 16 A. R. 5: Baskerville v. City of Ottawa, 20 A. R. 108.

There is nothing in the agreements between the city of London and the defendants or in the by-law No. 922 and the agreement entered into in pursuance thereof, which plaintiff invokes, to prevent the city of London from authorizing the defendants to lay a second track or double line upon or along Railroad street. And if the city has deemed it proper to do so, the plaintiff is not in a position to complain of it in this action.

Then a track laid upon the highway in a proper manner, and in accordance with the usual methods stipulated for by the municipality, is not such an obstruction as to constitute a public nuisance. And if it were, the plaintiff is not entitled to the intervention of the Court, for he fails to show any special injury to himself. The track is not yet laid, and until it has been it is impossible to say that it is an obstruction or a public nuisance. The work, as done, does not touch the plaintiff's property, and, as before stated, if it has been injuriously affected, the remedy is a claim for compensation against the municipality, and not a claim for damages.

Appeal dismissed with costs.

NOVEMBER 16TH, 1903

C. A.

McKENNY v. LYALL.

Master and Servant — Injury to Servant—Death — Action by Widow — Workmen's Compensation Act — Defect in Condition of Plant—Negligence.

Appeal by the defendants from the judgment of MEREDITH, J., at the trial, upon the findings of the jury, in favour of plaintiff in an action to recover damages for the death of her husband, who was killed on the 21st March, 1902, in consequence of the mast of a derrick falling on him. The defendants were his employers, and the derrick was part of the machinery and plant used by them in their business.

E. E. A. DuVernet and D. C. Ross for appellants.

C. Millar, for plaintiff.

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

OSLER, J. A.:— The question was whether the deceased sustained the injury which caused his death, by reason of some defect in the condition of the plant, which arose from or had not been discovered or remedied owing to the negligence of the employers, or of some person intrusted by them with the duty of seeing that the condition or arrangement of the plant was proper: Workmen's Compensation Act, secs. 3 (1), 6 (1).

The derrick was built in 1899 or 1900, for the Sturgeon Falls Pulp Co., and was acquired by the defendants in March, 1902. It was removed by them from its original anchorage

and re-erected on the place where it afterwards fell. The mast was supported by two stiff legs, which were firmly anchored by stones and cross-legs, between two of which the leg afterwards referred to was bolted by a steel bolt, 1 inch and 3-8 in diameter, passing through the legs. After it had been in use some time, the iron which connected one of the legs with the top of the mast broke, and it became necessary to renew it and also to make a change in the leg, as it did not work properly at its junction with the mast. Accordingly it was taken down, the leg shortened by cutting off 7 inches or a foot at the bottom, and reset, and bolted in the anchorage. Another hole was bored in it for passing the bolt through, 6 or 7 inches higher than the other. This was done by and under the superintendence of the defendants' foreman and two workmen. In its altered condition the derrick continued to be worked until the 21st March, when it broke down and killed the plaintiff's husband in its fall, as already stated. It was then lifting on the platform or basket attached to the boom, a comparatively small load of about 1,200 lbs. weight. The leg which failed, and in doing so brought down the whole machine, was the one which had been reset. On examination it was found that the steel pin passing through the leg and the anchor logs has been broken in two, and had torn its way through the leg. The other leg, being unable to support the whole weight thus thrown upon it, broke off at its anchorage, and the whole fell down.

For the defence it was strongly contended that the accident was due to a latent defect or flaw in the steel bolt, which could not have been discovered by any reasonable inspection. And several witnesses proved, what was not indeed denied, that a flaw or crack was found in the bolt, from its rusty appearance of some days' standing, and extending through nearly one-half of its diameter. The plaintiff on the other hand gave evidence from which it might be inferred that the real cause of the accident was the improper setting of the stiff leg in its anchorage weakening it by cutting it off too close to the hole through which the bolt had at first been passed, by making the second hole too large for the bolt, thus admitting of a play or movement which would bring an excessive strain upon it, and by setting the leg, instead of parallel to the anchor logs, and in the same plane as the mast, at an angle thereto which would cause a strain upon the leg at its weakest point whenever the boom swung round with the dump.

The view of each party was fully and fairly submitted to the jury by the learned Judge, in a charge which was not

open to objection, and in which the considerations—not light ones, no doubt—in favour of the defendants side were emphasized. The answers of the jury are supported by the evidence, and cannot be disregarded merely because we may think that the questions would have been more satisfactorily answered the other way.

I think the answers to questions cover everything that is necessary to make out a case against the defendants under the Act, and would therefore dismiss the appeal with costs.

NOVEMBER 16TH, 1903.

C.A.

FURLONG v. HAMILTON STREET R. W. CO.

Street Railways—Injury to Person Crossing Track—Collision—Negligence—Excessive Speed—Absence of Light—Neglect to Give Warning—General Verdict—Request to Put Questions Refused—Conflicting Evidence—Excessive Damages—New Trial—Discretion.

Appeal by defendants from judgment of BOYD, C., in favour of plaintiff, upon the verdict of a jury, for $850 and costs.

J. Crerar, K.C., and T. H. Crerar, Hamilton, for appellants.

E. E. A. DuVernet and D. C. Ross, for plaintiff.

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

GARROW, J.A.:—On the evening of 21st November, 1902, a few minutes before six o'clock, plaintiff was driving a team of horses attached to an empty lorry along Jackson street, in the city of Hamilton, which crosses James street, on which defendants have and operate an electric street railway. The horses were, as plaintiff alleges, going at a smart walk, and at that place, he says, commenced to cross James street in front of a car approaching from the south, which plaintiff says he did not observe until he had reached, and was in part upon, the track. He then urged his horses forward and had almost cleared, when the lorry was struck and plaintiff thrown out and injured. The lorry was not overturned or otherwise injured apparently, nor were the horses or harness.

The action is for negligence in the management of the car, and the particulars of the negligence complained of are

stated to be, excessive speed, no light in front of the car, no gong sounded or other warning given, and omission to bring the car to a standstill when the collision was seen to be imminent.

A teamster who passed over the track in the same direction just before plaintiff, saw the approaching car when it was, of course, further away than when plaintiff first approached the track. Plaintiff himself saw it as soon as he looked in that direction, and it was beyond doubt that he might have seen it in time to have stopped before entering upon the place of danger, or probably to have even passed over in safety, at a greater rate of speed. But plaintiff admits that he did not look in the direction from which the car was coming until his horses were actually upon the track, and when he then looked the car appeared to him to be about half a block or 150 feet distant. He at once, as he says, hurried up his horses, but before he got completely over the lorry was struck.

The evidence as to speed was, as usual, very conflicting, that of some of the witnesses for plaintiff going to shew that the rate was about 20 miles an hour, while those for the defendants place the utmost possible speed of the car, which was an old and defective one, at seven miles an hour on a level track, and its actual speed immediately before the collision at between 5 and 6 miles an hour. The car was stopped after the accident, within almost its own length from the place of collision, which seems inconsistent with any great degree of speed.

The absence of the headlight could scarcely have formed a decisive element in the matter (especially as it was otherwise lit up), because the teamster who passed immediately ahead of plaintiff could see the car up the track some 200 feet or more away—and plaintiff himself had no difficulty in seeing it when he looked. Nor, as the car was plainly in sight, could the alleged failure to sound the gong be a conclusive circumstance to establish the alleged negligence, even if it had been admitted, instead of being, as it was, strenuously disputed by defendants' evidence.

The plaintiff was earning at the time of his injuries $9 a week as a teamster. His chief injury was a broken wrist, which at the time of the trial, or within 8 weeks from the injury, was making satisfactory progress towards complete recovery. Dr. Rennie, the plaintiff's own physician, gave it as his opinion at the trial that in a month or six weeks plaintiff would be fully recovered. The jury, upon a charge un-

objected to, gave a verdict for the very considerable, if not excessive, sum of $850. The Chancellor, although requested, declined to submit questions.

The defendants' appeal is based chiefly upon the contentions: (1) that there was no proper evidence of negligence to be submitted to the jury; (2) that it was the duty of plaintiff to have looked along the track before attempting to cross, and that by his failure to look he brought the injury on himself; and (3) that in any event the damages are grossly excessive.

It may sound like being wise after the event, but I cannot help thinking that it is unfortunate that what is now the usual course of submitting questions to the jury in such actions as the present, was not followed in this case. Was the speed of the car 5 or 20 miles? Was plaintiff travelling at a smart walk or a brisk trot? Was the car 150 feet or 15 feet from him when he looked? Could plaintiff by looking while in a place of safety have seen the approaching car? Could defendants' servants, after seeing plaintiff and his lorry, have pulled up the car and avoided the collision? Had these or some similar questions been submitted and answered, the judicial task of applying the law would have been reasonably free from difficulty. As it is, while the mere refusal to submit questions may not be enough to justify a new trial, still, I think, having regard to this and to the conflict of evidence, which for obvious reasons I do not discuss in detail, and to the largeness of the verdict, it is not too much to say that the result is not a satisfactory one. . . . A proper case is made for the exercise of our discretion in ordering a new trial; the costs of the former trial and of this appeal to be costs in the cause.

NOVEMBER 16TH, 1903.

C.A.

EACRETT v. GORE DISTRICT MUTUAL FIRE INS. CO.

Fire Insurance—Statutory Condition 9—Variation by Special Condition—Application to Partial Loss of Goods Insured—Overvaluation in Application—Proportion of Actual Value.

Appeal by defendants from the judgment of MEREDITH, C.J., in favour of plaintiff in an action upon a policy of fire insurance.

W. R. Riddell, K.C., and H. E. Rose, for appellants.

G. C. Gibbons, K.C., for plaintiff.

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

MACLENNAN, J.A.—. . . The insurance was upon goods, valued in the application at $15,000. The policy was dated 11th June, 1902, and the fire occurred on the 12th July following, with a loss of $6,250. Defendants' policy was for $3,000; there was other insurance to the amount of $7,000; and the total value of the goods at the time of the fire was $9,374.62. . . .

The Chief Justice decided that the plaintiff was entitled to recover three-tenths of the loss, that being the proportion of defendants' policy to the whole amount of insurance.

Statutory condition 9 reads as follows: "In the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies."

There were also indorsed on the policy, in the method prescribed by the statute, certain variations and additions to the statutory conditions, among others the following: " . . . The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value of any building, and in the case of further insurance then only the ratable proportion of such two-thirds of the actual cash value, unless more than such two-thirds value as represented in the application shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property other than buildings, if the property insured is found by arbitration or otherwise to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application." . . .

The special condition consists of two distinct parts, of which the first is applicable to an insurance of a building, and is not at all applicable to the insurance of goods. . . . It is only the second part which is applicable to the insurance of goods. But it is evident that in order to ascertain the meaning of the second part it must be read in the light of the first, for what it declares is, that the company shall be liable for a certain proportion, not of the loss, but of the actual value. If there has been overvaluation in the appli-

cation, then the liability is to be a proportion of the actual value. The company is apparently guarding itself against liability to pay a proportion of the value stated in the application; that is innocent overvaluation by the assured. Now, it is only in case of a total loss that a proportion of the actual value is to be paid. In other cases it is a proportion of the loss. If there had been a total loss here, then this part of the condition would have been distinctly applicable, and the defendants would have been liable for three-tenths of the actual value, that is, the proportion which the amount insured by all the companies bore to the value in the application. That is the plain meaning of the first part of the condition in the case of a building where not more than two-thirds of the value as represented in the application has been insured. The language of the two parts of the condition is identical, and must receive the same construction; and it being clear, as I think it is, that in the case of a total loss the defendants would have had to pay three-tenths of the whole, it would be a strange result that in the case of a partial loss they should be liable to a less proportion. The only other construction of which the words admit is that defendants should pay, not as provided in the 9th statutory condition, a ratable proportion of the loss with the other companies, but three-tenths of the actual value, or $2,819.44.

For these reasons the special condition is inapplicable to the case of a partial loss, and the judgment should be affirmed.

NOVEMBER 16TH, 1903.

C.A.

EACRETT v. PERTH MUTUAL FIRE INS. CO.
PERTH MUTUAL FIRE INS. CO. v. EACRETT.

Fire Insurance—Misstatement as to Value of Goods Insured—Circumstance Material to Risk—False and Fraudulent Representation—Mistake of Agent—Cost or Selling Value of Goods—Approximately Correct Statement.

Appeal by the insurance company from judgments of MEREDITH, C.J., in favour of plaintiff in the first action for $1,250, and dismissing the second action.

The first action was upon a policy for $2,000, dated 3rd June, 1902, on a stock of goods partly destroyed by fire on the 12th July, 1902. The second action was to have the same policy declared void. The insurance company set up in both

actions (1) that, in violation of the first statutory condition the assured, in his written application, caused his goods to be described otherwise than as they really were, to the prejudice of the company, by describing them as of the value of $17,000, whereas they were of a value not greater than $9,374.82; (2) that he omitted to communicate to the company a circumstance material to be made known to them, in order to enable them to judge of the risk, namely, that the goods, while already insured for $8,000, were of the value of $9,374.82 or less; (3) that the insured had falsely and fraudulently represented the value of his stock to be $17,000, and thereby induced the company to issue the policy.

W. R. Riddell, K.C., and G. G. McPherson, K.C., for the appellants.

G. C. Gibbons, K.C., for the respondent.

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

MACLENNAN, J.A.—The policy in question was for $2,000 for three years from 3rd June, 1902, and there was $8,000 concurrent insurance. . . .

On the 3rd June one Ellis, an agent of the company, applied to the assured to increase his insurance with the company by the further sum of $2,000, which he agreed to do. Ellis thereupon produced one of the company's forms of application, and filled it up, and it was signed by the assured without reading it. On the same day Ellis sent the application to the head office, with a letter stating that the assured's "stock now amounted to about $14,000, and I trust you will be able to accept the risk." This was declined, objection being made to the rate of premium stated in the application, $60. After some further correspondence between the company and their agent, the risk was accepted at a premium of $80, and the policy was issued on the 18th June. No new application was signed by the assured, nor was the original application altered with his knowledge or consent. When produced at the trial the application contained the figures $17,000 in a column expressed to be the present cash value of the stock, but it is proved, and the Chief Justice has found, that these figures were not contained in the original application, but were inserted afterwards in the company's office, together with some other additions and alterations. The original application was for an insurance for 12 months, afterwards altered to 36 months, and none of these alterations were made by Ellis, although presumably the change of the insurance from 12 to 36 months must have been orally assented to by the assured.

The only reference to $17,000 which the original application contained was in the answer to these questions: "When was stock last taken? Last year. What was the amount? $17,000." Mr. Ellis in his evidence says this was a mistake made by him, and that he intended $14,000 and not $17,000. He says that what the assured told him at the time he was filling up the application was that his stock was about $14,000. This is confirmed by the evidence of the assured, and accords with Ellis's statement in his letter of 3rd June, and is further corroborated by his letter of 23rd July to the company, written long before the commencement of the actions, asserting that he had made a mistake in the application, and that he intended $14,000 and not $17,000.

Under these circumstances the 1st and 3rd defences of the company utterly fail. . . . To say, as the application did say, though by mistake of the agent, that at the last stock taking the value was $17,000, was no representation of the present value, while the blank for the present cash value was left unfilled. . . .

The policy provides that in case of loss or damage it is to be estimated according to the actual cash value at the time of the fire, which shall in no case exceed what it would then cost to replace the same, deducting therefrom a suitable amount for any depreciation.

Now, what he told the agent, and what the agent immediately communicated to the company, was that the stock then amounted to about $14,000. He says that at the time of the application he shewed Ellis his stock book, and Ellis says he may have done so, and that he will not say he did not. The stock was taken at selling prices, and according to the stock book was $15,867, besides a further sum of $2,054, which included fixtures of the value of about $1,000, so that, according to the stock book, the value of the goods at selling prices at that time was $16,921. . . . In his evidence the insured says that a fair deduction in order to get at the wholesale value would be 20 per cent., and if that is deducted it leaves $13,537, which, I think, may fairly be said to be about $14,000. But it would not have been wrong if the assured had valued his goods at selling prices, . . . although the policy provides for a settlement at wholesale or cost price. Even the words in the application "present cash value" might reasonably have been answered by the selling prices which were being got for the goods every day, and, in the absence of a stipulation to the contrary, the assured might reasonably claim the selling prices to be the measure of his loss.

But after the fire a Mr. Kennedy, a professional adjuster of fire insurance losses, of many years' experience, came to examine the claims, and he discovered an error in the stock book of $1,878 at selling prices. Deducting that from $16,-921, it leaves $15,043, the value at selling prices, or in round numbers $12,000 at cost.

Now, what the company says is, that the assured should have informed them that the value of his stock was $9,374 or less, and that the omission to do so invalidated the insurance. I do not think that charge is supported by the evidence. What he did was to shew them his stock book and to say that the value was about $14,000. The agent had the means of seeing, and must upon the evidence be taken to have seen, that the stock was taken at selling prices, and, having regard to all the circumstances, I think the expression "about $14,000" was a fair statement and honestly made, and was not a withholding of a circumstance material to be communicated.

It is true that, for the sake of a settlement with all the companies, the assured agreed to do so on a basis of a cost value of $9,374, after a deduction of 30 per cent. from cost price, the cost price being taken at $13,391; but that was clearly a compromise and still leaves his original statement of value of "about $14,000" fairly and reasonably accurate.

Appeal dismissed with costs.

NOVEMBER 16TH, 1903.

C.A.

BENTLEY v. MURPHY.

Ship—Contract to Sell—Co-owners—Partnership—Authority of one Co-owner to Bind the other—Ratification—Specific Performance—Contract under Seal—Co-owner not named—Principal and Agent—Evidence of Agency—Bill of Sale—Possession.

Appeal by plaintiffs from judgment of a Divisional Court, 1 O.W.R. 726, reversing judgment of BRITTON, J., 1 O.W.R. 273. The action was by the vendees to enforce specific performance of the sale of a ship called the "Island Queen."

L. G. McCarthy, K.C., and A. M. Stewart, for appellants.

C. H. Ritchie, K.C., for defendant Craig.

L. V. McBrady, K.C., for defendant Murphy.

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

GARROW, J.A. (after stating the facts at length):—The action is brought, and so put in the statement of claim, upon an instrument under seal; and a recovery against defendant Craig, who is not named nor in any way referred to in it, would be clearly in contravention of the well known rule of law that only the parties to the deed itself, or their privies claiming through them by blood, representation, or otherwise, can sue or be sued upon it: Chesterfield Colliery Co. v. Hawkins, 3 H. & C. 677. Nor has this rule been affected by the fusion of legal and equitable principles under the Judicature Act, unless the facts disclose the relationship of trustee and cestui que trust, which is not the case here: Gandy v. Gandy, 30 Ch. D. 57; Edmison v. Couch, 26 A. R. 537.

. . .

It is well established that an agent to bind his principal by the execution of a deed must execute in the name of the principal, and further, that the agent must have been himself appointed by deed. Neither of these circumstances exists in the present case.

Had the instrument been executed in the name of defendant Craig, evidence might properly enough have been received to prove that he had admitted Murphy's authority or had adopted the deed: see Tupper v. Foulkes, 9 C. B. N. S. 797. But no admission or adoption could, in my opinion, be held to convert that which is plainly on its face the deed alone of Murphy into the deed of Craig or of Murphy and Craig. Nor can it, in my opinion, make any difference that the contract could have been well executed as a simple contract, and that the seals were wholly unnecessary for its validity. . . . But, although a deed was unnecessary, I know of no safe authority which would justify me in ignoring the form in which the parties deliberately chose to express their contract, because now that form is found to be inconvenient or to lead to consequences not contemplated. It is true that in Evans v. Wells, 22 Wend. N. Y. St. 324, it is apparently laid down as the law in that State that, while the rule that a contract under seal entered into by an agent, to be binding on his principal, must on its face purport to have been made by the principal, and to have been executed in his name and not in the name of the agent, is applied in all its rigour when the validity of the instrument depends upon the annexation of a seal, in less formal writings, if it can upon the whole instrument be collected that the true object and intent were to bind the

principal, and not merely the agent, Courts of justice will adopt that construction of it, however informally it may be expressed. But, even with the wider rule of construction suggested by the case just cited, a rule, so far as I have been able to see, not adopted or followed in England or Ontario, the plaintiffs would still fail because it could not be collected *from the whole instrument* that the true object and intent were to bind defendant Craig as well as defendant Murphy, for the simple reason that there is not the most remote reference in it to defendant Craig. See Broomley v. Grinton, 9 U. C. R. 455; Moor v. Boyd, 23 U. C. R. 459. . . .

At present defendant Craig has a judgment in his favour, and, speaking for myself, I think that judgment should not be converted into one against him except upon legal evidence (which, in my opinion, all the evidence given as to agency and ratification was not), whether the inadmissible evidence was objected to when tendered or not, this having been a trial without a jury. See Jacker v. International Cable Co., 5 Times L. R. 13; Merritt v. Hepenstal, 25 S. C. R. 150.

In the view which I take, it is unnecessary to express any opinion upon the question of agency or ratification, but I may say that . . . I would have had upon the merits great and perhaps equally insuperable difficulty in adopting plaintiffs' contention that upon the proper construction of the contract they were entitled to call for a bill of sale, or for any thing more than mere possession, until the whole purchase money was paid. . . . The defendants, having offered to deliver possession, but proposing to hold the bill of sale until payment in full, had offered all that plaintiffs were entitled to, and were in no default when the action began. . . . It is a good defence to the action and an additional reason why plaintiffs' appeal should be dismissed. See Godwin v. Collins, 4 Houston (Del.) 28.

Appeal dismissed with costs.

NOVEMBER 16TH, 1903.

C.A.

WALKERVILLE MATCH CO. v. SCOTTISH UNION INS. CO.

Fire Insurance—Contract—Authority of Agent—Sub-agent—Notice of Termination of Authority.

Appeal by plaintiff from judgment of FALCONBRIDGE, C. J., dismissing without costs an action to recover $3,083.45

under a fire insurance contract in respect of plaintiffs' factory and contents at Walkerville. The defence was that defendants had not issued a policy, and that they were not bound by a receipt issued in the name of one Davis, who had been an agent, but had been superseded.

A. H. Clarke, K. C., for appellants.

O. E. Fleming, Windsor, for defendants.

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

Maclennan, J.A. (after setting out the facts at length): — It is argued on behalf of the plaintiffs that no notice having been given by defendants that Davis was no longer their agent, Morton, acting on behalf of plaintiffs, had a right to assume that the agency continued. It is admitted that Morton was ignorant of any change. . . . Whatever might have been the proper conclusion if the policy had been signed by Davis himself, the real question for determination is whether defendants are bound by a policy not signed by Davis himself, but signed by Mezger with Davis's name, without any authority whatever from him, and wholly without his knowledge or privity. Assuming that, in the absence of notice, Morton had a right to deal with Davis as defendants' agent, he did not in fact deal with him, but with one who never was defendants' agent at all. Davis was the man they had trusted.

The position of an insurance agent is one of responsibility, involving careful and prudent conduct in the transaction of business. The policy expressly required the counter-signature of the agent as a guarantee of the desirableness and prudence of undertaking the risk. Under these circumstances I think Morton was bound to see that Mezger had express authority from Davis to append his signature to the policy, and not having done so, he and the plaintiffs accepted the policy at their own risk, and Mezger not having any such authority, the plaintiffs cannot recover. This conclusion depends on a familiar principle, delegatus non potest delegare. . . .

[Reference to Leake on Contracts, 7th ed., pp. 401-2; Broom's Legal Maxims, 7th ed., p. 638.]

I think the present case comes within the rule and not the exception.

Much was made in argument by appellant's counsel of the letter of 3rd February, written by Rogers (defendants' district agent) to the head office of defendants, as evidence of the

authority of Mezger to act for them. But . . . what was expected and approved of, as expressed in that letter, was that Mezger should act under Mallett (the new agent), and not any longer under Davis.

Appeal dismissed with costs.

NOVEMBER 16TH, 1903.

C.A.

McAVITY v. JAMES MORRISON BRASS MFG. CO.

Patent for Invention—Trade Mark Used in Connection with —License—Option — Agreement — Construction — Declaration of Rights—Specific Performance — Injunction — Misconduct Disentitling Party to Equitable Relief— Counterclaim—Reservation of Rights—Res Adjudicata.

Appeal by defendants from judgment of MEREDITH, C. J., ante 156, in favour of plaintiffs in an action for a declaration that plaintiffs T. McAvity & Sons were the only persons entitled to manufacture and sell the Hancock Locomotive Inspirators in Canada, and an injunction restraining defendants from manufacturing and selling, or representing that they had the right to manufacture and sell, the articles in question, and for damages.

G. H. Watson, K. C., and Grayson Smith, for appellants.

L. G. McCarthy, K. C., and A. M. Stewart, for plaintiffs.

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

GARROW, J. A. (after stating the facts at length) :—At the trial it appeared that the articles called "inspirators," covered or intended to be covered by patent No. 7011, were intended to be applied only to stationary engines, while those covered by the latter patent (No. 44062.) are intended for locomotive engines, and are called "locomotive inspirators;" and one of the arguments addressed to us on behalf of the plaintiffs on this appeal was, that the second is not in any sense an "improvement" upon the first, within the meaning of that word as used in the agreement of 10th March, 1886, but an adaptation of the same idea to a totally different subject matter, . . . but, in the view which I take of the whole matter, it is not, I think, necessary to pronounce any opinion upon that question. Nor is it necessary to determine whether or not the patent 44062 is or is not valid, or whether

we have the power in this action to try its validity, because, in my opinion, the plaintiffs' rights would be the same whether the last mentioned patent is or is not valid, inasmuch at it is quite apparent that plaintiffs are not complaining of an infringement of the patent, but of an illegal use of a trade mark and of an advertising and holding out of an exclusive agency which they say does not exist, to the injury of the plaintiffs' trade and business.

The injurious acts complained of by plaintiffs are really not in dispute, and it is clear that the defendants' only possible justification is to be found, if at all, in the provision for an option contained in the agreement of 10th March, 1886.

The defendants contend that, having this option, they are, on equitable principles, entitled to be placed in the same position as if it had been implemented by an agreement wide enough to cover and justify the otherwise wrongful acts which they admit they have committed.

This to me would be, in the circumstances, an extraordinary application of the well known equitable maxims that "he who seeks equity must do equity," and "equity looks upon that as done which ought to have been done." But, if an appeal is to be made to the maxims, there is still another which, I think has some application, namely, that "he who comes into equity must come with clean hands," and obviously the latter maxim lies at the portal and must be passed before we reach the others which defendants invoke. I do not wish to say anything harsh, but to me it would be extremely difficult to make the defendants' somewhat furtive and underhand conduct in obtaining from plaintiffs the sample machine, and in afterwards making from it the other, afterwards sold with plaintiffs' trade mark upon them, square with "clean hands" as understood by a Court of Equity. The obvious course would, I think, have been, if defendants were asserting or intending to assert a right under the agreement, to have reminded plaintiffs of its terms and demanded its fulfilment. But, even if plaintiffs had refused upon request to recognize the option, or to negotiate or offer to negotiate a new agreement, such refusal would not have justified defendants in proceeding to copy and to sell the machine as they did, whatever other rights or remedies they might have had upon such refusal. As pointed out by the trial Judge, the assignment of trade mark contained in the agreement of 10th March, 1886, was not, as so strenuously contended by Mr. Watson, an absolute assignment, but, on the contrary, was

expressly limited to the case of machines to be made under the earlier patent. . . .

It is also clear that the trade mark, as matters stood on 10th March, 1886, did not cover and could not have been intended to cover "locomotive inspirators," which had not at that time been invented, or at all events used or made by that company. It may be that, if defendants are entitled to the benefit of the so-called option, and under it, or an agreement made in pursuance of it, to make and sell locomotive inspirators, it would be held, as a necessary implication, that they are also entitled to the use of the enlarged trade mark. It is not, I think, necessary to determine that, but it is, I think, quite clear . . . that up to the present time defendants have no legal or equitable right whatever to the use of the plaintiffs' trade mark as applied to locomotive inspirators, or to the agency or other rights in respect to them which they claim, and that their defence to the action wholly fails.

But in dismissing the appeal I think it is only just to defendants to do so without adjudicating in any way upon defendants' rights, if any, under the agreement of 10th March, 1886, further than, as I have indicated, that nothing in it affords any answer to plaintiffs' claim. A declaration of this kind, to prevent the matter from becoming res adjudicata by reason of having been set up in the counterclaim, may be inserted in the certificate of dismissal, if defendants so desire. The appeal otherwise should be dismissed with costs.

NOVEMBER 16TH, 1903.

C.A.

WATTS v. SALE.

Chattel Mortgage—Seizure under—Breach of Trust—Injunction—Damages—Counterclaim—Compensation of Trustee—Costs.

Appeal by plaintiffs from judgment of FALCONBRIDGE, C.J., 1 O. W. R. 681, dismissing action for damages for taking possession of a laundry business in the city of Windsor under a chattel mortgage, which plaintiffs alleged was a breach of trust, and directing a reference to determine the amount of defendant's compensation and disbursements as trustee.

W. R. Riddell, K.C., and R. McKay, for plaintiffs.

F. A. Anglin, K.C., for defendant.

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

MACLENNAN, J.A. (after stating the facts at length):—The proper conclusion is that defendant dismissed Hanrahan, who was in possession as manager for the true owner of the property, because he had telegraphed to him what had taken place on the previous day, and deliberately refused to deliver possession of the trust property to an agent duly authorized to demand it by his cestui que trust.

I think that conduct on the part of the trustee was inexcusable and a breach of trust. There were some costs at that time due to defendant arising out of the trust, but I am not aware that that is any justification for a trustee turning his cestui que trust out of possession. But, if it were, the defendant declares emphatically . . . that these costs had nothing whatever to do with his action.

On the following day the plaintiffs' solicitors demanded that possession should be delivered to Schwarte on behalf of both the mortgagor and the mortgagee, and threatened proceedings in case of refusal. This was answered by a refusal until settlement by Mr. Watts of defendant's claims against the property and against Mr. Watts. . . .

I think it is clear that the position taken by the defendant in that letter was untenable. Until 3rd March the possession was the possession of Mr. Watts. On that day defendant took possession adversely to him, without any right to do so, and if he made advances afterwards he did so as a wrongdoer, and no legal claim could arise out of that, either for advances or for his general bill of costs.

On the following day this action was commenced, and an injunction was granted by the local Judge to restrain defendant from taking possession of the property. That injunction was, on terms, continued to the hearing; and defendant withdrew from possession on 23rd March afterwards.

I think the injunction was properly granted, and that the trial Judge should have made it perpetual at the hearing.

The appeal in the action should, therefore, be allowed with costs, both here and in the Court below.

With regard to plaintiffs' claim for damages and defendant's counterclaim for commission or compensation as trustee, the one may be set off against the other.

Defendant's claim in respect to the indemnity bonds will be dismissed, and there will be a reference to take an account of defendant's alleged advances over and above his receipts, in

carrying on the laundry business, or for the purposes thereof, but not including any payment for the services or expenses of the bailiff.

There will be no costs of the counterclaim either here or below, and further directions and costs of the reference will be reserved.

NOVEMBER 16TH, 1903.

C. A.

RANDALL v. OTTAWA ELECTRIC CO.

Negligence—Injury to Linesman of Electric Company—Negligence of Strangers—Duty Owed by—Precautions against Danger—Volunteer or License—Jury.

Appeal by defendants Ahearn & Soper from judgment of a Divisional Court, ante 146, dismissing the appellants' motion for a judgment dismissing the action upon the findings of the jury. The action was by a linesman in the employment of defendants the Ottawa Electric Co. to recover damages for injuries sustained in the course of his employment. The trial Judge nonsuited plaintiff as against the company, but as against Ahearn & Soper left three questions to the jury, in answer to two of which they found that negligence of Ahearn & Soper was the approximate cause of plaintiff's injury, and that the negligence consisted in using uncovered wires and careless construction of tie-wires. They did not answer the third question, which was, whether plaintiff might, by the exercise of ordinary care, have avoided the injury. The trial Judge treated the result as a disagreement of the jury, and the Divisional Court held that he was right, and that there was evidence against the appellant, to go to the jury, and therefore that the case should go down for a new trial. The appellants subsequently moved for and obtained leave to appeal from the judgment of the Divisional Court, upon terms mentioned in the judgment by which leave was granted (ante 173), one of which was that for the purposes of the appeal and of the action the third question submitted to the jury was to be taken as having been answered in the negative.

W. R. Riddell, K.C., and C. Murphy, Ottawa, for appellants.

H. M. Mowat, K.C., and A. E. Tripp, Ottawa, for plaintiff.

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

OSLER, J.A.—The questions which arise . . . are: (1) Whether in respect of the way in which the defendants put up their wire they owed any duty to a person in the situation of the plaintiff, the servant of other employers, who had, so far as it appears, no authority to use the North-West Telegraph Company's poles for the purposes of their business. (2) If there was any such duty, whether it was different in any respect from that of his own employers, having regard to the plaintiff's obligation towards them to use the ordinary means of protection against danger. (3) Whether the plaintiff is not to be regarded as the author of his own injury by reason of his failure to employ them.

The case appears to me to turn substantially on the first question.

If the transformer had been put up by the Ottawa Electric Company under their contract with the defendants in order to supply the power to their wires, as the judgment below assumes, there would be no difficulty in affirming the existence of a duty towards the workmen of the electric company to take care that their wires were put up in a safe and careful manner. There is some evidence of the assent of the telegraph company to the temporary use by the defendants of the pole of that company for the purposes of their contract, and this might well be taken to imply assent to the doing of whatever was necessary to be done by anyone in order to make the wires effective. In that case the plaintiff would, as regards the defendants, have been lawfully working on the pole, and their duty would be to take care that their wires were in a reasonably safe condition for a person in his situation engaged upon an employment in which they were interested. It is, however, stated in the reasons of appeal, and was again urged before us and not denied, that there is a misapprehension in the judgment on this point, and that the putting up of the transformer had nothing to do with the defendants' business. It was put up by the Ottawa Electric Company solely in connection with their own business arrangements for supplying light to Victoria Chambers. This, indeed, was stated by counsel for the plaintiff in opening the case to the jury, and there is in fact nothing to connect the work which the plaintiff was doing with the defendants.

On this state of facts it appears to me that the plaintiff had failed to prove any negligence on the defendants' part towards the workmen of the electric light company, or the

breach of any legal duty owed by them to persons in the situation of the plaintiff. The electric light company had their own pole, which ought to have been used by their workmen, but these, for their own convenience, as it must be assumed, and at all events without any permission from the telegraph company, chose to use and work upon the pole of that company among the wires which the defendants had placed upon it. As regards the defendants, I think the plaintiff was a mere volunteer—a person on the pole without any license or authority—and, apart from any question of his own negligence, he took the risk of these wires being out of order or imperfectly insulated. He cannot be said to have been invited by defendants to use the pole, or to have had the license or permission of its owner to do so. The wires put up by the defendants were their own wires put up for a temporary purpose of their own, and they had no reason to anticipate that the workmen of the electric light company would be employed upon the pole. I refer to the cases of Indermaur v. Dames, L. R. 1 C. P. 274, 2 C. P. 311; Gontrel v. Egerton, L.R. 2 C.P. 371; Smith v. London and St. Catharines Dock Co., L. R. 3 C. P. 326; Batchelor v. Fortescue, 11 Q. B. D. 474; Tolhauser v. Davis, 58 L.J.Q.B. 98; O'Neil v. Everest, 61 L. J. Q. B. 453.

But, even if it could be inferred that the plaintiff, as a workman of the electric light company, was upon the pole in the character of a licensee, or that the defendants had reason to suppose that such a person would be making use of their wires, or of the telegraph company's pole, I should be of opinion that the plaintiff is shewn by the evidence to be the author of his own wrong—to have brought his injury on his own head by the omission to employ the usual means of protection against danger from electric shock. The possibility of danger was well known to him. His obligation to his own employers, and the instructions which as regards them he was bound to observe when working among or near wires, are proper to be considered as regards both his appreciation of danger therefrom, and the means he had in his power of avoiding it. The unfortunate man seems to have been as reckless as his fellow-workmen in working among the wires without his gloves. I can see no reason suggested in the evidence as a possible excuse for his having done so, or for saying that his injury was not attributable directly and approximately to that, rather than to any negligence on the part of the defendants. The cases of Paine v. Electric Co., 7 Am. Elec. Cases 657, and Cann v. Electric Co., ib. 746, are quite different in their facts from the case at bar, and the evidence

there was such as properly to reduce the omission of the workman to wear gloves to one of contributory negligence for the consideration of the jury.

On the whole I think the appeal should be allowed, and the action dismissed.

NOVEMBER 16TH, 1903.

C.A.

CENTAUR CYCLE CO. v. HILL.

Sale of Goods—Action for Price — Counterclaim for Damages— Substitution of Inferior Material in Manufactured Articles— Warranty — Resale with Like Warranty— Delay in Furnishing Goods—Measure of Damages— Costs.

Appeal by defendant Hill and cross-appeal by plaintiffs against the judgment of BOYD, C. (1 O. W. R. 229). on appeals by both these parties from a Referee's report, and from the judgment of BOYD, C., on further directions.

The action was for the price of goods sold and delivered by plaintiffs, who were bicycle manufacturers, carrying on business at Coventry, England, against Hill & Love, dealers in bicycles, carrying on business at Toronto. After the dealings in question had taken place defendant Love retired from the firm, defendant Hill agreeing to pay plaintiffs' claim, if any.

E. B. Ryckman and C. W. Kerr, for defendant Hill.

N. W. Rowell, K. C., and Casey Wood, for plaintiffs.

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

GARROW, J.A.—The questions to be considered are those relating to the alleged representation or warranty by plaintiffs as to quality; the failure by plaintiffs to deliver the samples, and, later, the bulk of the order at the terms agreed upon; the substitution by plaintiffs of the 1896 sprocket wheel for that of 1897; the omission by plaintiffs to forward the spanners; and the defects in the ball bearings. As to the three latter matters, I do not feel convinced that the disposition of them by the Chancellor is not, upon the whole, the proper one, and I do not, therefore, propose to interfere with his judgment as to them. There remain to be considered the two important questions of what are the rights and liabilities of the parties arising out of the substitution by plaintiffs of cast for wrought connections, and of the amount, if any,

which should be allowed to defendants for plaintiffs' delay in delivering.

The Referee found upon the evidence that by the contract between plaintiffs and defendants the plaintiffs agree that the bicycles ordered by defendants, which plaintiffs were to manufacture for them, would be made with connections of forged steel, and that, in violation of their contract, plaintiffs used castings from some of such connections, instead of forgings, and that it was proved before him that the cost of forgings exceeds that of castings, and increases the value of the machine by at least $10 on each machine and that the number of the machines upon which this sum would be payable is 290, if the Court should be of opinion that defendants are entitled to recover on this account.

A careful perusal of the evidence has fully convinced me that the Referee's findings are amply justified. Nor do I understand the learned Chancellor to have been of a contrary opinion, although on the motion for judgment he declined to allow to defendants the damages upon this head so found by the Referee, largely, if not wholly, because defendants sold the machines with a like warranty, and no claim had been made by any sub-purchaser against defendants upon their warranty, although in the judgment a reservation in favour of defendants is made of a right, if any such claim is made, to reclaim in respect of such damages from plaintiffs; and the real question in this appeal, as to this item, is, was that a proper adjudication as between the parties?

In my opinion, and with deference, I think it was not, and that defendants are entitled to have the damages so found in their favour applied at once in reduction of plaintiffs' claim. I am wholly unable to see any reason why this case should be treated in an exceptional manner. The substitution in question was a somewhat bold one, treated at first defiantly and as calling for no answer, resisted before the learned Referee as long as possible, and until a large amount of evidence, expert and otherwise, had been called to prove the fact, when, the fact having become apparent, a somewhat lame and halting admission or explanation was stated to the Referee by counsel for plaintiffs to the effect that, as advised in a recent letter from plaintiffs, they admitted that in the press of business some castings might have been used in place of the forgings called for by the contract. Viewed in the light of the high sounding pretentions made by plaintiffs, in their printed catalogues, of the advantages of steel forgings over castings, and their scorn of so-called "American shoddy

methods" for cheapening construction by the use of castings, the mistake, if it was only a mistake, was a most unfortunate one, leaving, as it does, room for a strong suspicion, at least, that "shoddy methods" are not confined to America.

The substitution in question was a most difficult one to discover, and was, in fact, not discovered until after all the goods in question had been taken into stock, and most, if not all of them, sold. If defendants had discovered the substitution in time, they would clearly have been entitled to refuse to accept, the warranty or representation standing in that connection and up to that time in the nature of a condition precedent. . . . Bowes v. Shand, 2 App. Cas. 445, 480, referred to.

But if, having taken the article, as in the present case, the purchaser afterwards discovers the defect, he may at once bring an action on the warranty, and recover the difference between the value of the article he should have received, and that which he actually did receive, at the time he received it: Mayne on damages, 6th ed. p. 198; Loder v. Kekule, 3 C. B. N. S. 128, 139, 140; Jones v. Just, L. R. 3 Q.B. 197, 200, 201.

Nor can it make any difference to the vendee's rights that he has been fortunate enough to sell the goods as if they had complied with the vendor's warranty. If he sells without a warranty, the resale may, of course, assist in determining the amount of his damages, but, if the resale is made with a similar warranty, such resale is no guide even for such a limited purpose: Muller v. Eno, 14 N. Y. 597.

But the right of action is complete without a resale, and the measure of damages must be the same whether the goods are in the vendee's warehouse or in the hands of persons to whom he may afterwards have pledged or sold them. Where credit is given, or where the goods have been paid for, the vendee may sue at once, or if in the former case he so elects, he may await an action for the price, and in such action set off or counterclaim for his damages by reason of the defective material or other breach of warranty: Mondell v. Steel, 8 M. & W. 858; Church v. Abell, 1 S. C. R. 422; Davis v. Hedges, L. R. 6 Q. B. 687. This is an action for the price, and I fail to see any satisfactory reason why defendants should not be allowed to meet plaintiffs' claim, as far as they can, by the counterclaim for the damages in question.

As to the amount of the damages for plaintiffs' delay in delivering the goods . . . the amount allowed by the Referee was $4,000, which the Chancellor reduced to $1,000. By both it is apparently accepted as the proper conclusion

upon the evidence that there was actionable delay causing serious damage, and in this conclusion I agree without hesitation. . . .

The real question must be confined to the goods actually forwarded, received, and kept by defendants, namely, the 291 bicycles in all, of which they apparently sold 289 in the season of 1897. The defendants say that their usual selling prices were $87.50 each at wholesale and $110 at retail, and that they could have disposed of all these goods at these prices but for the delay in sending the samples, and later of the bulk, and that in consequence of such delays they were obliged to reduce their prices until in the result they made a loss from those prices on the 289 bicycles sold of $3,795, of which the particulars are given in detail. But it appears that in the season of 1897 the competition, owing to the advent of large local manufactories, and of increased sales by the United States factories, was much more keen than in previous years, and this no doubt helped to reduce the selling price of the articles in question. This competition, however, although threatened early, apparently only developed as the season advanced, and it is, I think, quite probable that, had defendants' order been promptly filled, the samples placed early in their agents' hands, and sales pushed with reasonable vigour, many, if not all, of the bicycles in question would have been disposed of at or near the old standard of prices. . . . It is the case of goods ordered for a particular season arriving late for the season, and in consequence sold at more or less of a sacrifice. In such circumstances, it appears to me that a fair and reasonable measure of damages as against the defaulting vendor is to charge him with the difference between the value to defendants of the goods in question if they had been delivered according to the contract and their value for the purposes of resale, as plaintiffs well knew, at the time when they were actually delivered. That was the rule applied in Wilson v. Lancashire and Yorkshire R. W. Co., 9 C. B. N. S. 632, and Schulze v. Great Eastern R. W. Co., 19 Q. B. D. 30. . . .

Applying this rule or measure as well as I can to the actual facts, I have, after much consideration, come to the conclusion that the sum of $1,000 allowed by the Chancellor is quite too little, and that, under all the circumstances, a fairer result would be to allow an average of $10 on each of the 291 bicycles, or in all $2,910, to defendants under this head of damage.

Defendants' appeal as to these two items allowed, and as

to the other items dismissed. Plaintiffs' cross appeal dismissed.

Defendants to have their general costs of the action, the reference, the appeal from the report, the motion for judgment on further directions, and the costs of this appeal, except in the case of the items on which they failed in the appeal before the Chancellor, as now confirmed. Plaintiffs to have the costs of an undefended action for the amount of their claim as now allowed. These to be set off against costs payable to defendants.

TEETZEL, J. NOVEMBER 17TH, 1903.

TRIAL.

DOYLE v. DRUMMOND SCHOOL TRUSTEES.

Public School—Formation of New School Section—Award—Action to Set aside—Costs—Defendants Submitting their Rights.

Action by a ratepayer of public school section No. 8 of the township of Drummond, county of Lanark, to set aside the award of arbitrators appointed by the county council of Lanark, forming a new school section (No. 5) out of territory comprised in sections 8, 9, and 13 of that township. The defendants were the school boards of the three sections and individuals who were elected trustees of the proposed new section. At the trial the award was held invalid and the question of costs only reserved.

C. J. Foy, Perth, for plaintiff.

J. A. Allan, K.C., and A. C. Shaw, Perth, for defendants.

TEETZEL, J., held that none of the defendants was blameable for any of the errors which made the award invalid, and, as none of them endeavored to support it either in their statements of defence or at the trial, but submitted themselves to the judgment and protection of the Court, there was nothing upon which to exercise a judicial discretion in favour of plaintiff against any of defendants. Judgment setting aside award without costs. Re Southwold School Sections, 3 O. L. R. 81, 1 O. W. R. 32, referred to.

TEETZEL, J. NOVEMBER 17TH, 1903.

TRIAL.

HUNTER v. WILKINSON PLOUGH CO.

Chose in Action — Equitable Assignment — Consideration — Notice—Appropriation of Fund to Specific Purpose.

Interpleader issue (tried without a jury at Perth), directed to determine the ownership of certain moneys paid

into Court after an attaching order obtained by defendants upon moneys owing by Francis Hourigan to the common debtor, W. H. Perrin. The plaintiffs alleged that the moneys owing by Hourigan to Perrin were equitably assigned to them by Perrin prior to defendants' attaching order.

J. A. Allan, K.C., for plaintiffs.

R. B. Henderson, for defendants.

TEETZEL, J., held, upon the evidence, that what took place between the parties constituted an agreement between Perrin and plaintiffs that their claim, when ascertained, should be paid out of the moneys owing to him by Hourigan, that there was a good consideration for such assignment; that Hourigan was notified that the moneys were to be held by him for that purpose; and that there was, in effect, an appropriation of the moneys to satisfy plaintiffs' claim. The case was stronger than Heyd v. Millar, 29 O.R. 735. Judgment for plaintiffs with costs.

CARTWRIGHT, MASTER. NOVEMBER 18TH, 1903.

CHAMBERS.

CONFEDERATION LIFE ASSOCIATION v. MOORE.

Judgment—Default of Appearance—Motion to Set aside Service of Writ of Summons—Stay of Proceedings—Irregular Judgment.

Motion by defendant to set aside a judgment signed by plaintiffs for default of appearance on the 6th November, 1903.

After the decision of the Master, reported ante 941, the plaintiffs elected to take an order dismissing the defendant's application to set aside order for service of writ of summons out of jurisdiction, with costs to be costs in the cause, and filed a further affidavit as permitted. The order was issued on 6th November, and judgment was signed on the same day. The time for appearance had elapsed, and the defendant had not asked for a stay of proceedings.

W. E. Middleton, for defendant.

G. H. Kilmer, for plaintiffs.

THE MASTER.—I have always understood that a notice of motion operated as a stay in a case such as the present until finally disposed of: Archibald, 14th ed., p. 1406; Wood v. Nicholls, 4 P.R. 111; Dean v. Thompson, ib. 301; Farden v. Richter, 23 Q. B. D. 124. . . . I base my judgment on

the ground that the rule, as evidenced by the general understanding and practice of the profession, is that in a case like the present there is a stay of proceedings, which is a desirable and convenient practice, and that the entry of judgment was premature.

The judgment must be set aside with costs to defendant in any event.

CARTWRIGHT, MASTER. NOVEMBER 18TH, 1903.

CHAMBERS.

RE STRATHY WIRE FENCE CO.

Appeal Bond—Form—Irregularity—Obligees—Motion to Set aside—Costs.

Motion by the company and the assignee thereof for the benefit of creditors to set aside an appeal bond filed by the petitioner for a winding-up order on a proposed appeal from the decision of TEETZEL, J., ante 834, refusing the petition.

Grayson Smith, for applicants.

W. J. O'Neail, for petitioner.

THE MASTER.—The grounds of objection are:—1st. That the words "held and firmly" are omitted before the word "bound." I do not give effect to this. Rule 830 (1) says that "the security shall be by bond which may be according to Form 197." I think this is a substantial compliance with the form.

2nd. That the bond says "each of us by himself," instead of "binds" himself. It is said in answer that Form 197 says "by." No doubt this is a misprint continued from the form given in the Rules of 1888 (Form No. 209), and also in the Rules of the Court of Appeal issued 30th March, 1878 (Form A.). The same expression is found in Cassels's Practice of the Supreme Court, as pointed out by Osler, J.A., in Jamieson v. London and Canadian L. and A. Co., 18 P.R. 413, and Young v. Tucker, ib. 449. In the latter case the bond was on this ground alone disallowed. But here the very form given by the Rules is in this respect followed. The bond cannot, therefore, be set aside for this reason. It was contended that, inasmuch as the exact words of Form 197 had not been used, effect should be given to the objection. But I do not think there is any force in the contention.

3rd. It was argued that the assignee for benefit of creditors of the company should be made an obligee. But there is no evidence on this motion as to there being any assignee. All that I have is an unverified copy of what purports to be an order made on 10th October, in which it is recited that it was made "in presence of counsel for the said company and the assignee for the benefit of creditors thereof."

I think, therefore, that the motion fails on all grounds. But I dismiss it with costs to be costs in the appeal, because the bond itself is not wholly free from criticism. It is to be wished that the obvious misprint in Form 197 may be speedily corrected.

MEREDITH, C.J. NOVEMBER 19TH, 1903.

WEEKLY COURT.

CANADA FOUNDRY CO. v. EMMETT.

Contempt of Court—Inciting Breach of Injunction—Motion to Commit—No Breach Shewn.

Motion by defendants to commit George Fisher, Frank Hodapp, and James Ford, three employees of plaintiffs, for inciting a breach of an injunction obtained by plaintiffs against defendants on 5th September, 1903, restraining interference with plaintiffs' workmen. The plaintiffs (it was stated) sent Fisher and Hodapp to a hotel in the neighbourhood of plaintiffs' premises, to see what the defendants would do with them. Fisher and Hodapp represented to Atkinson and Elliott, two of the defendants, that they had left the plaintiffs' employment, and wanted to leave town. Atkinson and Elliott gave them tickets and money to enable them to leave the city. A motion was pending for the committal of the two defendants named for this breach of the injunction, and the present motion was to commit Fisher and Hodapp and Ford for inciting the breach.

J. G. O'Donoghue, for defendants, cited Seaward v. Patterson, [1897] 1 Ch. 545, and Vanzandt v. Argentine, 2 McCrary's Rep. 642.

G.H. Watson, K.C., for Fisher, Hodapp, and Ford, contra.

MEREDITH, C.J.—The Court will not permit anyone to commit a breach or to aid in the commission of a breach of the injunction. It is not an unfair result from that, that the Court would prevent anybody from inciting another to commit a breach of the injunction, if such case were made out.

There is nothing upon the material here to shew an inciting to commit a breach of the injunction. The injunction did not restrain any of the defendants from doing what, as I understand it, it is said Atkinson and Elliott did in this case, which was simply that two men who had been in the employment of the plaintiffs, came to them, one saying that he had quarrelled with the company, and left their employment, the other, that he was desirous of leaving, but had not the means of getting out of town, as they expressed the wish to do. There was nothing, as I understand, in the injunction to prevent the defendants doing that. What they are restrained from doing is inciting any employee of the company to leave their service. Here one of them was not in the employment of the company, and the other was himself applying, as I have said, to Atkinson and Elliott for assistance, upon the statement that he was desirous of leaving. It seems plain that no breach of the injunction has taken place, and it therefore follows that the effort of Fisher and Hodapp to incite them was no contempt of Court. I don't see that it makes any difference at all that the statement of Fisher and Hodapp, the one that he had left and the other that he was desirous of doing so, was untrue, and that they were mere spies in the camp of the enemy. The question is: Is the thing that they induced Atkinson and Elliott to do a breach of the injunction? I think not. I think the motion fails and should be dismissed with costs.

OSLER, J. A. NOVEMBER 21ST, 1903.

CHAMBERS.

RE WILSON.

Bankruptcy and Insolvency—Assignments and Preferences Act—Motion to Remove Assignee for Creditors—Grounds not Specified in Notice of Motion—No Evidence to Support Motion—Proposed Examination of Assignee—Judicature Rules not Applicable.

Motion by creditors for an order removing the assignee for the benefit of creditors of George Wilson & Co., insolvents, and appointing another or an additional assignee, and upon motion by the same applicants to commit the assignee for refusal to attend for examination upon the pending motion to remove him.

The motion was heard by OSLER, J.A., sitting for a Judge of the High Court.

A. C. McMaster, for applicants.

D. L. McCarthy, for the assignee.

OSLER, J.A.—Section 8 (1) of the Assignments and Preferences Act, R. S. O. ch. 147, provides that "an assignee may be removed, and another substituted, or an additional assignee appointed, by a Judge of the High Court, or of the County Court where the assignment is registered." The method of procedure under this clause is not prescribed by the Act, as it is in matters arising under secs. 34-39, nor is any provision made as to how the evidence is to be taken, whether viva voce or by affidavit. The notice of the original motion stated that in support of it would be read the examination of the assignee intended to be taken and the affidavit of one Le Vallée. No affidavit was filed or produced, and the examination of the assignee has not been taken. It appears that an appointment to examine him before the local officer at St. Catharines under Rule 491 was taken out and served upon him, but that he refused to attend, on the ground that Con. Rule 491 did not apply to a proceedings of this nature, which is not in Court, and in which the Judge acts simply as persona designata. The notice of motion stated no ground for the removal of the assignee.

In my opinion, in such a proceeding as this the assignee is entitled to know what is alleged against him as disqualification or other ground of removal, and, however briefly and compendiously, it should be expressly stated in the notice. The motion ought not to be launched in the bold fashion here adopted, in the hope of fishing out of the assignee's examination something or other to support it.

The motion to remove should be dismissed because no reason is stated in the notice why the assignee ought to be removed, and because there are no materials of any kind before the Judge to supply the omission.

The motion to commit must also be dismissed. There is nothing in the Assignments and Preferences Act or the Judicature Act or Rules which enables a Judge to apply to the principal proceeding the procedure applicable in an action. Re Young, 14 P.R. 303, referred to. That has been expressly done to a limited extent in matters arising under secs. 34, 37, and 39, but this only emphasizes the omission in the case of a proceeding under sec. 8 (1). The assignee is not obliged to attend upon the appointment of an officer who had no authority to issue it.

Motions dismissed with costs.