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SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. JUNE 8TH, 1914.

MASSIE v. CAMPBELLFORD, LAKE ERIE & WESTERN RW. CO.

6 O. W. N. 457.

Arbitration and Award—Valuators.

Certain provisions in an agreement for an award were that if either of the valuers appointed by the parties respectively, should die, refuse, or become incapable to act as valuer, another valuer should be appointed in his place by the party who had previously appointed such valuer; and there was a similar right of appointment by a Judge of the High Court Division in case the third valuer should die, refuse, or become incapable to act; but before this new appointment could be made by a Judge the two valuers appointed by the parties were to have the opportunity of agreeing upon the amount to be paid as compensation, and if they failed to agree, they might themselves appoint a third valuer, in which case the decision of any two was to be conclusive and binding without appeal. And by another provision "The decision of the said valuators shall be faithfully kept and observed, and shall be binding and conclusive upon the Railway Company and owner, and shall not be subject to appeal from the decision of said valuers or any two of them."

SUP. CT. ONT. (1st App. Div.) *held*, that the agreement in express terms contemplated an award by two valuators in two events, and that the agreement must be construed as it stands; "this being a determination in a private reference, not the performance of a public duty."

Grindley v. *Barker* (1798), 1 B. & P. 229; *Re O'Connor* v. *Fielding* (1894), 25 O. R. 568, followed. *Thirkell* v. *Strachan* (1848), 4 U. C. R. 136; and *Re Kemp & Henderson* (1863), 10 Gr. 54, distinguished.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE MIDDLETON, 26 O. W. R. 180.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

H. Cassels, K.C., for plaintiffs, appellants.

S. Denison, K.C., for defendants, respondents,

THEIR LORDSHIPS' judgment was delivered by

HON. MR. JUSTICE HODGINS:—I was under the impression during the argument that Mr. R. S. Cassels had given evidence of an agreement that an award by a majority of the valuators would bind both parties. I find, however, that, in words at all events, his evidence only goes this far, that he was satisfied with the draft form submitted (exhibit 4) provided the referee was agreed upon first.

This position was accepted by the respondents and accordingly the name of Edward Morgan as third valuator appears in the agreement, exhibit 1. But there is nothing which states or even inferentially suggests that a definite agreement upon the point so fully argued before this Court was made in so many words.

Mr. Cassels, at p. 25, says: "I said that (exhibit 4) will be satisfactory subject to the referee or whatever you choose to call him, being agreed on first, because we are sure to have a disagreement, that is the whole essence of the thing."

"Q. Then the whole bargain you had was, we accept exhibit 4 subject to agreeing on the third man first? A. Yes.

Q. And you say that is all that appears in this document exhibit 1? A. That was the vital matter in my mind.

Q. I am not asking about vitals? A. I do not remember more than that.

Q. That is all you remember? A. That was substantially a satisfactory agreement, provided, instead of going through the form they had here of disagreeing and then going to the County Judge, we, recognising the fact there was disagreement any way from the point of view from which we were approaching the matter, we wanted a third man adopted first."

This completely disposes of the claim for reformation and reduces the dispute to this question, is the effect of the agreement arrived at and in which the third valuer is named as desired by Mr. R. S. Cassels to allow an award by the two valuers to govern?

I think it is quite clear that in dealing with the construction of the document in question evidence of the intention of one of the parties, or indeed of both, cannot be given. The Court cannot look at the draft, exhibit 4, in order to see whether Mr. R. S. Cassels' view as to its effect when the third valuer's name was inserted in it is correct or not and then compare it with the agreement in question in order to arrive

at its meaning. All that the Court can do is to construe the agreement as it stands, bearing in mind that the parties had failed, through their representatives Hickson and Garland, to agree.

Dealing with it then in that way, its contents may be summarised as follows:—

There is by it a reference of the question of the amount of compensation to the "determination of Joseph Hickson, as valuer appointed by the railway company, and Nicholas Garland, as valuer appointed on behalf of the said owner, and His Honour Edward Morgan, as third valuer."

Then follows a provision that if either of the valuers appointed by the parties respectively, i.e., Hickson and Garland, die, refuse or become incapable to act as valuer, another valuer shall be appointed in his place by the party who had previously appointed such valuer. Then follows a similar right of appointment by a Judge of the High Court Division in case the third valuer shall die, refuse or become incapable to act. But before this new appointment can be made by a Judge the two valuers appointed by the parties are to have the opportunity of agreeing upon the amount to be paid as compensation, and if they fail to agree they may themselves appoint a third valuer, in which case the decision of any two is to be conclusive and binding without appeal."

The further clauses provide for the payment of the fees of all the valuers by the railway company and for the finality of the decision of "the said valuers" and that that decision "shall not be subject to appeal from the decision of said valuers or any two of them."

The covenant is that "upon tender of the amount payable . . . as such compensation by the said valuers (*sic*) with interest" the owner will convey in fee simple.

There is also a paragraph providing for a view by the valuers and for the calling of such witnesses and the taking of such evidence or statements on oath or otherwise as the valuers "or a majority of them may think proper," and for the giving of "such weight, if any, to such evidence as they in their discretion think proper."

If the agreement in question had contained merely the appointment of three valuers and the clause dealing with procedure which I have just quoted, and that providing for the finality of the decision, it could hardly be said that two valuers could not make a valid award. For both these two latter

provisions contemplate action by a majority or a decision by two. That which is the most important, reads: "The decision of the said valuers shall be faithfully kept and observed and shall be binding and conclusive upon the railway company and owner, and shall not be subject to appeal from the decision of said valuers or any two of them."

It is said that the words "subject to appeal" are not appropriate to the situation, as, if this is a valuation, there is no appeal. But the sentence may be fairly paraphrased thus: "Shall be final and conclusive and shall not be subject to appeal," which is a perfectly proper mode of expressing the finality of an award or of a decision. But for the other provisions of the agreement, it would not be unreasonable to construe that clause as meaning that the decision of any two valuers was to be kept and observed and was to be final and without appeal, for, apart from two provisions to which reference will be made, there would be nothing to which the words "decision . . . of any two of them" could apply except in such a case as exists in the present action.

Then do the other contingencies contemplated in the paragraphs to which reference has been made account for the provision in this clause regarding the decision of any two so as to require it to be confined to those other situations alone? These are (1) the case of the two valuers appointed by the parties agreeing as to amount, if the third arbitrator has died, refused or become incapable to act, and (2) where the said two valuers, having failed to agree on the amount, appoint a third arbitrator.

Dealing with No. 1, the expression "any two of them" would be inaccurate, as there are only two left and to apply the words "any two" requires more than two specified persons. The finality clause cannot, therefore, have reference to that.

As to No. 2, while the words "any two of them" are apt, yet in the provision itself it is said that the "decision of any two of the valuers shall be conclusive and binding without appeal." The further provision in the finality clause cannot, therefore, have been intended to refer merely by way of repetition to this event. Besides this the expression "any two of them" while appropriate to the case dealt with in (2) is equally so in the event which happened. i.e., "any two" may well include two of those orginally appointed.

To my mind the two situations provided for in what I have called (1) and (2) in which two valuers may make a valid award, do not account for nor exhaust the provision dealing with the finality of the decision. Indeed, No. 2 in words reproduces almost exactly the position which gave rise to the agreement itself, for here the two valuers chosen by the parties did fail to agree and in consequence a third was appointed; not, it is true, by the two chosen valuers, but by the parties who appointed them a distinction without a difference in this case.

It seems incredible to me that the parties, in view of the agreement of reference having arisen out of such a disagreement, should have proceeded in it to solve an *impasse* which might occur again, but which, if it did, would be practically that in which they then found themselves and yet left entirely out of sight the very thing they had to deal with, thus settling a contingency only, and not the very problem in hand.

The rule which says that if the parties agree to leave a matter to the determination of more than one person they cannot be bound by the decision of a less number than the whole of the agreed tribunal, is merely another way of saying that the parties are held to the contract which they have made. There is nothing that requires more than the ascertainment of what the bargain really is, this being a determination in a private reference, not the performance of a public duty. This appears clearly, if authority is needed, in *Grindley* v. *Barker* (1798), 1 B. & P. 229; *Re O'Connor & Fielding* (1894), 25 O. R. 568.

The result seems to be that this agreement in express words contemplates an award by two valuers in two events, and, in the paragraph which is framed so as to give final effect to the decision of the valuers, recognises it, though not perhaps in exceptionally clear language.

One other consideration, drawn from the document itself, points in the same direction. Two valuers may decide what evidence may be taken and whether under oath or not. Yet the other valuer, who may possibly dissent from their view as to procedure, would, if the respondents' contention be correct, be required to agree in a result obtained in a way which he did not favour and upon evidence which he did not desire or ask for. Otherwise no award could be had, and the proceedings taken under the discretion vested in the majority would be useless and a waste of time.

It must be borne in mind that the respondents are given the right to retain possession and to proceed with the construction of their railway. If these proceedings are to be treated as nugatory, what are the appellants' rights? They have agreed that the compensation is to be determined by three valuers, who have now disagreed. Does this failure to ascertain the amount render the agreement void? If it does, then the arbitration clauses apply, or the Court itself has jurisdiction; and in either event a majority of the tribunal will be able to decide the question.

The question asked by Lord Kenyon, C.J., in *Withnell* v. *Garthem* (1795), 6 T. R. 388, may well be repeated in this case; "If they cannot all agree in such a case, how is it to be decided?"

The cases cited do not help very much. *Thirkell* v. *Strachan* (1848), 4 U. C. R. 136, decides that where a reference is made to three persons and there was a covenant to abide by their award or that of a majority of them the word "arbitrators" would, in dealing with their powers, be construed as including a majority. In *Re Kemp & Henderson* (1863), 10 Gr. 54, the decision was finally put upon the fact that the arbitrators had not decided all that was referred to them. The point of importance here was not necessary to be decided, and while the opinion of Esten, V.C., would seem to be adverse to the appellants' contention, it indicates at all events that the meaning of the whole document governs. The agreement here is *sui generis*, and I can find nothing expressly in point.

I think the appeal should be allowed and the judgment should be set aside. In view of the statement of the learned trial Judge that his judgment was, for the reasons he gives, in effect a non-suit and that the respondents were not called on for their evidence, the case should go back for trial with a declaration that the agreement between the parties provides for a valuation by the valuers named therein or a majority of them, and expresses the true agreement between the parties, and that no case for the reformation thereof was made out. The respondents should pay the costs of the appeal and of the former trial.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE :—We agree.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. JUNE 8TH, 1914.

MANCELL v. MICHIGAN CENTRAL RAILWAY.

6 O. W. N. 451.

Railway—Contract for Transportation of Horses—Breach—Canadian Railway Act, Authority of Tariff under—Agent, Authority and Knowledge of.

SUP. CT. ONT. (1st App. Div.) *held*, that the "Eugene Morris Freight Tariff, 130 F." has no authority under the Canadian Railway Act. Also,

"That the undertaking to have a car in readiness for the shipment of horses imposed an obligation to take initiatory steps towards transportation, and that the respondent was justified, on discovering the lack of efficient action, in treating that as a breach of contract sufficient to relieve him from the necessity of bringing the horses forward."

That the railway agent's authority was sufficient to bind railway company in matters such as this; and that knowledge peculiar to a certain private business and derived from experience therein, cannot be imputed to every wayside agent of a railway company. *Kennedy* v. *Am. Express Co.* (1895), 22 A. R. 278, distinguished.

Appeal by defendant company from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., in favour of plaintiff for the recovery of $1,989, in an action for damages for defendant company's breach of an agreement to furnish a palace horse-car to take plaintiff's horses to Guelph Fair, whereby, as plaintiff alleged, he lost his entry fee, prizes, etc.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

W. B. Kingsmill, for defendant, appellant.

J. G. Kerr, for plaintiff, respondent.

THEIR LORDSHIPS' judgment was delivered by

HON. MR. JUSTICE HODGINS:—The telegraphic correspondence shews a request from Fletcher to St. Thomas for the Ames Palace Horse Car on 27th November, 1913, from St. Thomas to Detroit on November 29th, and from Detroit to Chicago on December 3rd. On the 4th December Detroit advises St. Thomas that the New York Central Ry. Co. will deliver car at Suspension Bridge and that it should

reach St. Thomas at 6 p.m. that day. Apparently there was a misunderstanding as the New York Central on 6th deny the receipt of any order. On the same day the respondent notified the appellant that he would make claim against them for damages, it being too late to get ready to load. The tariff put in at the trial as that on file with the agent at Fletcher was relied on as limiting the appellant's liability. But it is apparently one issued and signed by Eugene Morris and is headed on each page : " Eugene Morris Freight Tarriff 130 F." Who Eugene Morris is does not appear, but from a perusal of the book he would seem to hold a power of attorney from numerous railway companies as agent.

This may be a convenient compilation of various tariffs, classifications and rulings, but from all that appears has no authority under the Canadian Railway Act and may have no official standing in the United States. The general application of the tariff as stated on pp. 58 and 61 does not cover Michigan Central points in Canada, except to and from United States points. I can see no reason or authority for allowing its provisions to affect the liability of the appellants in this case.

I do not think the respondent cancelled the order in the sense of abandoning it or calling it off when the appellant was in process of preparing to perform it. The pencil memorandum entry on exhibit 12 filed by appellants, dated December 6th, is : " Shippers would not load after midnight Sunday, says will put claim in against company." It was also objected that the respondent should have tendered the horses for carriage. I think the undertaking to have a car in readiness for the horses imposed an obligation to take initiatory steps towards transportation and that the respondent was justified, on discovering the lack of efficient action, in treating that as a breach of contract sufficient to relieve him from the necessity of bringing the horses forward. I agree with the judgment in appeal that the agent's authority was sufficient to bind the appellants in such a case as this, which does not appear to be an unusual one.

The judgment in appeal allows all the respondent swore to, for (1) entry fees $54; (2) extra labour, etc., fitting horses, $300; (3) extra blacksmithing, $60; (4) extra feed, grain, and hay, $325; (5) extra expense of carrying the animals until 1st May, $500. It also allows for loss of profit, $250. The respondent swore he would have

made $1,000 profit on his horses if he had sold them all, as he thought he could, and he figures this on the basis that they would have taken places as prize winners. I do not think this item can be disturbed. It is obviously an allowance such as a jury might make. I have, however, doubt as to the award of $500 for loss of advertising.

The appellant speaking of the loss of opportunity to exhibit as related to value in his business from advertising says : "Judging from what advertising costs in other ways and the ways of advertising in papers, I figure the loss on advertising that I lost at this show was $1,000." Watson puts it that to sell the horses a man has to establish a reputation, and exhibiting is the principal way he gets advertising.

The respondent admits that this class of advertising depends somewhat on whether his horses win prizes or not. But I cannot find in the evidence anything that indicates that the agent of the appellants was aware that failure to carry would or might result in such an injury to the respondent's business as a breeder of pure Clydesdale horses. Hoy admits he knew that the horses were to be exhibited at Guelph, and it is fair to conclude that he knew the respondent would or might lose sales if the animals were not there to be seen. But beyond that I do not think the evidence goes.

The respondent says in cross-examination in reference to his conversation with Hoy : "I just simply asked him to get me a 16 stall palace car to take the horses to Guelph," and that was all he said. In re-examination he goes a little more into detail and says that Hoy knew what was going on at Guelph as he had told him on previous occasions. But this does not touch the point that while the probable loss of local sales might be obvious to an agent of the appellant, it is not specially brought home to him that the object or one of the objects of the sender was to obtain such advertising there as would take the place of newspaper advertising, and that the absence of the horses would probably reduce his profits by loss of future custom. For that reason I do not think that the case of *Kennedy* v. *American Express Co.* (1895), 22 A. R. 278, applies, as it otherwise would, to support this item of damages. I do not think that possession of this point of view peculiar to the business and founded on experience in it can be imputed as knowledge to every wayside agent

of a railway company, and it is not suggested in the telegraphic correspondence that any special notice reached any higher official than Hoy.

I think that the judgment should be reduced to $1,489, and that with that variation it should be affirmed, but without costs of appeal.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE :—We agree.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. JUNE 8TH, 1914.

ARMOUR v. OAKVILLE.

6 O. W. N. 453.

Contract—Construction of Sewer System in Municipality — Action for Bonus — Interpretation of Contract — Ambiguous Words—Total Cost of Work—Extras—Finding of Engineer—Reference.

MIDDLETON, J., 25 O. W. R. 875; 5 O. W. N. 980, in an action by a contractor against a municipality for a bonus under a contract which bonus depended upon the actual cost to the municipality of the work done, referred it to the Master to take an account of several items of such cost.

SUP. CT. ONT. (1st App. Div.) *held*, that in construing a building contract the words "Total Cost," were ambiguous, and the Court must be guided in their construction by the context and the circumstances in which the parties then were.

Bank of New Zealand v. *Simpson*, [1900] A. C. 182; *Gerow* v. *British American Ins. Co.* (1889), 16 S. C. R. 524; *Black* v. *Toronto Upholstering Co.* (1888), 15 O. R. 642: followed.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE MIDDLETON, 25 O. W. R. 875.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

T. N. Phelan, for plaintiff, appellant.

M. K. Cowan, K.C., and J. P. Crawford, for defendants, respondents.

THEIR LORDSHIPS' judgment was delivered by

HON. MR. JUSTICE HODGINS :—The argument for the appellant, reduced to its simplest form is, that the total cost is a mere matter of adding to the $81,418.35 any extras at the contract price and deducting any omissions according to the same standard, quite irrespective of the actual cost of the work under the original contract or of the additions.

This seems to be an unreasonable position to put the respondents in, having regard to the fact that they had to finish the work by day labour and pay the total cost. They must have had it in their minds that the bonus was to repay the appellant for keeping the actual cost down and not for keeping an account for the purpose of making a calculation, useless for every purpose but that of establishing a fictitious standard of cost. The appellant admits that the account he kept was of the actual cost, but admits that he did not keep an account of how far the extras exceeded the contract figures.

It must be borne in mind that the respondents were the absolute masters of the situation, and in finishing the work so mapped out in the Lorenzo contract they were not hampered by any of the distinctions so carefully drawn between essential details under clause 9, and those which were, in fact, extras or additions. They contemplated finishing the work, but it and any additional extras or essential details would be the work of which the total cost was to be ascertained.

The provisions, so carefully arranged for all these, came to an end when Lorenzo defaulted, and they are only of value in enabling this Court to deal with the meaning and effect to be given to the contract sued on.

The bonus depends, first, on the total expenditure, and then on certain deductions from that sum. The words "total cost" are ambiguous, and the Court must be guided in their construction by the context and the circumstances in which the parties then were. *Bank of New Zealand* v. *Simpson*, [1900] A. C. 182; *Gerow* v. *British American Ins. Co.* (1889), 16 S. C. R. 524; *Black* v. *Toronto Upholstering Co.* (1888), 15 O. R. 642. The particulars of the original contract, the default and the subsequent arrangement for day labour, as well as the fact that the next highest tender to Lorenzo's was for $103,000, are all relevant to the enquiry and were properly put in evidence. While mention is made in the contract sued on of the plans and specifications of the Lorenzo contract, and particularly of clause 12, dealing with extra work and omissions, it is worthy of note that where work was not to be done by the respondents themselves, the schedule price in the earlier contract is adhered to. Part of the work known as "disposals" had been let to other contractors, and it is provided that it is to be taken as part of the cost at the agreed amount under the Lorenzo contract,

viz : $11,374.74. This is in ease of the appellant. Again the "laterals" or private drain connections, although considered an extension under clause 12, are not to be counted in the cost. No provision is made for calculating withdrawals, no doubt because clause 12 allows for them, either the arranged contract cost, or such sum as the engineer considers just and reasonable, and the words "aggregate value" are only used where the amount of these withdrawals is to be deducted from additions and enlargements.

The agreed cost, $115,922.08, is the difference between the total expenditure, $120,388.84, and $4,466.76, the credits given in exhibit 2 for Lorenzo's deposit forfeited and other items realized upon.

From this net total of		$115,922 08
the appellant deducts the cost of disposals	$12,190 79	
and laterals (as calculated on the Lorenzo contract basis	10,629 70	
		22,820 49
Leaving a balance of		$93,101 59
To this balance		$93,101 59
should be added the three items provided for in the appellant's contract :		
1. Disposals	$11,374 74	
2. Work done by Lorenzo..	2,826 18	
3. Plant left by	224.00	
		14,424 92
		$107,526 51
To this should be added, as stated in the appellant's contract, his wages at $30 per week, say		1,500 00
		$109,026 51
Deducting the excess of extended over diminished work as stated by the appellant.....		17,220 36
Leaves the total cost as arrived at by the appellant's method at..		$91,806 15

I can find nothing in the ingenious argument of Mr. Phelan that leads me to think that the judgment is wrong. The only clause, the reason for which is not clear, is that excluding from the cost the excess of additions over withdrawals. But whatever standard of cost is adopted the result will be the same, and I would reject as unsound the argument that if the additions are to be taken at actual cost, the omissions or diminutions must therefore be rated at an artificial standard before being deducted. The only reason for allowing the $816.05 in addition to the $11,374.74 (making up the item of $12,190.79) is that it is work actually done and therefore included in the total of $115,922.08.

On the reference, the Master, in addition to determining the actual cost of the items $22,130.36 and $10,629.70, as directed in the judgment, should ascertain the amount of the appellant's wages and add it to the cost as per the contract. With this slight variation, the judgment should be affirmed with costs. The formal judgment does not contain the direction that before the reference is proceeded with each party is to name a sum it is willing to give or receive. That should be embodied in the order on this appeal.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, and MAGEE :—We agree.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. JUNE 8TH, 1914.

LANGLEY v. SIMONS FRUIT CO.

6 O. W. N. 449.

Bankruptcy and Insolvency—Assignment of Goods—Assignor in Insolvent Circumstances — Lack of Knowledge of Insolvency by Assignee—Cash Advance — No Intent to Defraud or Prefer—Transaction Upheld.

FALCONBRIDGE, C.J.K.B., 26 O. W. R. 79; 6 O. W. N. 104. *held*, that an assignment by a firm in insolvent circumstances of certain goods to a firm which did not know of such insolvency, in return for a money advance, without any fraudulent or preferential intent, was valid.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment.

Appeal by plaintiff from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., pronounced 16th March, 1914, after the trial of the action before his Lordship, sitting

without a jury at Hamilton on 17th December, 1913, 26 O. W. R. 79.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

W. S. MacBrayne, for appellant.

H. Howitt, for respondent.

THEIR LORDSHIPS' judgment was delivered by

HON. SIR WM. MEREDITH, C.J.O :—The appellant is the assignee for the benefit of creditors of the Better Fruit Distributors, Limited, and the action is brought to recover from the respondent the value of a quantity of apples which it received from that company shortly before the assignment was made.

The apples were received by the respondent under the provisions of two documents called warehouse receipts, signed by the company, dated respectively 7th November, 1912, and 5th December, 1912, by the first of which the company acknowledged that it held in storage, on the respondent's account, and properly and sufficiently protected by fire insurance, 3,000 barrels of apples, which are stated to be "held in the warehouse rented by the company in Hamilton from the Armstrong Cartage and Storage Company, and will be shipped out as requested by you (i.e., the respondent)," and by the other of which the company acknowledged that it held in storage, on the respondent's account, in its warehouse at the top of Victoria Avenue, Hamilton, Ont., 4,500 barrels of apples which the company agreed to keep insured in the respondent's favour for one month and were to be shipped to the respondent's house in either Liverpool or Glasgow, from time to time, and be "handled on commission there and net proceeds after deducting $1.50 per barrel previously advanced by" the respondent on them "to be paid over to the company." These documents were given in consideration of large cash advances made by the respondent to the company, no part of which was repaid by the company, and the respondent received from the company 4,021 barrels of apples which were delivered to them in pursuance of the warehouse receipts between the 7th December, 1912, and the 25th

January following, and were shipped to England and there sold on account of the company.

The respondent realized nothing from these shipments, but after paying expenses of various kinds there was, as the learned Chief Justice found, a deficit of $35.51.

The securities held by the respondent are attacked by the appellant on the ground that they are void under the Bills of Sale and Chattel Mortgages Act, and the delivery of the apples to the respondent is impeached as a fraudulent preference.

In the view we take, it is unnecessary to consider the elaborate and lengthy arguments addressed to us as to these contentions. Assuming both contentions of the appellant to be well founded, the appellant is not entitled to recover, on the short ground that the measure of the respondent's liability is the value of the apples, and that was nothing, as was demonstrated by the result of the respondent's dealing with them.

It is argued by counsel for the appellant that the respondent is chargeable with what is said to have been the value of the apples at the time they were received by the respondent, and that they could have been sold at that time for as much as $1.25 to $2.50 per barrel.

I am not satisfied that the evidence establishes this, but in any case the shipment of apples to England was the ordinary method of disposing of them, and the company was an assenting party to their being dealt with in that way, and it could not be heard to complain because that course was taken, and the appellant stands in this respect in no better position than the company.

The appeal should be dismissed with costs.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS :—We agree.

HON. MR. JUSTICE KELLY. JUNE 13TH, 1914.

LONDON v. GRAND TRUNK RW. CO.

SUMMERS v. GRAND TRUNK RW. CO.

6 O. W. N. 494.

Negligence—Railway — Highway Crossing — Accident at—Fire—Motor Engine and Truck Hit by Freight Train—Evidence as to Excessive Speed—Sounding of Bell and Whistle — Contributory Negligence of Driver of Motor Truck — Fireman Injured — Actions by City for Damages to Truck and by Fireman for Personal Injuries.

KELLY, J., dismissed city's action but gave fireman $600 damages upon the findings of the jury.

These two cases resulted from the same happening and were tried together with a jury at London, the evidence in the two cases being the same.

T. G. Meredith, K.C., for plaintiffs in the first action.

Sir George Gibbons, K.C., and G. S. Gibbons, for plaintiff in the second action.

D. L. McCarthy, K.C., and W. E. Foster, for defendants in both actions.

HON. MR. JUSTICE KELLY :—On August 5th, 1913, between 2 and 3 o'clock in the morning, plaintiffs' motor fire engine and truck, which was being driven southerly on William street, in the City of London, was struck by defendants' freight train, number 93, going westerly, and was so badly damaged as to be rendered practically worthless.

William street, at this point, is crossed by several of defendants' tracks. Train number 93 was running on the most northerly track.

Plaintiffs claim against the defendants on the ground of negligence in failing to take proper care in the running of the train, and by reason of the breach of statutory duties; and further, that defendants were running the train at an excessive and improper rate of speed; that the bell of the locomotive was not rung and the engine whistle was not sounded as required by statute; and that there was no proper or sufficient light upon the locomotive. A great amount of evidence was given with a view to establishing these claims.

The jury, in answer to questions submitted to them, found that defendants were negligent in that "the switchman and employees at Maitland street who saw the fire truck pass Maitland street should have used what power they had at their disposal to have cleared William street, employees knowing that the fire was on the other side of the track, also knowing that number 93, a special, was coming from the east."

Maitland street runs northerly and southerly across the railway tracks, and is the next street to the west of William street. King street which runs easterly and westerly is the second street north of the tracks. The fire to which the fire engine was proceeding was to the south of the railway tracks. The fire engine proceeded easterly along King street; the switchman and other employees of the defendants, who were at or near the intersection of Maitland street with the tracks, saw it going east on King street on its way to the fire, and also saw the freight train (number 93) east of William street and moving westerly.

These conditions throw light on the meaning of the above answer of the jury. The jury also found that the plaintiffs were negligent in that "the firemen might have stopped the fire truck and made sure the railway crossing was clear, knowing same crossing was a dangerous crossing, also knowing the railway had the right of way."

Counsel for defendants contends that even assuming that defendants were negligent, the jury's finding of negligence on the part of the plaintiffs disentitled them to succeed. Counsel for plaintiffs, relying upon *Hollinger* v. *Canadian Pacific Rw. Co.*, 21 O. R. 705, argues otherwise.

In cases such as this, each rests upon its own peculiar circumstances; the circumstances of the Hollinger case are quite distinguishable from those which the jury were called upon to deal with in the present case. *Weir* v. *Canadian Pacific Rw. Co.*, 16 A. R. 100, more nearly approaches a resemblance to this case than does *Hollinger* v. *Canadian Pacific Rw. Co.* There is here some evidence from which the jury were entitled to draw the conclusion that plaintiffs, through their workmen, servants or agents, did not exercise that reasonable care when approaching this dangerous crossing which it was their duty to observe, especially having

regard to the facilities they had, and which they did not use, of observing if a train was approachng them.

The driver of the fire engine says he looked and listened for a train, but did not see or hear it; Eddyvane, a city fireman who occupied a seat beside the driver and had charge of the searchlight carried on the front of the fire engine, says he did not observe the train, though he looked for it; but he says that he did not turn the searchlight onto the railway track and that if he had done so he would have seen the train.

The duty of a traveller in approaching a railway crossing is stated in *Weir* v. *Canadian Pacific Rw. Co.*, at p. 104, to be, to use such faculties of sight and hearing as he may be possessed of, and when he knows he is approaching a crossing and the line is in view and there is nothing to prevent him from seeing and hearing the train, if he looks for it, he ought not to attempt to cross the track in front of it merely because the warning required by law has not been given." There is no finding by the jury of want of warning in so far as the ringing of the bell, the blowing of the whistle, or the presence of the light on the locomotive is concerned, notwithstanding that the claim of want of such warnings was clearly before them on the pleadings and evidence given thereon.

The onus of making out contributory negligence is here upon the defendants and the matter is to be determined by the jury, if there is evidence that can properly be submitted to them on that question. In my opinion there was such evidence, and upon it the jury have found against the plaintiffs. On that finding the plaintiffs must fail and the action must be dismissed with costs.

SUMMERS V. GRAND TRUNK RW. CO.

The plaintiff in this case was a fireman in the employ of the City of London and was injured when the defendants' train struck the plaintiff's motor fire truck referred to in the foregoing judgment of the City of London against the defendants. He was riding on the running board on the westerly or right side of the fire truck, and when the collision occurred between the defendants' locomotive and the fire truck, he was thrown beneath the truck and sustained serious injuries.

The finding of the jury, in respect of the negligence of the defendants, was the same as in the other case; but they also found that Summers could not by the exercise of reasonable care have avoided the accident.

The claim set up in the statement of claim is that the accident was caused by the neglect of the defendants in not giving warning of the approach of the train as required by law; adding that no whistle was sounded or bell rung as required and that the train was running at an excessive and dangerous rate of speed.

Defendants' contention is that the negligence found by the jury does not apply to and is not in respect of the acts or omissions particularly complained of as constituting negligence,—that is, running at an excessive and dangerous rate of speed, and failure to ring the bell and sound the whistle, as to which there is no finding by the jury of negligence. If the lack of warning complained of by the plaintiff is not to be confined to the failure to whistle or sound the bell, or to the running at an excessive and dangerous rate of speed, but is, as I think it is, a general allegation of want of warning not limited to these three particular matters, then the finding of the jury that the switchman and employees at Maitland street should have used what power they had to have cleared William street may properly be taken to extend to the giving of a warning in some other manner, such as by the swinging of a lantern; there being evidence that defendants' employees who were at or near the Maitland street crossing and who saw the fire truck and the train, had with them lanterns with which they could have signalled the train. If that be the correct view of the meaning of the general allegation of want of warning set up in the statement of claim and the interpretation to be put upon the jury's finding—and I am of opinion that it is, and the jury having negatived contributory negligence, the plaintiff is entitled to succeed.

I direct judgment to be given in his favour for $600, the amount assessed by the jury, and costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 9TH, 1914.

RE ANNIE GIBSON ESTATE.

6 O. W. N.

Revenue—Succession Duties Act—Trust—Joint Account.

Where there was a gift of money from deceased to her son, who put the money into the bank with some of his own on a joint account, the amount to go to the survivor upon the death of either; and the son invested a large part in mortgages, the mother being informed thereof and consenting thereto.

SUP. CT. ONT. (2nd App. Div.) *held*, that this was a distinct departure from the original intention, that there was no property belonging to the mother at her death referable to this joint account, and that no trust was fixed upon the securities into which the money went; therefore was not liable to succession duties.

N. B. Gash, K.C., for the appellant.

Coatsworth, K.C., for the respondent.

HON. SIR JOHN BOYD, C. (V.V.):—We have come to a conclusion upon the evidence, and I think we all agree in the result.

Assuming that the Surrogate Judge had jurisdiction to deal with this particular aspect of the case, to my mind the only real objection made was whether or not there was any property belonging to the mother at the time of her death, referable to this joint account. We think there was none. The joint account had served its purpose and had disappeared.

At the origin of the transaction there was a gift from the mother to the son of $20,000. The son considered it would be well to put that in the bank with something of his own in a joint account, and that the amount of the account would go to the survivor in the event of the death of either.

The son dealt with this money and invested a large part in mortgages, and that fact was communicated to his mother in several instances.

At the beginning he communicated his intention of making these investments, to her, and it was done with her consent.

That was a distinct departure from the original intention and it was a state of affairs which existed at the time of the mother's death.

Now unless it is possible to fix a trust on the securities into which the money went, the appeal must fail. We think that the evidence falls short of establishing this.

The son dealt with the money as his own, and invested it as he thought proper. He says himself he considered the whole thing as his own and dealt with it accordingly.

We cannot conclude that it comes within the scope of the Succession Duties Act, and think the appeal should be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. JUNE 13TH, 1914.

ROUS v. ROYAL TEMPLARS.

6 O. W. N. 498.

Boundaries—Encroachment—Injunction—Damages.

Where plaintiff's land had been encroached on by defendants' building,

MIDDLETON, J., refused injunction, the evidence shewing that the mistake had arisen from confusion in old street boundaries, and it not being "a seemly thing to direct the destruction of a building," but gave damages on basis of front-foot value for loss of land.

Birmingham v. *Ross*, 38 Ch. D. 295; and *Godwin* v. *Schweppes*, [1902], 1 Ch. 926, followed.

Action concerning the title to a small strip of land at the rear of the Templar building, erected at the north-west corner of Walnut and Main streets in the city of Hamilton. Tried at Hamilton, 8th June, 1914.

A. M. Lewis and F. W. Schwenger, for the plaintiff.

G. S. Kerr and J. W. Jones, for defendant.

HON. MR. JUSTICE MIDDLETON:—The building in question has recently been erected and is a very substantial structure, covering approximately the entire lot. The plaintiff's allegation is that the northern boundary of this lot encroaches upon his land, which lies to the north of the Templar parcel.

The controversy is based upon the exact location of the northern boundary of Main street. When the township was originally surveyed, the somewhat common custom was adopted of laying out the base line of the township and then the side lines between the lots right across the township, placing stakes where the concession roads would cross the side lines;

the concession lines not being themselves surveyed. This has resulted in great uncertainty and confusion, because it is not possible in the actual laying out of the survey, to have such accuracy as would insure concession roads determined in this way being in a continuous straight line. As the result of this, Main street, as actually laid out and travelled for very many years, is 66 feet in width, but at certain places there are jogs in the boundaries.

Comparatively recently an original monument was found which shewed that the south boundary of the street as travelled is 2 feet north of the true limit. There is no room for doubting the accuracy of the street line thus determined, for at the time of the discovery of this boundary post, at the north-west angle of lot 13, an old oak tree was found which in early conveyances was referred to as being at the north-east angle of the lot; and besides this a brick dwelling on Wellington street, which is erected on a parcel of land described as beginning a certain distance south of Wellington street, is found to conform to the measurement from the true boundary.

It may well be that those who have been encroaching on the south side of Main street have not acquired any title to the land of which they have been in possession; but it does not follow that the land on the north side of Main street, which has been in public use for all these years, has not become part of the highway. A dedication through acquiescence in public user is very easily inferred, and I think there can be no doubt that the presumption exists in this case and that the owners of the lands north of Main street can not now claim the right to build down to the theoretical street line.

When the owner of the block lying between King street and Main street and abutting Walnut street came to subdivide this parcel, the sub-division was made, I think, with reference to Main street as it was actually travelled. It was quite competent for the owner of this parcel to lay out the sub-division with reference to the actual boundaries then existing, treating the travelled road as being the true road and recognising the dedication of the 2 feet to the public. I think this is what was done, for the survey was evidently carefully made. The distance along Walnut street between King street and Main street corresponds precisely with the distance between the travelled roads upon the ground, 280

feet, 8 inches. If this is so, then the grant to the plaintiff had for its southern boundary a line parallel with Main street as travelled and distant 73 feet north therefrom. If this is accepted as the true southern boundary of the plaintiff's land, then the Templar building has not encroached upon him in any way, for it is 1 foot, 2 inches south of the boundary, and the eaves project south of the boundary 1 foot, 2 inches at the east end and 1 foot, 1 inch at the west end. The eaves and footings project 13 inches north of the wall of the building, so that they fall exactly within the line (Mr. Tyrell's plan of January 5th, 1914, which was put in, though not marked, shews the situation.)

When Dr. O'Reilly, who then owned both parcels, sold the northern portion to the plaintiff's predecessor in title, a fence was erected upon the southern boundary. This fence was not upon the true boundary according to any survey. I suggested at the hearing, to the plaintiff, that this might be regarded as a conventional boundary; but the plaintiff's counsel strongly opposed this view, and insisted that the true boundary according to actual survey, following the description of the deed, must govern.

If the fence should be accepted as the true boundary its location is well shewn upon plan exhibit 11. The fence was not run parallel with Main street. The footings encroach over the old fence line, and the north-west corner of the building is 6 inches over the fence boundary. At the request of the parties I viewed the premises; and the indications upon the ground shew that this plan accurately describes the situation.

If the plaintiff should be found to be entitled to recover, I think the case is one in which the defendant should be allowed to retain the land, making compensation. It would not be a seemly thing to direct the destruction of the building.

The plaintiff complains that it is an unfair thing to him and would seriously interfere with the selling value of his land to deprive him of 2 feet of the frontage of his property. There is some force in this, and the allowance to be made, if he is entitled to anything, should be correspondingly liberal. Yet I cannot think that the matter is nearly as serious as the plaintiff anticipates. No doubt the projection of the eaves and the projection of the footings renders the 13 inches beyond the wall useless for building purposes. But the cutting down of the frontage from 47 feet to 45 feet is a

matter of dollars and cents only. Immediately north of the plaintiff's property is an alleyway. North of that again, and fronting on King street, is a substantial building. Ultimately the old residence will be superseded by an office building or warehouse, as the location has long ceased to be suited for residential purposes.

If it should be held that there is the encroachment claimed by the plaintiff and that he is entitled to recover, I should think an allowance at the rate of $200 per foot for the land actually taken would be ample.

Complaint is also made with reference to discharge of water in the winter time from the overhanging eave. I had this examined by a competent builder, approved by both parties, and he has suggested some changes. The defendants have agreed to make these changes; so that the complaint disappears.

At the trial complaint was made with reference to obstruction to light, and an amendment was allowed to permit this claim being set up. It appears that on the south side of the residence there are now some 4 or 5 windows, but at the time of the sale the only window to the south was a hall window. This window is just back of the steps marked on the plan; and while there has been some interference with the light I do not think that the window is rendered at all useless. No doubt the tall wall of the building to the south interferes with the access of a great deal of light, but light yet reaches this window in considerable quantity from the east.

The claim to light is based upon the implied grant arising from the existence of the window in the building at the time of the sub-division. This I think must be measured by the presumed intention of the parties at the time of the making of the grant. The wall of the house was some distance from the southerly boundary of the parcel conveyed, and I do not think it ought to be inferred that it was the intention of the grantor to sterilize the use of his own property for the purpose of permitting any greater access of light to the window than that which can be obtained over this strip.

The cases with reference to implied grant are, I think, gradually coming to indicate that this is the true way of looking at the matter, and the Courts are becoming less inclined to impute an intention to render useless the property retained by the grantor than in some of the earlier cases. *Birmingham* v. *Ross*, 38 C. D. 295, perhaps is the point of departure.

The head-note states the principle accurately: "The maxim that a grantor shall not derogate does not entitle the grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee." See also *Godwin* v. *Schweppes,* [1902] 1 Ch. 926.

Even if I am wrong in this view I think the plaintiff will not be entitled to an injunction and that the case is one in which under Lord Cairns' Act damages should be awarded in lieu of an injunction.

In view of the fact that the days in which the residence can be used as a residence are numbered and that the building must ultimately, according to the plaintiff's own evidence, be superseded by an office or factory building covering the whole lot, which would mean the abandonment of the easement, the damages so awarded would be trifling.

For these reasons I think the action fails; but as there was some complaint justified from the overflowing of the water from the eaves, I think it is not a case for costs.

HON. MR. JUSTICE LENNOX. JUNE 12TH, 1914.

DOUGHERTY v. TOWNSHIP OF EAST FLAMBOROUGH.

6 O. W. N. 487.

Schools—High — District Boards — Municipal Councils—By-laws, Requisition for—High Schools Act.

Where two municipalities constituted the High School District, the High School being situate in one of them; and the High School Board made a requisition upon the Municipal Council of the other to pass a by-law authorizing the issue and sale of debentures for one half the amount proposed to be expended upon a school site building, etc.,

LENNOX, J., *held,* that under The High Schools Act, s. 38 (4) (6) the requisition for whole of money must be made to, and by-law passed by, council of municipality in which school is. Also, that sec. 60 of Statute Law Amendment Act of 1914 is not retroactive.

Order made quashing by-law.

Application to quash by-law 580 of the township of East Flamborough.

J. G. Farmer, K.C., for plaintiff.

C. W. Bell, for defendants.

HON. MR. JUSTICE LENNOX:—The municipalities of the township of East Flamborough and the village of Waterdown, constitute a High School District in the county of Wentworth. The high school board, having jurisdiction over this district, determined to expend $25,000 in permanent improvements, including the acquisition of a school site and the erection of a school house and necessary equipment and adjuncts; and prior to the passing of the by-law in question made a requisition upon the municipal council of the township of East Flamborough "to pass a by-law authorising the issuance and sale of debentures to the amount of $12,500 to be applied as one-half of the purchase of a site," etc. The municipal council thereupon at a meeting called "for general business holden in the village of Waterdown, passed by-law No. 580 providing for the issue of thirty year debentures of the municipality to raise the sum required. The last equalised assessment of East Flamborough is $2,265,433 and of the village of Waterdown $225,601. Sub-sec. 10 of sec. 38 of the High Schools Act provides that the municipality in which the high school is situate may assume the full cost of permanent improvements, and as the school is at present in Waterdown and there is no distinct provision for the new school house being erected elsewhere an equal division of the total cost between the two municipalities if the proceedings in other respects are within the provisions of the statute, would not be illegal. I am of opinion, however, that the municipal council of Flamborough had no authority to pass a by-law at all. The high school is established and is carrying on its work in Waterdown, and although there is a half-hearted suggestion now that a site may be chosen in Flamborough, at the time the requisition was made or the by-law passed the board had not taken any definite action, and has not yet taken definite action to have the high school established elsewhere. Until this is done the requisition for the whole of the money required must be to the council and the by-law must be passed and the whole of the money raised by the council of Waterdown, being "the municipal council of the municipality within which the high school is situate," sub-sec. (4) of sec. 38 of the High Schools Act. Section 60 of the Statute Law Amendment Act of 1914 is not retroactive, and sec. 39 referred to does not contemplate a by-law by any municipality except the one in which the school is situate, sub-sec. 8.

What the council of Flamborough was empowered to do, if a requisition for the full amount had been forwarded to them, was to "consider and approve or disapprove of the same" and only after the approval of the majority of the councils has been obtained and then only by the council of the municipality in which the high school is situate could a debenture by-law be passed. There will be an order quashing the by-law with costs.

HON. MR. JUSTICE BRITTON. JUNE 2ND, 1914.

WEBB v. PEASE FOUNDRY CO.

6 O. W. N. 416.

Contract—Building—Delay in Completing—Action for Damages for Breach of Covenant.

Plaintiff having contracted with defendants to complete certain construction work for them by a certain day; and that having become impossible through the delay of another contractor, without fault of defendants,

BRITTON, J., *held*, a clause in the contract between the parties that "The proprietors are not to be responsible to any contractor for the non-completion of a prior contractor's work, or any particular portion thereof, at the time named," barred recovery of damages for delay.

Bush v. *Trustees of Whitehave*, 2 Hudson's Law of Building, 118, and *Jackson* v. *Union Marine Ins. Co.*, L. R. 8 C. P. 572; distinguished.

Tried at Toronto without a jury.

Plaintiff on the 4th July, 1912, contracted with defendants to do the excavating and the cement and concrete work and the cement floors and cut stone and brick work required in the erection and completion of a foundry and manufacturing building at Brampton. The price was to be $29,662, and the work was to be done according to the plans, drawings and specifications then prepared and submitted to plaintiff, and was to be completed by 1st November, 1912.

G. H. Watson, K.C., and N. Sinclair, for plaintiff.

N. W. Rowell, K.C., and J. M. Langstaff, for defendants.

HON. MR. JUSTICE BRITTON:—The contract agreement contained special covenants and provisions, some of which will be referred to later.

The plaintiff was delayed in the performance of his contract, and did not complete the same until the summer of 1913. He alleges that this delay was caused by and was the fault of the defendants, and he claims damages by reason thereof. The plaintiff states as the reasons why he sustained loss and damage, that he was obliged to perform a part of the work in the winter of 1912-13, under wholly different circumstances from those which existed at the time of making the contract and down to the 1st of November following.

This action is brought for the recovery of a balance of $820.51 upon the contract itself and for extras. This amount was certified by the architects, but the plaintiff alleges that the defendants would not pay it over except upon the terms that it would be accepted by the plaintiff in full of all his claims. The plaintiff declined to accept it with such terms and condition attached. The defendants had no right to impose such a condition. That sum is not now further in dispute, as the defendants on the 29th November, 1913, paid that amount with interest upon it, making $828.61 in all, into Court. The action is also brought for certain specified things, not extras within the ordinary meaning of that term; not covered by the contract, and as to which the claim does not arise by reason of plaintiff being delayed. Apart from these latter items, the dispute is in reference to the loss, alleged to have been sustained by plaintiff, by reason of his being delayed in performing certain parts of his work under his contract. The foundry buildings of the defendants were all to be erected by contract. On the 27th June, 1912, the defendants entered into a contract with one W. H. Salter for supplying the steel and iron work to be used in erecting the same buildings. Salter was to have the iron and steel on the site ready to erect, 6 weeks, or within 6 weeks from the date of his contract, and was to have the iron and steel in place within 4 weeks from the time of such delivery. The plaintiff knew of this contract. Very shortly after entering into this last mentioned contract, Salter ordered the steel and iron, and a portion was shipped to Salter, but before any use was made in erecting it, Salter died. There was considerable delay. The Toronto General Trusts Corporation obtained letters of administration to the estate of Salter, and completed Salter's contract, but not within the time mentioned therein. The delay and default on the part of Salter occasioned the delay and consequent loss to the

plaintiff. His work was thrown back, so instead of completing it by 1st November, 1912, it was not, in fact, completed until in June, 1913. It was not disputed at the trial, and I find as a fact, that the delay complained of was the delay in furnishing the iron and steel and that delay occasioned all the loss which the plaintiff can recover in this action if entitled to recover at all under that head.

I find also that the plaintiff did sustain some loss and damage by reason of this delay.

The defendants accepted the work done by the administrator of Salter, and also the work done by the plaintiff, and they made no claim, nor do they now make any claim, for damages by reason of the non-completion of the work by the time mentioned in the contract. The defendants deny any liability to the plaintiff for loss to him, by reason of his work being delayed, and they invoke the special provisions of the contract in their defence, which are as follows:—

(1) The proprietors are not to be responsible to any contractor for the non-completion of a prior contractor's work, or any particular portion thereof, at the time named, but in case any contractor is unable to get possession on account of the failure of a prior contractor to complete his work within the time named in his contract, such subsequent contractor shall be entitled to have for the completion of his contract, such additional time as the architects may deem necessary or just, and such extended time shall be substituted for the time for the completion named in the contract." The time may be considered as having been extended. The defendants make no claim upon plaintiff for any loss of time. The question is solely upon this branch as to defendants' liability to plaintiff, for plaintiff's alleged loss.

I am of opinion that the contract must govern and that defendants are not liable for this loss.

The plaintiff relies upon the case of *Bush* v. *Trustees of Whitehaven,* set out in full in 2 Hudson's Law of Building, 3rd ed. 118. That was an action by a contractor asking to have the special conditions of his contract set aside or rendered inapplicable, and to be paid as upon a *quantum meruit,* because the circumstances under which the contract was entered into, contemplated erecting the building in summer instead of winter. There are many facts in common, in that case and the one tried by me, but the facts wherein

the cases differ are such as compel me to uphold the integrity of the present contract.

It was found in that case :—

(1) That it was the duty of the defendants under the contract to be in a position at the commencement of the work, and at all times during its continuance, to give to the contractor the use of so much of the works as might be necessary to enable the contractor to commence and continue according to the contract.

(2) That the contract was made upon the basis that the defendants would be in a position to act as aforesaid.

(3) That the defendants were not in a position at the commencement of the contract to so act.

In the absence of special provisions it is an implied condition that proprietor will give possession of site, and that he will permit builder to do work and to proceed with reasonable diligence with the work. The defendants here did provide the site—they did permit the plaintiff to commence and proceed.

Lord Coleridge thought the contract in the *Bush Case*, one in which the contractor was handed over bound hand and foot to the proprietor. He thought it an oppressive contract, and so could not reasonably be thought to mean what the defendants in that action contended for. The present contract does not seem to me oppressive, but on the contrary, it seems to me reasonable. The words are so plain that the plaintiff could not fail to understand them. The plaintiff now asks, because delay, occasioned by default of prior contractor, that words should be read into the contract that if delay was occasioned by death of such contractor, he and any subsequent contractor should be at large as to time, price and as to everything material. That would be a new contract and would be a harsh one for defendants. The provision as it is, must be considered in determining plaintiff's rights and defendants' liability.

Here the defendants did provide the site. They did all they could reasonably be asked to do. There was no reason to expect that the Salter estate would not proceed as rapidly as any new contractor would to complete the work under the Salter contract.

Here the contract was not upon the basis that the defendants would do any more than is expressed in the contract.

Here the defendants were in a position at the commencement of the contract to do and act as the contract stated.

Here the conditions of the contract, if changed at all, were not changed by any act of the defendants, but only by the death of Salter, which occurred after both contracts made and had been entered upon by Salter and the defendants.

Then as to the principle (*Jackson* v. *Union Marine Ins. Co.*, L. R. 8 C. P. 572) "that where a contract is made with reference to certain anticipated circumstances, and where, without default of either party, it becomes wholly inapplicable to, or impossible of application to any such circumstances, it ceases to have any application. It cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made."

This principle has no application here. The only anticipated circumstances are the default or delay of a prior contractor. The condition in the contract is as applicable to Salter's representative as to Salter. It is equally applicable to any "prior contractor," that is to say, any contractor who is to do work unnecessary to be done before the work of another contractor can be done.

The delay in this case was not of such length, or of such character as to exonerate the plaintiff.

The plaintiff did not ask to be exonerated. He went on under the contract and completed his work, claiming additional compensation because of loss, and the defendants, while willing to consider any application or statemeent, held to the contract, and denying legal liability, *King* v. *Parker*, 34 L. T. N. S. 887.

If I am wrong in thinking the defendants not liable for plaintiff's loss by reason of delay or prior contract, and if I am to consider the amount, the plaintiff is not entitled to any such sum as claimed at the trial. In the statement of claim, the amount asked is $820.51, which the defendants at first withheld, but afterwards paid into Court, and $2,000, for loss by delay in the work.

At the trial the plaintiff alleged that he had made a mistake of some magnitude in estimating his loss, and that his loss was, in fact, $2,180, made up in the main, if not altogether, in the cost of labour. He also put forward a further claim of items amounting to $1,409.71, all of which, except for lumber, lime, bunks, shed and office rent, may properly be classed as losses by reason of delay, if such losses

were sustained at all; so the plaintiff asked at trial for say $3,590 damages occasioned by delay. The increase from $2,000 in the statement of claim to $3,590 in round figures, at the trial is remarkable, and for all of this the plaintiff before the trial, presented an account of $955.64, and would have accepted that in full, in addition to the $820.51, had the defendants been willing to pay it. The plaintiff should not, of course, be precluded, by a mistake honestly made, from claiming more if he claimed too little, but the increase from $955.64 to $2,000, and then to $3,569, compel me in considering all the evidence to accept the earlier estimates in preference to the estimates of a bookkeeper, and if the defendants are liable, and if the plaintiff entitled to recover on this branch of the case, I would find the amount to be $955.64. It must not be forgotten that plaintiff, in carrying out his contract, had extras to a large amount, for which plaintiff has been paid, except as to such as may be included in the account, of which $820.51 is the balance. It appeared in evidence that as to a door jam, $50 had been allowed to plaintiff.

As to the specific items claimed referred to above, amounting in the whole to $1,409.71, this sum is made up of the following :—

(1) Additional cost and loss :			
Time of men lost			$200 00
(2) Material lost and injured, including:			
Lumber	$200 00		
Bricks	30 00		
Lime	54 71		
			$284 71
(3) Loss of use of property:			
Shed	$125 00		
Office	100 00		
			$225 00
(4) Loss of use of Wettlauffer			200 00
(5) Injury to system and damages ...			500 00
			$1,409 71

(1) This item is estimated because of partial occupancy by defendants of parts of premises, and so, interfering to some extent with plaintiff's men in opening and shutting doors, in waiting, meeting, and passing, in going farther distances, etc., to their work and from it. There was, no

doubt, a little interference, no account was kept of it at the time. No complaint with an intimation that a charge would be made. I find that defendants should pay for this, $50, and that amount is ample.

(2) For this, I find, for lumber—including the old lumber used for bunks, and such of shed as was, or could have been used by defendants, $100.

Nothing for lime—that was not proved.

(3) Shed was used for storing until torn down. Neither that nor office was used under such circumstances as that any promise to pay would be implied. Defendants did not expect to pay, nor did plaintiff at the time, expect to charge.

During the progress of the work, the office was a convenience for both. The plans and specifications were there for examination and discussion. After the 1st November, 1912, there was some additional use by the defendants of this office, an allowance of $50 for this is quite enough.

As to items 4 and 5, nothing can be recovered. No such loss proved. Such damages, if any sustained, are too remote. On the 6th March, 1914, the defendants by special leave, paid into Court, in respect of these latter items, the sum of $200. That sum was enough.

The judgment will be for the plaintiff for the sum of $1,028.61, being for the two sums paid into Court, viz., $828.61, paid into Court on the 29th November, 1913, and $200 paid in on 6th March, 1914. The plaintiff will be entitled to such interest from the Court as will be payable on these sums. As to all other matters in controversy in this action, the judgment will be for defendants.

The defendants should pay costs upon High Court scale up to the 6th March, 1914.

There will be no costs payable by either to the other in this action for proceedings since the 6th March, 1914.

Twenty days' stay.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 23RD, 1914.

HAIR v. MEAFORD.

Corporations, Municipal—By-laws—Rescission—Injunction.

An interim injunction, restraining a municipal council from passing by-law, having been granted, to continue till trial and the trial having been held February 2; and judgment having been issued February 11 dissolving injunction; and notice of appeal having been granted February 12, and appeal set down February 13; and council having passed the by-law February 16:

SUP. CT. ONT. (2nd App. Div.) *held*, that the passing of the by-law was a legislative act, and the Court had no jurisdiction to compel legislation for repeal of third reading; that nothing short of rescission could secure plaintiff any relief that the Court could grant, which relief could be enforced only by mandatory injunction; and, as such injunction is granted only when remedy for damages is inadequate or there is no other remedy, appeal was dismissed, there being another remedy here.

A. E. H. Creswicke, K.C., for appellant.

W. E. Raney, K.C., contra.

HON. SIR WM. MULOCK, C.J.EX. (V.V.):—Although Mr. Creswicke has very fully and ably presented his case, we do not find ourselves able to give effect to his contention.

The facts upon which our decision rests are in a small compass.

The action is for an injunction to restrain the municipal council of the town of Meaford from passing a certain local option by-law.

An interim injunction was granted to continue until Monday, the 2nd day of February, 1914, at the hour of eleven o'clock in the forenoon, or "until such time as the trial hereof to be on that day had shall have been heard and disposed of," restraining the council from passing the by-law.

The trial was held on the 2nd of February before Mr. Justice Hodgins who, on the 11th of February, delivered judgment dismissing the action; and on the same day the formal judgment was issued dismissing the action and declaring the injunction dissolved.

On the 12th of February, notice of appeal was given, and on the 13th of February the appeal was set down. On the 16th of February the council passed the by-law.

Whether or not the injunction was then in force, the by-law had been passed and become law, and nothing short of its rescission would secure to the plaintiff any relief which it is open to the Court to grant to him in this action.

Such relief could only be enforced by a mandatory order.

The plaintiff, in his statement of claim, alleges that in the year 1913 a similar by-law had been submitted to the electors at Meaford and defeated; and that, under the Liquor License Act, a second by-law for the same purpose could not be submitted for a period of 3 years.

He also attacks the various proceedings connected with the by-law in question, including the voting thereon.

It is open to the plaintiff to raise these questions on the motion to quash the by-law, nevertheless we are in effect asked to compel the council by mandamus to repeal the third reading.

The act of the council in passing the by-law was a legislative act, and its repeal would be an act of the like character, and we are aware of no jurisdiction in the Court to compel legislation such as would be involved in repealing the third reading.

Further, even if it were open to the Court to issue a mandatory order directing such repeal, it is to be observed that the Court exercises extreme caution in granting mandatory orders, only doing so in cases where the remedy of damages is inadequate in order to meet the ends of justice, or where procedure by *mandamus* in order to restore matters to their former condition is the only available remedy.

There being here another remedy open to the plaintiff, the Court should not exercise its extraordinary jurisdiction of dealing with the matter by way of *mandamus*.

For this reason, therefore, the appeal must fail.

There may also be another formidable difficulty in the way of the plaintiffs.

The judgment of the Court dissolved the injunction on the 11th day of February. It was granted only until the trial was "heard and disposed of." No proceedings by way of appeal were taken on the 11th of February. Was there any injunction in force on that day after the judgment was entered? If not it is difficult to understand how proceedings by way of appeal, short of an order of the Court, would bring into existence an injunction which had been dissolved.

Thus it may be that in giving the by-law a third reading, the council was not violating any order of the Court.

However, for the purpose of this appeal, it is not necessary for us to pronounce an opinion upon that point.

The only remaining matter to consider is that of costs. The injunction was sought at the hands of certain members of the Licensed Victuallers' Association, or persons interested in that association. Mr. Kennedy was one of them, and this plaintiff was acting for Mr. Kennedy and others. They had all united in retaining a solicitor to promote the common object, and the whole body speaking through Mr. Haverson, their solicitor.

As a result of the arrangement come to, the authorities granted licenses to the interested applicants, members of the association, and the council in turn sought to give effect to the arrangement so far as the local option people were concerned, by submitting the new by-law.

Under these circumstances, we think it proper, in dismissing the appeal, to do so without costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. JUNE 15TH, 1914.

RAINY RIVER NAVIGATION CO., LTD. v. WATROUS ISLAND BOOM COMPANY.

6 O. W. N. 537.

Water and Watercourses—Obstruction of Navigation — Invasion of Right—Damages, when More Than Nominal.

On appeal from judgment of BRITTON, J., 24 O. W. R. 905; 4 O. W. N. 1593, dismissing action for damages in connection with steamer carrying passengers, mails, and goods on a navigable river, through erection of obstruction by defendants.

SUP. CT. ONT. (2nd App. Div.) set aside judgment and gave $500 damages, holding that: (1) The fact that plaintiff had not shewn what pecuniary damages were sustained was no answer to claim, as, where there is invasion of right, the law infers damages. *Asby* v. *White*, 2 Ld. Raym. 938; *Embrey* v. *Owen* (1851), 6 Ex. 353, followed.

(2) Where evidence shewed "that the wrongful conduct of defendants had been deliberate, persistent, and high-handed, and productive of substantial inconvenience and delay to the plaintiffs," the damages should be more than nominal.

Bell v. *Midland Rw. Co.* (1861), 10 C. B. N. S. 287.

Appeal from a judgment of HON. MR. JUSTICE BRITTON dismissing the plaintiff's action with costs, 24 O. W. R. 905.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J. EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

I. F. Hellmuth, K.C., and Bartlett, for the plaintiffs, appellants.

A. W. Anglin, K.C., and Glyn Osler, for the defendants.

HON. SIR WM. MULOCK, C.J.EX.:—This case was tried along with that of the *Rainy River Navigation Co.* v. *Ontario & Minnesota Power Co.*, and evidence common to both actions may be found in the evidence, and, in my judgment, in that case, and it is sufficient to refer here to only such portions of the evidence as are material to the question here under consideration.

The Rainy River from Fort Frances to its mouth is an international stream, and lies along the boundary line between Canada and the United States. The citizens of each country are entitled to free, uninterrupted navigation throughout the whole length of the river. On the 18th June, 1911, the steamer "Aguinda" owned by the plaintiff company left for the village of Rainy River, proceeding upstream towards Fort Frances. On reaching a point called Hannoford Bar, further progress was stopped by a boom stretching completely across the river from one shore to the other. The defendants' men were in charge of the boom, and when asked by the captain to permit the "Aguinda" to pass through, they declined. Thereupon the captain proceeded down the river to the company's office, some three miles away, and learned that the foreman, who apparently was in charge of the men, had gone upstream. After further search he was found, and finally consented to open the boom and allow the vessel to pass through.

The detention caused by this obstruction extended for a period of about three and one-half hours. On the 20th of June, when coming down stream, the vessel was again delayed by the boom for about one-half an hour. On the 23rd of June she was again obstructed by the boom for a period of from one-half to three-quarters of an hour. On the 25th of June there was a similar delay.

The defendants had erected some stone piers in the river in connection with the boom, whereby they could make

different openings in the boom to permit vessels to pass through and on one of these occasions the opening was so close to a sandbar that the vessel was obliged to go out of the channel, coming in contact with the sandbar, whereby her rudder post was injured and she was probably in danger of grounding. On reaching Fort Frances the same evening, the captain reported the occurrence to Mr. Sutherland, one of the defendants' officers, and informed him that the vessel would remain at Fort Frances until the centre pier which had occasioned the trouble was removed. It was a log pier filled with rock and sunken just at the side of the channel.

Speaking of the occasion of the 18th of June, Captain Black says, on cross-examination:

"Q. Who did you see? A. A stranger who claimed to be the foreman. He said he had orders to allow no boats through and there were men with him.

Q. And when you spoke to him you got him to go down the river? A. No, I consulted with the manager and he said 'Better go down and get the foreman' who was over him again—Mr. Vealey. We passed him on the way down in a blue canoe and didn't know it.

Q. Mr. Graham is the manager you speak of? A. Yes.

Q. And when you found Mr. Vealey, he came up and had the boom opened? A. When we got back he opened the boom for us.

Q. How far did you say you went back when you were stopped on the 18th June? How far was it from the boom? A. In the neighborhood of three miles.

Q. Would you be surprised to learn it was two miles? A. I would.

Q. When you saw Mr. Vealey, he made no question at all about your getting through the boom? A. He talked to the manager.

Q. To Mr. Graham? A. Yes.

Q. You don't know whether he made any objection or not? A. It was some little time after they got talking before any decision was arrived at anyway.

Q. And on all subsequent occasions as soon as your boat put in an appearance the boom was opened? A. The system they had of opening that boom; it was so slow they couldn't help themselves.

Q. They opened it as quickly as they could? A. If we got there they did. . . .

Q. When you came to Fort Frances you told Mr. Sutherland you would not run any more until this boom was changed in the river, down at the boom? A. I asked to have the deep water channel open. . . .

Q. But this was not in the deep water channel? A. 15 ft. on the upper side. Everything was boom, timber and chains. . . .

Q. When you complained to Mr. Sutherland you complained entirely about this boom? A. Yes.

Q. And you told Mr. Horne that? A. About the boom putting us out of the channel."

It is clear from the evidence that the defendants unlawfully interfered with the plaintiff's rights in the river. It was, however, contended that the plaintiffs not having shewn what pecuniary loss they had sustained were not entitled to recover. But such a contention is no answer to the plaintiff's claim. Where there is invasion of a right the law infers damage; *Ashby* v. *White*, 2 Ld. Raym. 938, as said by Parke, B., in *Embrey* v. *Owen* (1851), 6 Ex. 353; "Actual perceptible damage is not indispensible as the foundation of an action. It is sufficient to shew the violation of a right, in which case the law will presume damage."

The river is a public highway and the citizens of both countries are entitled to free use thereof. The defendants had no right to erect and maintain therein piers and booms and thereby exclude the plaintiffs from the enjoyments of their rights of navigation. The difficulty, risk, trouble and delay caused to the plaintiffs on several occasions establish not a mere accidental but a high-handed intentional interference by the defendants with the plaintiffs' rights.

For the reasons which appear in my judgment in the *Rainy River Navigation Co.* v. *Ontario and Minnesota Power Co., ante,* I am of opinion that the plaintiffs are entitled to maintain this action for damages, and that the amount thereof should not be limited to nominal damages. If the case had been tried with a jury it would have been proper for them, although the plaintiffs were unable to shew the extent of their damage, to award more than nominal damages if they found on the evidence that the wrongful conduct of the defendants had been deliberate, persistent and high-handed, and productive of substantial inconvenience and delay to the plaintiffs; *Bell* v. *Midland Rw. Co.* (1861), 10 C. B. N. S. 287.

It is impossible to believe that the defendants could have considered themselves entitled to take exclusive possession of a portion of a great international river to prevent or seriously obstruct its navigation by the plaintiffs' steamer when engaged in carrying passengers, mails and goods, and to dislocate and injure their business with impunity.

All these circumstances are proper elements for consideration in assessing the plaintiffs' damages and it is no answer to say that the difficulty in determining the amount with precision disentitles the plaintiffs to substantial damages. On this point the reasoning adopted in *Chaplin* v. *Hicks*, L. R., [1911] 2 K. B. D. 791, which was an action for breach of contract is equally applicable where the action is in tort.

With respect I think the plaintiffs were entitled to substantial damages for the wrongs inflicted upon them by the defendants and that the learned trial Judge should have awarded to the plaintiffs damages to the extent of at least $500 with costs and therefore the judgment appealed from should be set aside and judgment entered for the plaintiffs for that sum, with costs of the action, and of this appeal.

HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH agreed.