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NOVA SCOTIA.

SUPREME COURT.

OCTOBER 31ST, 1910.

CHAPMAN v. PREST.

Sale of Goods—Principal and Agent—Partnership—Defence of Payment to the Agent.

This was a case heard before PATTERSON, Co.C.J., for District No. 5, as Referee.

Rogers, Milner & Purdy, for plaintiff.

C. R. Smith, K.C., for defendant.

PATTERSON, Co.C.J.:—Reuben W. Prest, with another, was in the lumbering business at Mooseland and Tangier for some time previous to 1905 under the firm name of the Prest Lumber Co. In connection with their business they had stores at both places. They became indebted to the plaintiff in a very large sum, and to defendants in the sum of $400 or $800 secured apparently by the personal notes of Reuben W. Prest. The firm, I imagine, was dissolved by its insolvency. At any rate Reuben W. Prest alone makes any effort to pay the firm debts. In the fall of 1905 he came to Amherst and he and plaintiff entered into an arrangement by which the business was to go on much as usual. I shall have to set out later everything that appears in the evidence about this arrangement, but for the present it is sufficient to say that Reuben Prest was to be the man on the ground, run the stores as before, make the contracts and generally carry on the business. The plaintiff supplied the goods for the stores

(an attempt is made to shew that Reuben W. Prest's name was on the notes given in payment of these goods, but I find as a fact that they were bought solely on plaintiff's responsibility and paid by him), but save that all contracts were to be made in plaintiff's name there was nothing whatever to shew that there was any change in the business. The old building with the old sign was used, sometimes at least the old bill heads were used and the same people were in charge. Defendant obtained from Reuben W. Prest out of the store the goods sued for, and credited the amount on the notes he held of Reuben. When the amounts of the accounts which were rendered to him were credited on the notes (one of the notes was in this way paid in full and returned to Reuben) these accounts were receipted. And to plaintiff's suit for goods sold and delivered defendant pleads payment. He sets up no plea of estoppel and asks for no amendment.

From the foregoing statement of facts it will be seen that everything depends upon the view to be taken of the arrangement between the plaintiff and Reuben W. Prest. If it were a partnership agreement plaintiff does not deny that he has lost his right of action against defendant. If it were not, but on the contrary was of such a character that plaintiff was the principal and Reuben W. Prest only his agent, then plaintiff contends that his agent could not use the principal's goods in satisfaction of his own private debts. With this contention in this particular case I agree. If the arrangement be only one of principal and agent, not partnership, plaintiff must have judgment. Of course, if there were anything in plaintiff's conduct that had induced defendant to believe, and he did believe, that in dealing with Reuben he was dealing with the actual principal the case would be different (Cooke v. Eshelby, 12 A. C. 271). As I have said, there is no plea of estoppel, and though I should judge a fairly strong case of estoppel could have been made out, the witnesses were not fully examined along that line. From what appears I would infer that defendant kept on dealing with Reuben W. Prest as he had formerly done without any belief one way or the other as to whether Reuben were the principal or an agent, which, under the case cited, is not enough. But it might quite well be if asked he would have gone farther and said he believed he was dealing with Reuben as principal and might have been able to shew that

it was plaintiff's conduct induced that belief, which, if I read Cooke and Eshelby aright, would have entitled him to judgment.

Prest's version of the arrangement between him and Chapman is as follows: "Plaintiff and I were in partnership at this time (i.e., when the goods were sold to defendant) in store business as well as in lumbering. We entered in partnership latter part of November or first part of December, 1905. Verbal agreement. Each to receive half profits till debt I owed him was paid for. Firm name was Chapman & Prest." (It is a striking fact that in the two accounts rendered defendant this name does not appear. And in one the creditors are the Prest Lumber Co., in the other R. W. Prest). Plaintiff says of it: "I spoke to Reuben W. Prest about business. He suggested I take over business, put in goods, and receipts were to go to pay off old debts. I was to take contracts in my name. Goods were to be used in lumbering operations, not for sale to general public." In cross-examination he adds: "First began to do business with Reuben W. Prest personally fall 1905. Our business was to be in lumber on Tangier river. I was to do business down there and put in goods in store. Reuben and his wife were to be in charge of store, look after and sell and dispose of goods, and at end of season profits arising from lumber and sale of goods were to go in reduction of debt. My share of profits was in shape of commission which I was to get. Reuben's share of profits after deducting living expenses was to go to reduce debt."

It will be noticed that Prest swears there was a partnership, but that he should not have been allowed to say, and of course his statement is not conclusive. We have to read the two versions of the arrangement together, and with the aid of the well known principles decide whether there was a partnership or not. I have read and re-read the evidence many times and have reached the conclusion that there are only two reasonable views that can be taken, each of which excludes the idea of a partnership. First, either plaintiff took over and conducted the business of the Prest Lumber Co. not in any sense in partnership with Reuben W. Prest but entirely on his own account, with Reuben W. Prest as his manager, servant or agent. Or, secondly—and here we are getting very close to the leading case of Cox v. Hickman, 8 H. L. C. 268—Reuben W. Prest was himself to carry on

the business and be himself the only person interested in it save that he has mortgaged (to borrow the language of Cox v. Hickman) all the profits to the plaintiff. The plaintiff supplied the goods in order to enable Prest to do this much as the defendant in Bullen v. Sharp, L. R. 1 C. P. 86, gave a guarantee. It might be that if it were necessary for the carrying on of the business that Reuben W. Prest should take plaintiff's goods and with them pay a private debt plaintiff could not recover. But that has not been proved, and from what we know I think it would be impossible to prove.

The plaintiff will have judgment but not for the full amount claimed. The credit he gave defendant for work should be $17, not $12.80. I also allow defendant for goods supplied $21.73. Plaintiff's counsel intimated that before I could allow this last item defendant must amend his pleadings, in which case he would want leave to amend by pleading as to it the Statute of Frauds. I do not see that there is any necessity for the defendant amending, nor as I understand the evidence, would the Statute of Frauds assist the plaintiff, but if any amendments are required they are allowed. The plaintiff will have costs, but the defendant will have any costs occasioned in establishing his right to the two credits.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. DECEMBER 3RD, 1910.

THE CUMBERLAND COAL AND RAILWAY CO. v. McDOUGALL ET AL.

Employer and Employee — Strike — Appeal from Order of Judge Continuing an Interlocutory Injunction until Trial of Action—Balance of Convenience—Discretion—Criminal Code, sec. 501 — Parties to Action — Trade Union—Point Raised for First Time on Appeal.

Appeal from the judgment of DRYSDALE, J., continuing an injunction until the trial of the action.

W. F. O'Connor, K.C., in support of appeal.

H. Mellish, K.C., and J. I. Ritchie, K.C., contra.

TOWNSHEND, C.J.:—This is an appeal from the decision of MR. JUSTICE DRYSDALE continuing an injunction granted herein until the trial of the case. This injunction was granted in June last, and, apparently no effort has been made to bring the case on so that the matter might be disposed of after full trial and hearing of the witnesses. We are now asked on this appeal from an interlocutory injunction to overrule the learned Judge who, after considering the same affidavits before us in his discretion, decided it was a proper case for intervening by a restraining order until the merits could be enquired into on trial. A very strong case indeed should be made out by the appellant to induce the Court to interfere under such circumstances. Had there been no evidence at all to sustain the order, or if some great injury to the defendants were shewn to be the result of the continuance of the interim order there might be some ground for a much closer and more critical examination of the evidence than is at all necessary at this time. No injury surely can be suffered by defendants by being restrained from committing alleged illegal acts which they deny. On the other hand very great injury may be suffered in the meantime by the plaintiff company from the alleged conduct of defendants or some of them in collusion with others. The balance of convenience is an important consideration, and in this case is clearly on the side of the plaintiff.

As to the want of sufficient evidence it is true there are contradictory statements in the respective affidavits of plaintiff and defendants, but it would be unusual to dispose of the question on appeal as to whether the Judge below was right in adopting one set of affidavits rather than another in an interlocutory proceeding. But if we were obliged to do so I should arrive at the same conclusion as the learned Judge, when he says:

"I am satisfied that since the strike now existing and since the plaintiff company have been endeavouring to carry on their works by the hiring and introduction of men for that purpose, the defendants have been, and are parties to an organized system of intimidation and coercion intended and having for its object the prevention of employment by the company of men, and the prevention of work by men engaged

for work in and about the company's property upon terms mutually agreed upon between the company and the men."

The affidavits on behalf of the plaintiff company indicate strongly such to have been the conduct of the defendants and others in concert with them, while in my mind the denials of the defendants' affidavits, such as they are, have been framed generally with the purpose of evading the real truth as to the character of their acts of interference with the men hired by the company. It would be idle to shut our eyes to the fact shewn in the affidavits that there is a combination among these defendants with others associated with them to prevent and obstruct the company in carrying on its operations at Springhill. Whether these charges could be sustained on the trial of the cause is another matter with which we have nothing to do at present. In the very clear analysis of the evidence on both sides furnished by Mr. O'Connor, counsel for defendants, there will be much to be considered and weighed by the trial Judge if similar evidence with more testimony is adduced thereat. As I have already pointed out on this application the Court will refrain from doing so if satisfied that the Judge who granted the injunction had before him any reasonable material on which to act.

This injunction is based on the violation of sec. 501 of the Criminal Code, and there is a great deal of evidence to prove that someone or more of the various provisions of that section have been violated by the defendants deliberately planned and carried out for that purpose. It would be useless and unnecessary at this stage to discuss and finally pronounce on these varied acts, and the final distinctions as to their application pointed out in the various authorities cited in defendants' brief. That will be done when the action is tried and ready for final determination. I, therefore, pass then over without giving any opinion on the ultmate conclusion which may be arrived at by the Court which hears and determines the whole case. There is one further point made by Mr. O'Connor which must be noticed, that is to say, that under Order 16, r. 9, before the so-called Union of United Mine Workers could as a body be enjoined there must be on order of the Court authorizing the defendants to be proceeded against as representatives of that body or society, as without proof of acts of interests in common a whole class cannot by a general order be restrained.

This objection applies to that part of the restraining order which directs that "the defendants except James D. McLennan (who was not served) and that all other members of the United Mine Workers of America resident and being members in the province of Nova Scotia of the said United Mine Workers of America, and that all members of District No. 26 of said United Mine Workers of America, and that all members of Local Union No. 46 of said United Mine Workers of America be and they are hereby restained, &c., &c."

This objection, I understand, was not made before the Judge below, and, therefore, should be cautiously regarded at this stage of the proceedings. In the meanwhile no inconvenience can be suffered by the Union or any of these other members if not guilty of the acts charged, and not properly before the Court. On the final adjudication that question can be settled.

A brief reference to the cases on the subject may, however, be useful. Order 16. r. 9 is as follows:

"When there are numerous persons having the same interest in one cause or matter one or more of such persons may sue or be sued, or may be authorised by the Court or Judge to defend in such cause or matter on behalf or for the benefit of all persons so interested."

In the Taff Vale Railway v. Amalgamated Society of Railway Servants (1901), A. C. 426, this question was thoroughly discussed in the House of Lords and the other cases up to that date commented on. Lord Macnaghten, on this point, says:

"Then if trade unions are not above the law the only remaining question, as it seems to me, is one of form. How are these bodies to be sued? I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons who from their position may be fairly taken to represent the body. I should be sorry to think that the law was so powerless, and therefore it seems to me that there would be no difficulty in suing a trade union in a proper case if it be sued in a representative action by persons fairly and properly represent it."

In Wood v. McCarthy (1893), 1 Q. B. 775, Wills, J., said in substance that where plaintiff's claim is against an association or class of persons, the members of which are so

numerous that they cannot conveniently all be made parties, the plaintiff may make two or three members of the association defendants on behalf of themselves and the other members.

So far as I can understand the subject there is no rule or authority to the effect that as a prerequisite to suing an association or class of persons, in the name of some one or more of them, there must be an order of a Judge or of a Court authorising the same to be done. The decision in the Taff Vale Colliery case, already cited, seems to be the latest and most authoritative deliverance on the subject, and no such necessity is even hinted at in the judgment. It suffices that the persons selected be shewn to have a common interest in the subject matter of the action. It is beyond question that some of the defendants in this action are especially representative of the Union, and the United Mine Workers of America in this province. Defendant McDougall is president of District No. 26, McLachlan is secretary, Moss is vice-president, Bannyman is president of the local union No. 469, Watkin, the secretary is also a member of the board, District No. 26, Kellaher representative of the international organisation at Springhill with the control of distributing its funds for the support of the strikers, and all the other defendants are members of the Local Union No. 469.

It seems to me no better or more representative persons could have been selected as defendants to represent the whole body of United American Mine Workers in Springhill.

That the local union members and these defendants are actuated by a common purpose and have a common interest is, as I have already said, established satisfactorily. That their object was to obstruct and hinder the plaintiff company by picketing, intimidation, forcing persons hired by the company to break their contracts, making use of the highway so as to discommode the public using it and otherwise violate the statute seems too plain to be doubted.

I conclude by citing an observance by Meredith, J., in King Furniture Co. v. Union of Woodworkers (1903), 5 Ont. R. 465:

"Whatever may be thought of this purpose from any other than a legal point of view, so long as the workmen resorted to lawful means only to accomplish a lawful object, they were quite within their rights, and entitled to and would receive the prompt protection of the law from un-

warranted interference at any one's hands, but any unlawful objects or unlawful means adopted by them to obtain a lawful object should meet with equally prompt prevention and punishment in the courts of law."

I am of opinion that this appeal should be dismissed with costs.

MEAGHER, J., read an opinion concurring with the judgment just read with respect to the affirmance of the judgment appealed from. The evidence shewed concerted action on the part of the strikers with a view to preventing the company from resuming operations until the demands of the strikers were conceded. The balance of convenience must be considered and the balance of convenience in this case was reasonably strong in favour of continuing the restraining order.

As to the question raised under Order 16, r. 9, he did not consider it material at the present stage. The point was not raised below or it would have been cured at once. It might be that under the circumstances of this case there was no class coming within the rule in question. On the whole he was of opinion that parties not joined were not bound by and would not be affected by the order, and there was no sufficient reason for interference.

RUSSELL, J.:—I agree that the appeal should be dismissed with costs.

LONGLEY, J.:—I agree with the conclusions reached by the Chief Justice and the reasons upon which they are based. If I add any word it is simply that I do not wish to be understood as placing an appeal from an interlocutory restraining order made by a Judge upon any different footing from any other form of appeal, and I think that this Court has full power to reverse the discretion which he has sought to exercise if there be good and substantial grounds for it. In this case I think there are not such grounds and I therefore agree that the appeal should be dismissed with costs.

Appeal dismissed.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. NOVEMBER 26TH, 1910.

REX v. NEILSON.

Industrial Disputes Investigation Act, 1907—Aiding Striker —Intent — Criminal Code — Summary Conviction — Jurisdiction of Magistrate.

Prosecution for violation of the Industrial Disputes Investigation Act in furnishing supplies to strikers.

H. Mellish, K.C., for prosecutor.

W. B. A. Ritchie, K.C., for defendant.

The following judgment was delivered by

TOWNSHEND, C.J.:—This is a stated case sent up to this Court by the stipendiary magistrate for the town of Inverness. It appears that the case was tried under the provisions of Part XV. of the Criminal Code relating to Summary Convictions.

The defendant, David Neilson, was on the 26th day of October, 1909, convicted of having unlawfully aided Francis Morien, an employee of the Inverness Railway and Coal Company, to continue on strike by gratuitously providing him with means to procure groceries and other goods, contrary to the provisions of the Industrial Disputes Investigation Act, 1907, the said strike being on account of a dispute within the meaning of the Act, between said company and its employees in said town, the said aid being prior to a reference of said dispute to a Board of Conciliation and Investigation under said Act, the Inverness Railway and Coal Company being an employer and Francis Morien an employee within the meaning of the Act.

Several grounds have been suggested in the case sent up shewing that the conviction is illegal, but it is only necessary to deal with those presented at the argument.

It is contended that supplying provisions to a striker is not giving aid within the meaning of section 60, chapter

20. That the aid must be given with intent to assist the employee to continue on strike, and that that is not proved by merely giving him food or clothing.

The magistrate finds as facts that the accused represented the United Mine Workers of America, that he was giving merchants cheques for goods supplied employees of company on his order as such agent; that there was a dispute within the meaning of the Act between the company and the men; and that the men, including Morien, went out on strike in consequence of this dispute and continued on strike; and that these men were induced to cease working by the head officials of the United Mine Workers of America.

It is difficult to conceive any more effectual means of aiding strikers than those found in the present case. It is of course precisely the aid wanted to enable tthe strikers to live during the pendency of the strike, and it hardly needs comment to shew that the defendant as an agent of the United Mine Workers of America so gave the aid with the express and sole purpose of enabling the strikers to stay out until their demands were complied with. I have no doubt however the offence in this respect has been completely proved.

Then it was contended that it was not such a dispute as was contemplated by the Act. The dispute arose in consequence of a deduction of a certain amount from the wages of the employee and as the case states: "and the discharge of five Belgians in consequence of their refusal to pay the said dues; that their committee threatened unless their demands were granted 'to go out on strike'—'to tie up the mine,' and that 300 men went out on strike on the 9th day of July, 1909."

Again I may say, if this was not a dispute within the meaning of the Act, I should find a difficulty in defining what was. That Morien was one of the strikers who combined with the others is, I think, very clearly apparent in the case stated.

Then it is said Morien was not an employee when the assistance was given, because he had gone out on strike sometime previously, but it will be noted that he was not dismissed by the company and that it was open to him to return to work if he chose. If such an argument could prevail, then all men who go on strike would cease to be employees, then the Act would be useless.

The magistrate finds as a fact that said Francis Morien went out on strike with other employees on the 9th July, 1909, and was an employee of the said Inverness Railway and Coal Company at the time, and as such employee continued on strike up to and including the date of the laying of the information.

I think his finding was right, and that Morien was and remained an employee of the company in the same way as all others who went on strike with an avowed purpose of compelling the company to comply with their demands.

An objection was made, but not very seriously urged, that the stipendiary acted without jurisdiction because he did not take evidence when the information was laid as required by sec. 655 of the Criminal Code as amended by chapter 9 Acts of 1909. But as pointed out by counsel for the prosecution that section does not apply to prosecutions under Summary Convictions—it is only applicable to charges of indictable offences. Sec. 710 Code.

What I have said, I think, deals with all the matters in the stated case, and I am of opinion that the conviction should be affirmed with costs.

The same result will follow in the second conviction.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. NOVEMBER 26TH, 1910.

REX v. ATKINSON.

Nova Scotia Liquor License Act — Second Offence — Evidence of Previous Conviction—Certificate—Identity of Defendant.

Appeal from conviction for violation of Liquor License Act.

F. McDonald, in support of appeal.

W. F. O'Connor, K.C., contra.

LAURENCE, J., delivered the judgment of the Court.

The defendant was convicted before a stipendiary magistrate of a second offence under the Liquor License Act, the only evidence of the previous conviction being the production of a certificate thereof under the Act from which it appeared that a person of the same name and address as that of defendant had been convicted previously and before the same magistrate who heard this case. The magistrate convicted defendant of a second offence.

An appeal was taken by defendant and the learned County Court Judge set aside the conviction, deciding as a matter of law that the production of the certificate of conviction, giving a similar name and address as that of defendant affords no evidence of identity. I think such proof does afford some evidence of identity and warranted the magistrate in the circumstances to treat it as some evidence.

The latest case on the subject is Martin v. White (1910), 1 K. B. 665, wherein Lord Alverstone, C.J., says: "The question is whether in the circumstances it" (the record of previous conviction) "affords in itself some evidence of identity of the appellant with the person who was so convicted" . . . "In my opinion the identity of name and address was evidence that the appellant was the person who was convicted of the offence on January 5th, 1908." And he cites Simpson v. Dismore, 9 M. & W. 47, and Russell v. Smyth, 9 M. & W. 810, as authorities to shew that the Court may act upon identity of name and address as evidence of the identity of the individual.

The magistrate having found identity proved the learned County Court Judge should have found on this evidence as a matter of fact one way or the other.

The appeal should be allowed and the conviction below affirmed.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. NOVEMBER 26TH, 1910.

REX v. McKENZIE.

Nova Scotia Liquor License Act — Conviction — Alleged Irregularity of Magistrate in Delivering Judgment — Agreement by Counsel for Defendant that Magistrate Should Take Time to Consider Case—Effect of.

Motion to quash a conviction under the Liquor License Act.

W. F. O'Connor, K.C., in support.

J. A. Wall, contra.

DRYSDALE, J.:—This was a motion to quash a conviction made against defendant for an offence against the provisions of the Liquor License Act.

It was alleged by defendant that at the close of the hearing the magistrate announced that the charge was dismissed, and that he thereafter improperly filed a conviction against the defendant.

This allegation has, however, been fully met, and it appears that at the close of the hearing the magistrate desired time for consideration. The defendant was represented by counsel and it was agreed by counsel that the magistrate should take time on condition that he file his decision within one week and notify the solicitor of both prosecutor and defendant respectively when it was filed or given.

The magistrate did decide within the week, and thereupon at once notified the respective solicitors.

I think the defendant, by his counsel having agreed to the course pursued by the magistrate, it is not now open to him to question the procedure.

I am of opinion the motion fails, and the conviction stands affirmed.

MEAGHER, J., read an opinion to the same effect.

The other members of the Court concurred.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. NOVEMBER 26TH, 1910.

REX v. BYNG.

Nova Scotia Liquor License Act—Sale—Social Club—Bona fides—Conviction Affirmed.

Appeal from a conviction under the Liquor License Act.

W. F. O'Connor, K.C., in support.

F. McDonald, contra.

DRYSDALE, J., delivered the judgment of the Court.

This is an appeal from the judgment of the County Court Judge for District No. 7 affirming a conviction by a magistrate against defendant for the offence of keeping intoxicating liquor for sale contrary to the provisions of the Liquor License Act.

It was contended that the place in which liquor was admittedly kept for sale was the club house or property of a club duly incorporated and organized as a social and rowing club under the name of the Union Jack Rowing Club, but after an examination of the evidence I have come to the conclusion that no bona fide club, either social or rowing, was ever organized, and that the transfer spoken of by the defendant of his business was a mere colourable transaction entered into with a view to evade the provisions of the License Act, and that the business was and continued to be that of the defendant. The trial Judge's finding to this effect was quite warranted by the evidence and I agree that the conviction ought to be affirmed.

The appeal will be dismissed.

NEW BRUNSWICK.

SAINT JOHN COUNTY COURT.

NOVEMBER 1ST, 1910.

LEPORTE MARTIN CO. v. JOSEPHINE LEBLANC.

Extra-Provincial Corporation—Wholesale Importing License—Retail Liquor Dealer—Onus Probandi—Special Pleading—Nonsuit Refused—Judgment.

This was an action brought by the plaintiffs who are wholesale liquor dealers in Montreal, Quebec, against the defendant, who is the proprietor of a retail tavern in Richibucto, Kent Co., for liquors supplied the defendant amounting to three hundred dollars. The plaintiffs being an extra provincial corporation, laid the venue in St. John. During the trial it developed that the plaintiffs had not taken out either a license to carry on business as an extra-provincial corporation or a wholesale importing license as required by sec. 45, sub-sec. 5, ch. 22, N. B. Con. Stat., 1903. The case was heard without a jury.

J. A. Barry, for the defendant, at the conclusion of the plaintiffs' case, moved for a non-suit. Cites sec. 45 sub-sec. 5 N. B. Con. Stat. 1903:—"The Provincial Secretary may issue a license, to be known as a wholesale importing license, to any person, or firm of persons, authorizing such person or firm of persons, whether resident in or outside the province, by themselves or their employees, to sell throughout the province in counties, cities or towns in which the Canada Temperance Act is not in force, by wholesale to persons holding a wholesale license under this chapter, any intoxicating liquors; provided however, that no liquors shall be kept in stock by the person holding such wholesale importing license within this province, and such license shall only authorize the holder thereof to take orders from such wholesale dealers for direct importation into the province from foreign countries."

The onus is on the plaintiff to shew that he has such a wholesale importing license and that the defendant is also a wholesaler.

A. A. Wilson, K.C., and C. S. Hanington, for the plaintiffs.

It is for the defendant to shew that we have not taken out the license as required.

The general issue was only pleaded and the objection that the sale is illegal because of the non-payment of the license fee as required by the Act cannot be taken unless specially pleaded. Section 42, ch. 116, N. B. Con. Stat. 1903, the County Court Act.

"The defendant in any action in any County Court may, in addition to any matter which may be by him pleaded in bar to such action, and put to trial by a jury, give in evidence on the trial thereof, any other matter of defence in law whatsoever; provided that notice of such other matter be given in writing to the plaintiff or his attorney at the time of the delivery of the plea, and be filed with the plea (which notice may be proved on the trial to have been delivered, either ore tenus or by affidavit of the person delivering the same); and provided also, that any such other matter of defence may, without previous notice thereof, be met on the trial by evidence of any matter which might have been pleaded thereto by way of replication, in case such matter had been pleaded, and so toties quoties by either party."

Cites Daintree v. Hutchinson, 10 M. & W. 85, Chitty Arch. 258.

FORBES, Co.C.J., would not allow the nonsuit in view of the authorities cited by the counsel for the plaintiffs. Judgment for the plaintiffs for the full amount.

NEW BRUNSWICK.

SUPREME COURT.

KING'S BENCH DIVISION. NOVEMBER 3RD, 1910.

CHAMBERS.

RE THE ALEXANDER DUNBAR & SONS CO.

Company—Winding-up — Assets Covered by Debentures—Rights of Unsecured Creditor — Right to Winding-up Order.

Before McLEOD, J., in Chambers, St. John, N.B.

This is an application for an order to wind up the Alexander Dunbar and Sons Company Limited of Woodstock, N.B. The petitioning creditor is the Edgar Allen and Company, Limited, of Sheffield, England. The Bank of Montreal are creditors to the amount of $98.000, and have collateral security upon all the personal property of the company. The Royal Trust Company hold a trust mortgage for $30,000, on all the property of the company, the debentures of which are held by the Bank of Montreal. The Royal Trust Co., went into possession under a power contained in the mortgage and started suit for foreclosure on October 22nd last.

November 2nd, 1910.

M. G. Teed, K.C., for the petitioning creditor, L. P. D. Tilley and J. D. P. Lewin for judgment creditors in support of the application.

A. B. Connell, K.C., and Fred R. Taylor and C. F. Inches of Weldon and McLean, for the Bank of Montreal and Royal Trust Co., contra. There are no assets to wind up and what benefit could the petitioner gain from a winding-up order? Cites, In re Chic Ltd., 1905, 2 Chan. 345; Grundy Stove Co., 7 Ont. L. R. 252; Re Georgian Bay Co., 29 Ont. 358; In re St. Thomas Dock Co., 45 L. J. Chan. 116.

Teed, K.C., in reply, cites: Criggleston Coal Co., In re, (1906), 2 Chan. 327; Parker and Clarke on Companies, 365.

November 3rd, 1910.

McLeod, J., now made an order winding up the company and appointed a provisional liquidator.

Petition allowed.

NOVA SCOTIA.

Full Court. December 15th, 1910.

SUPREME COURT.

CARR et al. v. FERGUSON.

Land—Trespass—Removing Fences — Crown Lands—Title of Occupant as against Wrong-doers—Evidence.

Appeal from the judgment of Meagher, J., in favour of defendant in an action for breaking and entering lands and removing and injuring fences, &c.

The learned trial Judge, in the judgment appealed from, said, in part:—

"The Crown, I have no doubt, is the true owner of the entire locus, but the defendant's possession under, at least, colour of title, is good against the plaintiffs, who as against him, were mere wrongdoers. . . .

The plaintiffs have no documentary title, and did not shew their father had any, nor even that they went in under him. They did not go into possession as his heirs, because their alleged possession began eighteen years before their father's death. When his occupation began or ended was not shewn; nor was its limit or extent. He never had any enclosure or erection upon it. They speak of his occupation for 50 years, but if it ended when their's began neither of them was old enough to remember so far back.

The evidence of their occupation and use is vague and indefinite and consisted rather of conclusions of fact than of the facts themselves; and where it was otherwise it was largely the outcome of leading questions. They never enclosed any part of the locus. Beyond their little pier and fish store there never was anything to indicate the limits of their occupation or claim. The C to D fence was their first act in that respect, except when they built fences upon defendant's possession, but that gave no indication either southwardly or westwardly of their possession. The beach was always opened and unenclosed save for the line fence between Carr and Hadley spoken of.

The evidence as I believe it, proved that their occupation and use, apart from their small structures, were at best casual, temporary and irregular both in time and area, and never were in any sense of a character which could ripen into a right as against the Crown. Their little hut or store was removed three times, each time some distance apart, and on one occasion quite a distance while their pier is not much over 15 years old if it is that. Less than 25 years ago there was deep water where it now is: at present it is beach under part of it at any rate. There have been considerable changes in that beach, some quite perceptible, others gradual. They live a mile and a half from the beach, and own no property upon which the locus fronted. The fence C-D by which they now claim on the west is except about a panel's length at the northern end, wholly upon the beach. There is therefore no ground for presumption of owner-

ship in the frontage, as happened in many English cases where the foreshore fronted a manor.

They dried their nets on the beach at times; but how much they covered, and whether they were always in the same place or places, except that they were north of the breakwater, was not proved. The same is true of where they put their lobster pots when not in use. They may have been put in a small pile, or placed one by one at some little distance from each other, from aught that appears. And spaces too may have intervened between their nets while drying. At best it was therefore an irregular possession even by their appliances when they were on the beach, a possession in small spots, which if effective would only give a sort of "strewed and patched" title. During the fishing season both nets and pots were in the water the greater part of the time, and when the season ended they were put under cover, and thus for a large portion of the year, apart from the winter season, the alleged occupation entirely ceased, and there was nothing to indicate a possession in any one. Others, though not so often, nor so extensively, used it for fishing purpose as well as they.

When from day to day in the fishing season they removed and set their nets and pots, their possession was broken. There cannot be a pretence of disseizin here against the Crown, or in fact against any owner by them. Whenever they had not some property spread upon the beach, the Crown was in possession of it, or the true owner, and when they were there they only had possession of the precise spots their appliances covered. The area outside of and between these was not in their possession at all. During several months beginning probably in November and ending in March, often later, they were not on the locus at all, and outside of their structures had no possession actual or constructive.

They were, in my opinion, either intruders from time to time upon the Crown property, or they were there in the exercise of a public right in connection with, and as part of, the public right of fishing. The latter was lawful, the former not so; in such a case the possession is referred to the lawful use, but in neither case did they acquire any special right or interest in the locus. I mean special to themselves. They used the beach in the latter sense only, and all their acts of drying nets, and placing lobster pots, etc., are referable to such public right only. Their acts and

use taken most liberally for them did not under the circumstances constitute a weak case of possessio pedis. I say this for reasons given; because they had no enclosure, and nothing to indicate the extent of their possession, which was varied frequently and never was continuous in time or area. When members of the public are exercising a public right over Crown property, the Crown is in possession by its subjects. See Moore on the Seashore, 435, per McDonald, C.B.

As against the Crown the proof to give title, or possessory rights even, should be clear and unequivocal, and the acts relied on should be regarded strictly against those setting, so that the interests of the Crown and public may be protected. The Crown, unlike an ordinary individual, is not in a position to know of invasion of its property, and the public is liable to be listless in such matters. I cannot form a notion even how much of the beach was at any time covered by the nets or pots, or both combined. The only use they ever made of any soil outside of the beach was perhaps to cross it occasionally going to and from the beach. Before the defendant's pier was built it was probable they crossed it at that point on the old road.

I shall discuss the justification aspect first on the assumption that they had some right or interest in the area where the road was located; in that view the defendant must rely on his position only as surveyor or as an agent of the municipality.

If the council became seized of jurisdiction to deal with the laying out of the road, mere irregularities in the procedure, including proceedings inverso ordine, cannot be relied on by way of collateral attack. The council has not only general, but exclusive jurisdiction over the subject-matter.

Section 2 of chapter 76, R. S. 1900, enables 20 freeholders to petition for a new road, and if upon hearing it, and what is said in support of it, the council is satisfied the application should be granted, it awards a precept to a commissioner directing him to examine whether the proposed road will be a benefit to the public, and if he is satisfied as to this he is to proceed to lay it out. Upon hearing the petition the council acquires jurisdiction over the project. It can only determine that the request of the petition is a reasonable and proper one. The petition set forth sufficient reasons which were no doubt supplemented, as in the legislature, by the local knowledge of the councillors, and the council being satisfied appointed a commissioner to examine

and report whether the road would benefit the public. He reported in the affirmative and laid out the road as required by the precept and statute. And the report duly came before the council.

Up to the time when he so reported to the council, there does not appear to be any notice called for to any one; none is prescribed. The petitioners need only shew a public need for a road in a certain locality between certain points, which need only be indicated in a rough, general, way. It could not define its location even approximately perhaps; the statute does not require that even with any particularity. The task of locating belongs, in the first instance at any rate, exclusively to the commissioner. The petition therefore could not shew through whose lands it might or would pass, and these could not be definitely ascertained until the commissioner completed his work. The parties interested thus far are not merely those through whose land the road will pass; it is the public at large.

The commissioner first determines that it will benefit the public; then he proceeds to lay it out, and until he completes that task he does not know who it may effect in their lands, and he therefore could not notify them of his examination, and it never was intended he should summon the countryside. Who may be damaged does not enter into his enquiry until after he lays it out, and then he is to make arrangements if he can for damages with those affected by it. There is no prescribed method or form of examination, and therefore, as in partition cases. (See Archibald v. Handley, 40 N. S. R. 437). It is open to him to make enquiries where and of whom he pleases in addition to viewing the neighbourhood or the latter alone for the purpose of deciding the question submitted to him. More is not required and there is no scope for notice to any one to come before him.

The commissioner in this case made no effort to agree with either plaintiff for damages. One of them forbade him to lay out the road, and he does not appear to have had notice of any other award.

Section 6 provides the machinery for the appointment of arbitrators where the party after notice fails to appoint one to assess the damages. One of the plaintiffs admitted he had notice to appoint one; but if the clerk's evidence is regarded, notice was not given. The latter was in ill-health

when examined and died very soon after, and his memory may have failed him. I shall act upon the view that such notice was not given. Its absence does not affect the validity of any of the proceedings later taken in the matter. The damages may be determined as well after as before council confirms, or adopts the proceedings. Section 12 and 17 are sufficiently specific in that respect. Under 17 the way may be entered upon before the damages have been ascertained, and that means, I submit, for any purpose or use which may be made of it under the law. I say that even although actual title may not have rested under section 20; though personally the officers did their duty in due season and had the plan registered. I do not place any stress upon this however.

All the provisions of section 10 were complied with in this instance by the clerk. I mean as to the matter and publication and length of time called for. This was the essential notice to all parties interested who had an objection to make or grievance to be redressed in the matter. The notices were posted in February. The council met in April, heard the report of the commissioner and also heard and received a counter petition signed by several parties, not objecting to the road or its location, but opposing the closing of any part of the old road, and to giving the defendant any part of it in place of damages. The council gave effect to the contention, but otherwise confirmed the proceedings. Among the names of that petition are those of James K. Carr, and Joseph G. Carr, the names of the plaintiffs. It would not be stretching matters unduly perhaps to presume they signed it. I need not go that far; because they had all the notice the law prescribed or required. Joseph says his brother took steps to oppose, but was taken ill. They knew all about it, and knew when it came before the council. They had, as the American cases say, "their day in Court" and were not entitled to more. If they or either had any objections to urge, or any ground, against the project altogether, or the location, or the damages, or the absence of an award as to Joseph, or want of notice to appoint an arbitrator, or otherwise, that was the time to make them, and not having done so they cannot urge these irregularities as a ground for invalidating all prior proceedings, and the more so when the damages might have been appraised later on. It is fair ground to say they raised all or any

of these questions before the council. They were decided against them by the final tribunal; if they did not raise them they waived them and elected to forego them for all time, so far as collateral proceedings are concerned.

The result, therefore, is that the laying out of the road was regular, valid, and complete, and that enough was done assuring their ownership, to prevent their obstructing the locus and to justify the removal of obstructions wilfully put there to prevent the laying out of the road. Very soon after the council confirmed the proceedings, the clerk required them by letter to remove obstructions on the way, but they paid no attention to it. The road was laid out in January when the fence was the only thing within its limits, and even the tan pot had been removed to shelter.

The authorities having entered, or being entitled to enter, had, I take it, the right to remove obstructions upon the way and especially after notice as in this case.

A question was raised as to the locus being within defendant's district as road surveyor, and if I regarded the oral testimony I should find it was. I mean apart from the clerk's. His appointment was identified by plaintiffs' counsel but put in by the defendants. I cannot well apply the description in it. I do not know who James Carr is, nor where in relation to the locus his east line is: nor where he lives so as to be able to say on which side of the disputed place he lives. The municipality has ratified the defendant's act, be he surveyor or not, and undertaken to indemnify him for what he did, and the result is the same as if it expressly authorized him to remove the fence, pots, etc., so that it might enter into full possession of the area. No overseer or contractor would be willing to enter and construct the road while these were on it, and run the risk of litigation for the removal.

The removal was done in the public interest, but above and beyond that I find the plaintiffs had no interest whatever in the soil of the area. That they were merely trespassers upon it, and liable to have their fence, pots, etc., removed, and nothing more was done. I say trespassers because the property upon the area was put there not in the exercise of any fishing rights, but merely to obstruct the laying out and construction of the road. In the views expressed it makes no difference whether the defendant as surveyor had jurisdiction over the place or not.

I find the facts generally in the defendant's favour. The action will be dismissed with costs and the defendant will have judgment on his counterclaim with costs as above indicated.

I may add the road was a real necessity, and I cannot understand the spirit which prompted opposition. It would be a convenience and not an injury to the plaintiffs even if they owned all they claimed. The new pier, the only suitable landing place near, can only be reached from the old road by boat at high water. The new road was intended to afford, and will do so, a direct and ready access to the landing place on the pier without the additional use of a boat necessary from the old road.

G. A. R. Rawlings, in support of appeal.

E. C. Gregory, K.C., contra.

LONGLEY, J., read the judgment of the Court:

The plaintiffs seek damages for two distinct acts of trespass. One for tearing down twenty links of fence on a line C.D. on the plan, and another for tearing down the fence on the line A.B. on the plan.

In respect of the first claim the defendant justifies in his capacity as surveyor of highways, on the ground that the fence so removed was on land duly laid out as a highway or public road. This fact was not disputed but it was claimed there had been some irregularities in the steps taken under the Highway Act, ch. 4. Acts of 1906. The whole question of these irregularities is dealt with very fully in the grounds of decision of the learned trial Judge. He finds that the fence removed was on the line of the road laid out and approved by the council; that the plaintiffs were not owners and not in regular occupation of the land through which the road passed, and that the proceedings had been regular.

Although the judgment on this alleged trespass has been attacked on appeal it was not very seriously pressed, and I see no reason whatever to question the judgment below on this point.

REPORTER'S NOTE:—The remainder of the judgment proceeded upon the point as to whether the evidence supported the finding of the trial Judge on a question of fact as to defendant's possession of the lot in question at the time of the trespass.

NOVA SCOTIA.

DECEMBER 23RD, 1910.

IN RE ESTATE C. E. KAULBACH, FRANK R. MOORLAND, CLAIMANT.

Contract—Publication of Newspaper — Terms — Probate Court — Claim Filed against Estate — Right to Amend Claim—Evidence—Corroboration.

Appeal from the judgment of S. A. CHESLEY, Esq., Judge of Probate for the county of Lunenburg ordering the executors of the estate of C. E. Kaulbach, deceased, to pay claimant the amount of his amended claim, with costs.

H. Mellish, K.C., and R. C. S. Kaulbach, in support of appeal.

W. F. O'Connor, K.C., and D. F. Matheson, K.C., contra.

TOWNSHEND, C.J.:—This is an appeal against the decision of the Judge of Probate for the county of Lunenburg, allowing the claim to the extent of $500.

The claim as rendered and sworn to was as follows:

"To printing and publishing the "Argus" newspaper for one year from December, 1903, to December, 1904, $700."

In support of this account the claimant was examined under oath and among other things says:

"I printed it from 1901 to 1904. I claim for the last year. . . $700 is too small a charge."

On cross-examination he admits that he did this work under a written contract with Kaulbach, part of which has in fact been lost, but its contents have been established by verbal evidence. The Probate Judge finds that the deceased was proprietor of the "Argus" newspaper and plant, that he entered into a written contract, signed on his behalf by W. A. Letson as his agent, and at the time editor of the "Argus," with claimant, under which claimant was to publish the paper with the plant of deceased, paying the ordinary running expenses of publication, and receive the proceeds of subscriptions and advertisements, and upon delivering up to deceased at his request the subscription list,

claimant was to receive $500. He further finds that claimant did deliver subscription list to deceased at his request and is entitled to receive $500.

Now, in agreeing, as I do, with the Judge below in this finding, to the extent that claimant for the year for which the claim was made worked under a written agreement, I would call special attention to this fact, that in so doing he has decided directly against claimant's testimony in the first instance, and directly against his sworn testimony in rendering the account to the executor. That this is so we have only to refer to the reasons for his decision when he says:—

"His claim as originally framed was for $700 for services publishing the "Argus" during 1904. It was amended during the hearing to correspond with his evidence respecting a written contract, of which only a portion was produced." Now, it seems to me, to permit a claimant who has sworn to an entirely different account against the estate of deceased to amend by putting in an entirely different claim for a different amount, after he has been forced on cross-examination to admit an agreement totally inconsistent with the claim first put in, is, to say the very least, an extreme exercise of the powers of amendment, and, in my opinion, should not have been allowed, and I am doubtful if the Judge had power to allow it But, more extraordinary still, the Judge not only allows the amended claim but accepts claimant's sole testimony without any corroboration of the most material facts necessary to claimant's success. That is to say, that he delivered the subscription list to the deceased. Unless this fact was clearly established by corroborative evidence claimant could not succeed. In the decision the Judge says:—

"There is no evidence corroborating the statement of claimant as to the delivery to Mr. Kaulbach of the subscription list, and the question arises as to whether corroboration is required as to every point necessary to be proved in order that claimant may succeed."

He then proceeds to cite some Ontario authorities to shew that he need not be corroborated in every particular. But these cases do not support the Judge's decision in upholding this claim where one of the facts necessary to recovery is wholly without corroboration.

The case of Radford v. McDonald, 18 O. A. R. 167, is referred to by the Judge below, and a sentence extracted from

the judgment of Osler, J.A., is relied on where he says: "It has long been conceded that it need not be corroborated in every particular."

But it is quite evident that the learned Judge did not mean that a material fact, necessary to be proved to enable a party to recover at all, could be accepted without corroboration. Doubtless his reference was to those collateral and incidental facts which accompany all dealings and transactions and do not touch the essential question of the right to recover. Any other meaning would render the statute useless and meaningless and be directly contrary to the express words of the Act. In the case referred to the creditor was corroborated by two documents, both of which were found to be in the handwriting of deceased, and dealing with the very work for which he claimed.

I should have thought such evidence amply sufficient as corroboration. Osler, J.A., further says:

"Nor is the corroboration required to be directed to any particular fact or part of the evidence. It is the evidence of this party which is to be corroborated by some other material evidence."

Maclennan, J.A., says:—

"'Corroborate' means to strengthen, to give additional strength to, to make more certain, and if the evidence helps the judicial mind appreciably to believe one or more of the material statements or facts deposed to by the party, then I think it is what is required by the statute."

Now we look in vain for any evidence whatever to strengthen the claimant's testimony that he delivered the subscription list to the deceased, on which was to depend his right to recover $500. The Judge, indeed, does say:

"It is some corroboration of his evidence as to the surrender of the subscription list that the paper ceased publication just about the time it is said to have been surrendered."

It seems to me that such a fact has no bearing on the delivery of the list whatever, and it is going far afield to refer to it as in the smallest degree corroborating an important and necessary prerequisite to claimant's right of recovery. The Judge below has not undertaken to explain how it could be corroboration, and the fact as to the time of its surrender rests on the unsupported testimony of claimant.

The other case, Green v. McLeod, 23 O. A. R. 676, was decided on the same principle as Radford v. McDonald, and illustrates another mode of corroborating evidence by inference from the proved conduct of deceased in reference to his money affairs but does not further assist us.

The Judge of Probate here indeed does not put forward the ceasing of the publication of the paper as a corroboration very strongly, as he says only "it is some corroboration," but it appears to me, with all respect, that it is none at all.

Apart from the legal question as to the extent corroboration is necessary, one would have supposed that a claimant who had so recklessly, if not untruthfully, sworn to a different claim would not so far have commanded weight with the Judge as to accept his unsupported evidence on a fact so important. Indeed, reading his whole evidence, it indicates a want of accuracy, or a want of memory as to his dealings with deceased, if not worse, which, in my mind, should have entirely discredited him—at any rate unless corroborated.

But are there no other facts which should have weight with the Judge below? It is certainly significant that the deceased, by four different cheques during the year 1904, paid claimant exactly $500. The Judge thinks these were paid for other sums outside the contract. It is curious that in one cheque, for $200, "Publisher of Argus newspaper" is written in it. The Judge gives his opinion that the cheques were for extraordinary expenses on evidence of claimant and Schnare.

The claimant's testimony on this point is very unsatisfactory, and as to Schnare I am unable to find any warrant for such a conclusion except one statement, when he says:—

"I know that Mr. Kaulback once supplied money which I took to Moorehead to pay for paper they had ordered from Halifax." This clearly has no reference to cheques, but money only, and he repeats later on that it was money, "as I wanted cash."

Now, having regard to claimant's conduct in regard to the claim—to the whole evidence—to the want of corroboration on a most material point—I come to the conclusion the Judge of Probate was wrong, and that his decision should be reversed, and the claim disallowed with costs of the appeal and in the Court below.

MEAGHER, J. read an opinion concurring in the result reached. He was unable to discover evidence of corroboration.

LAURENCE, J.:—I have arrived at the conclusion that the appeal should be allowed.

RUSSELL, J. read an opinion dismissing the appeal.

LONGLEY, J. concurred in the conclusion reached by RUSSELL, J.

Appeal allowed.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. DECEMBER 3RD, 1910.

OLAND v. MACKINTOSH.

Action to Restrain Defendant from Obstructing Drainage of Dwelling-house—Easement—No Reservation in Deed Effect of on Plaintiff's Rights.

Appeal from the judgment of MEAGHER, J., refusing an interim order to restrain defendant from cutting off and obstructing the drain from plaintiff's house.

H. Mellish, K.C., and R. T. Macilreith, K.C., in support of appeal.

J. M. Davison, contra.

TOWNSHEND, C.J.A.:—John H. G. Bauld died intestate in the year 1895, leaving him surviving five children. At the time of his death he was the owner in fee simple of the lands in question. In an action brought by some of the heirs for a partition of these lands the Supreme Court ordered that they should be sold at public auction by the sheriff of the county of Halifax. This sale was carried out and the plaintiff, one of the heirs, purchased two lots and the defendant another lot. During all the time he owned and occupied these lands, from 1872 to the time of his death,

there existed a continuous drain from his house, No. 4 Pleasant street (in the lot purchased at the sale by the plaintiff) through lot No. 3 (that purchased at the sale by defendant) which drain emptied into Halifax harbour through an opening in the east retaining wall of said lot No. 3. A house built by John H. G. Bauld on the other lot, purchased also by plaintiff, connected with this drain and went into the harbour.

The defendant, in September last, commenced building a house on the lot he purchased, and in digging the cellar, finding this drain, stopped it up, whereby plaintiff's house drains were cut off. She has begun this action to prevent and restrain defendant from continuing this obstruction to the drainage of her houses. The learned Judge decided in defendant's favour on the ground that the plaintiff as grantor could not derogate from her own grant.

According to his view, in which I agree, the conveyance by the sheriff has the same effect as a conveyance by herself as one of the heirs-at-law; that he is simply the officer of the Court in making the conveyances to purchasers for the heirs-at-law. And I may add here that I do not think the fact of it being a judicial sale under the direction of the Court makes any difference in the relations of the heirs as grantors of the land. If it does, then it must follow that the effect of the order directing a sale of the real estate in a partition action is to take the title out of the heirs-at-law and vest it in someone else—not certainly the sheriff who simply obeys the order of the Court in carrying out the sale. I cannot conceive of anyone to whom the title to the land could go, and therefore it must remain where it was. The sheriff, in executing the deeds to the purchaser, does so as the agent of the parties appointed for that purpose by the Court.

The question then for our consideration is whether notwithstanding she was one of the grantors to defendant she is entitled without any express reservation to enjoy this easement over and upon his lot—that is to say, was there an implied reservation to drain in defendant's land? This has been in the past a subject of much difference of opinion in the English Courts, and the decisions very conflicting.

In Pyer v. Carter, 1 H. & N. 916, says Gale in his work, "It was laid down by the Court that where the owner of two or more adjoining houses conveys one to a purchaser, such purchaser will be entitled to the benefit

of all drains from that house, and subject to all drains then necessarily used for the enjoyment of the adjoining houses, and that without any express reservation or grant, inasmuch as the purchaser takes the house as it is; and that the question as to what is 'necessarily used' depends upon the state of things at the time of the conveyance and as matters then stood without alteration. And upon the argument urged that this was not an 'apparent' and continuous easement, the Court said that although the defendant did not know of the existence of the drain at the time of the conveyance to him, yet, as he must or ought to have known that there was some drainage for the waters he ought to have enquired, and the Court 'agreed with' the author's observation that those things are apparent, which would be so upon a careful inspection by a person conversant with such matters." Gale on Easements, 8th ed., p. 159.

This case was followed by many others until in Suffield v. Brown, 4 DeG. J. & S. 185, Lord Westbury expressly disapproved of it, saying: "But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the things granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of the grantor."

He further says:

"But with great respect the expression is erroneous and shews the mistaken view of the matter, for it is a question (as this was) between the purchaser and the subsequent grantee of his vendor, the purchaser takes the house not such as it is, but such as it is described and sold and conveyed to him in and by his deed of conveyance." Gale, p. 163.

But Lord Westbury's views did not command the general assent of other Judges in subsequent cases, and while not expressly dissented from, it was not in all cases followed. In Watts v. Kelson, L. R. 6 Ch. 166, Mellish, L.J., said:

"I think that the order of the two conveyances in point of date is immaterial, and that Pyer v. Carter is good sense and good law. Most of the common law Judges have not approved of Lord Westbury's observations on it, and Lord James added, "I also am satisfied with the decision in Pyer v. Carter."

Finally, in Wheeler v. Brown, 12 Ch. D. 31, the Court of Appeal overruled Pyer v. Carter so far as it rested purely

and simply on the doctrine of implied reservation, and Thesiger, L.J., says:

"We have had a considerable number of cases cited to us, and out of them I think two propositions may be stated as what I may call the general rule governing cases of this kind. The first of these rules is that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed there will pass to the grantee all those conditions and apparent easements (by which, of course, I mean quasi easements) or in other words all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the party granted. The second proposition is that if the grantee intends to reserve any right over the tenement granted it is his duty to reserve it expressly in the grant. Both of these general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense that a grantor shall not derogate from his grant."

The author above referred to (Mr. Gale), reviewing all the cases, says "Wheeldon v. Burrows has been often followed and must now be regarded as settled law," p. 167.

If I am right in holding that the plaintiff was the grantor or one of the grantors, then this case falls under the second proposition laid down by Lord Thesiger that not having reserved any right over the defendant's lot she cannot now claim to drain through it.

In this view the decision below was right and the appeal should be dismissed with costs.

RUSSELL, J:—The decision of this case must necessarily inflict a hardship on one or other of the parties. If the plaintiff succeeds the defendant's property is burdened with an easement of which he was not aware. If the defendant succeeds the plaintiff's house is probably made uninhabitable for want of drainage. The defendant could have saved himself from the trouble that has come upon him by making an examination of the property before purchasing, which I think the law has cast upon him the duty of making. The easement claimed over his property comes within the class of "apparent" easements, the term "apparent" in that

classification not being equivalent to "obvious" but merely importing something that can be discovered by the necessary inspection. But while the defendant could have protected himself there was no way in which the plaintiff could have escaped the calamity by which the judgment appealed from brings upon her without foregoing altogether the right which the statute gave her of purchasing the property at the partition sale.

It is quite certain, I think, that if the property on the west side of the street had been purchased by a stranger under the circumstances in which it has been purchased by the plaintiff the defendant's property would have been burdened with the easement complained of. The purchaser of the west side property would have bought a house with a drain from it over the other property to the harbour. The statute gave the plaintiff a right to purchase at the auction and sale, and it is inconceivable to me that the plaintiff so authorized to purchase could have been intended to purchase something different from that which was being offered to other competitors. The argument of Mr. Mellish on that point is to my mind conclusive. The opposite contention absolutely nullifies the right intended to be conferred upon her by the statute. She must, if that contention prevails, be willing to give the same amount for a house without a drain that her competitor at the auction will give for a house with a drain. She will not do so and cannot properly do so and the consequence is that the statutory privilege of purchasing at the partition sale becomes an illuson. I cannot think that such an absurdity was ever intended.

Moreover the sale is one that is forced upon the plaintiff. Let us imagine a case in which the party desiring to purchase has substantially the whole interest in the property to be divided, but that a partition and sale are requisite because of a failure to agree. If she were selling her interest in the balance of the property she would, of course, protect herself from the ruin of her property by the reservation of the easement necessary for its safe occupation and enjoyment. But a sale is forced upon her by the procedure of the Court. She can make no reservations and must either be turned out of house and home or dwell in a house that has become uninhabitable by the stopping up of the drain.

These consequences follow from the application to such a case of the doctrine that the grantor cannot derogate from his grant.

I am of opinion that the doctrine does not apply. It seems to me to be a matter of plain common sense that if a party is allowed to bid against all the world he must be bidding for the same thing that is offered to the other bidders, and further that if a sale is forced upon an owner of property it is a fallacy to say that it must necessarily be a sale without the reservations which no prudent owner would omit if the sale were a voluntary one. I can see no reason why the defendant should in this case be in any different position with respect to his purchase from that in which it is certain that he would be but for the accident that the property claimed to be dominant was bought in by one of the parties to the proceedings. His hardship is no greater than it would have been in that case.

LONGLEY, J.:—It was common ground on the argument and I think it is in accordance with the law that if the deed had been given direct to Mackintosh by the plaintiff or by the heirs of J. H. Bauld nothing would have been reserved in the deed except what was specifically reserved. The principle is that a grantor cannot derogate from the title he has given. But in this case it is sought to make a distinction between the title given by the sheriff under an order of sale by the Court and a title given by deed from the heirs direct. I have some difficulty in apprehending the distinction. There is, of course, no magic in the sheriff. The order of the Court to him is merely incidental. An order to any other person would have been equally effective. The sheriff for this purpose is simply an auctioneer, and when he has made the sale he is simply empowered to convey to the purchaser the interest of the heirs. This is plainly all he could give. He has no interest. No title vests in him. He can only convey under the order of the Court the interest which the heirs might have conveyed by deed direct if there had been no partition order. How then does a title conveyed in behalf of the heirs differ from a title given by them direct? If no distinction can be made I am not able to differentiate between the legal incidents of a sheriff or auctioneer's deed in partition suits and that of a conveyance of identical interests by the heirs direct.

For this reason, as I apprehend the law, the plaintiff is not in a position to derogate from the title which she herself has conveyed without reservation to defendant, and

therefore the conclusion reached by the learned Judge at Chambers is sound and the appeal fails.

DRYSDALE, J.:—This case in my opinion turns upon the effect to be given to the sale by the Court in the partition suit between the heirs of John Bauld. If the sale is to be treated as a judicial sale wherein the Court is the vendor, then the principle of a vendor not being allowed to derogate from his own grant does not apply. The learned trial Judge bases his judgment on the application of this doctrine holding that the defendant, under his deed from the sheriff, is in the same position as if he had a deed of his lot No. 3 from the plaintiff, and so treating it, held that plaintiff could not derogate from her own grant.

I am of opinion that the sale under the decree in the partition suit was a judicial act, the Court being the vendor and the sheriff the officer conducting the sale the mere agent of the Court.

I think the sale under the auction directed by the Court, and under which plaintiff and defendant bought separate lots was a transaction between the Court and the purchasers, and that defendant is not in the same position under his deed acquired from the Court's officer as if he had acquired title from the plaintiff by a deed from her. The distinction between mere ministerial sales by the sheriff, such as sales under execution and judicial sales where the Court is the vendor, is fully dealt with in the opening chapters of Rorer on Judicial Sales, and it seems to me clear that here in the Bauld petition suit, under which plaintiff and defendant bought, we have an undoubted case of a judicial sale where the Court was the vendor. This being so, can the purchaser at such sale of lot 3, as against the purchaser of lots 1 and 2, cut off or obstruct the main drain leading from the house on lots Nos. 1 and 2, and which ran through lot 3 and into the harbour, such drain having been constructed and used by the said John Bauld, the common owner, for many years and as necessary to the reasonable enjoyment of such houses?

I think we must treat plaintiff and defendant as having simultaneous conveyances from the Court and the plaintiff, under her deed of lots 1 and 2 as acquiring all quasi easements necessary to the reasonable enjoyment of the property conveyed.

It is quite apparent that this drain in question is necessary to the reasonable enjoyment of the property sold to the plaintiff, and in my opinion it passes on the severance as a quasi easement. Since Wheeldon v. Burrows the rules to be applied in such a case are pretty well settled, and I think it cannot well be urged here that the drain in question does not come within that class of quasi easements, that, by implication, pass under the grant of the house. The plaintiff purchased her houses as they then were and surely with the closets, sinks and main drain. The defendant at the same sale purchased his lot and that lot was burthened with the drain in question, and I think it was not open to him under such circumstances to cut off or obstruct the drain.

It was argued that because the drain after leaving lots 1 and 2 passed under the street of the city and then through lot 3 the fact of its so passing under the street prevented any right on the part of the plaintiff to the use of the drain on or over lot 3. In other words that because lots 1 and 2 and lot 3 were not adjacent, Bauld, the common owner, could not burthen lot 3 with a quasi easement necessary to the reasonable enjoyment of the houses on lots 1 and 2.

I do not think such an argument sound, as I do not think lots need to be contiguous to be burthened by a common owner.

In my opinion the appeal ought to be allowed with costs.

LAURENCE, J.:—I concur with the Chief Justice, and think the appeal should be dismissed.

Appeal dismissed.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. DECEMBER 15TH, 1910.

PETERS v. DODGE.

Land—Trespass—Cutting Down Tree on Boundary Line—Action for Damages—Ownership of Tree—Evidence.

Motion to set aside the verdict for plaintiff and for a new trial in an action claiming damages for cutting down a line tree.

W. E. Roscoe, K.C., in support of motion.

J. J. Ritchie, K.C., contra.

RUSSELL, J.:—The plaintiff has brought this action to recover damages from the defendant who cut down an oak tree about twenty inches in diameter. The parties are adjoining owners, plaintiff's property lying to the east of defendant's. Plaintiff derives his title from Theron A. Neilly by deed dated in 1908. Neilly bought from Brown who bought from Pierce in 1863. These facts are of importance only because the description in plaintiff's deed, so far as it regards the line of the property, is the same as in the deed from Pierce in 1863. It is a line running south, 17 degrees east, or thereabouts, until it strikes a large oak tree near the river bank; thence to the river. It is contended, or was claimed for the plaintiff, that the tree cut down by the defendant was the one mentioned as the boundary, but the surveyor says:—

"This tree was only forty-one years old, judging from the rings." And E. G. Dodge says:—

"It was only six inches in diameter forty years ago." If it existed at all in 1863 it could not possibly have been then described as "a large oak tree near the river bank."

There is an old stump which was at one time a large tree, and in all probability an oak tree, judging by its associates, and although the witness already named says that the tree has been a stump ever since he can remember, we do not know that it may not have been the tree intended as a boundary, the phrase having possibly been borrowed from some older document, written when it was a tree. This suggestion may be impossible if the property never was divided until 1863, but I am not certain that such is the case. Defendant's counsel said at the argument that the property was all one until 1843. He may have meant to say 1863, referring to the deed from Pierce to Brown. But in any case I do not see how we can be certain that there never was any occasion previously to 1863 to refer to this stump as a tree, and if not it may have at the date of writing the deed in 1863 existed in the mind of the grantor as a large oak tree from his having known and remembered it as such. If the stump is not the boundary no evidence has been given which enables us to determine where the boundary is. There is a line of posts, somewhat broken and irregular, from the road to the river, which the surveyor who was called by the plain-

tiff has indicated by a red line on the blue print used at the trial. If this red line is the line of the posts it seems impossible that it could be so drawn as to put the tree in question on the plaintiff's land. Even the old stump, which is to the east of the tree, seems to be wholly on the defendant's land. Some evidence was given that these posts had been shifted by the freshets and ice, but if it proves anything it proves that they would go west. That is the last word of the witness. It is in Theron A. Neilly's evidence in the re-examination. He first says that the posts could not work east, and then says the water would work them to the west. If they are now west of the position in which they were placed, it is evident that the line at this part of it was well to the eastward of all trees including the old stump. But I do not for myself believe a word of the story about the freshets changing the position of a post. Ice and freshets might draw a post out of the ground and float it away, but if the posts are in the ground they are where they were placed, unless there has been a land-slide.

If the old stump is the boundary and the centre of it is to be taken as the line, it seems from the evidence of the surveyor that the tree in question has encroached on the property of the plaintiff. A vertical plane on the line so drawn would shave the bark of the tree on the plaintiff's side of the line and cut off a protuberance of five inches at the part of the tree where it strikes the ground. This, then, is the only injury about which the plaintiff can complain if he has any grievance at all, but he has recovered damages for his interest in the tree on the theory that it was the common property of the plaintiff and defendant.

I think the verdict cannot be supported. The tree at one time was, and on any possible construction of the evidence must have been for a number of years on the land of the defendant and his exclusive property. It did not cease to be his tree because the roots and branches spread over on the plaintiff's land, and I do not think it can have ceased to be the defendant's tree because a little of the bark and an excrescence of five inches diameter above the root at the ground is now upon the plaintiff's land. The tree was cut eighteen inches from the root and the bark and roots with the protuberance referred to are still with the plaintiff. The defendant did not need even to go upon the plaintiff's land to cut the tree, and if he had done so, or has done so, that

is not the trespass for which the plaintiff has claimed and recovered.

I am not aware of any case in which the precise point has arisen as to the ownership of a tree planted on the land of one or growing on the land of one person, and which in process of its growth encroaches upon the land of another. Cases have arisen as to roots, and branches, and the law seems to be well settled as stated in the Connecticut case of Lyman v. Hale, 27 Am. Dec. 728, that "a tree standing wholly on one's land, but extending its roots into and its branches over the land of another, belongs nevertheless to the former."

I do not think it can be the law that because a tree planted on the land of one proprietor and growing thereon for years has encroached for a few inches in the course of its growth upon the property of the adjoining proprietor, it has therefore become the common property of the adjoining proprietors.

Some efforts were made to shew that the line had been conventionally settled and that there had been a continuous occupation sufficiently long to give title to the land on which the tree stands. I do not think there is any sufficient evidence for this. No doubt the tree was used from time to time as a convenient post, and there was some evidence of nails on the west side of the tree which would indicate that the boards had been nailed on that side. Those nails may be explained by the evidence of E. G. Dodge who says that he remembers one board was nailed on the west side of the tree. The tree leaned over towards the east, and this was suggested to him as a reason why the board at this place was nailed on the west side of the tree. He does not accept the suggestion but says he thinks it was nailed there to keep the water from taking it away. Defendant says that the boards were invariably nailed on the east side of the posts, and that the fence went on the west side of the tree and could not go on the other side unless you made a crooked fence.

I notice that in the charge of the learned trial Judge he put it to the jury that the defendant does not seriously dispute but rather confirms the evidence for the plaintiff. I cannot think that this was a correct view of the matter. The defendant was asked in a general way by Mr. Ritchie: "You

have no fault to find with Mr. Neilly's evidence given here to-day? A. No.

Q. You did not see anything incorrect in it? A. I don't know that I saw anything incorrect in it.

Q. You accept his testimony as correct? A. Yes, I accepted the post where it stood."

He refers here to the post at the road, but it would be exceedingly unfair in any case to make use of this indefinite approval of Neilly's evidence by an old man eighty years of age as a confirmation of any particular statement of a witness whose evidence covers several pages of the printed book. It is clear, taking the evidence as a whole, that he never meant to assent to Neilly's statements as to the existence for twenty-five years of a fence at the part of the line as to which the dispute and difficulty have arisen.

I think the plaintiff has made out no reasonable case against the defendant; that the latter did what he had a perfect legal right to do; that the case might properly have been withdrawn from the jury; and should now be dismissed, seeing that a verdict for the plaintiff under proper instructions would be one that no reasonable jury could render.

LONGLEY, J.:—In this case the jury found a general verdict for the plaintiff and since the preponderance of evidence supported the plaintiff's view of the case there is no reason whatever for disturbing the verdict.

The only serious ground upon which the verdict was sought to be attacked was that the presiding Judge had not formally submitted to the jury the issue of the occupation by means of a fence shewn to have been in existence for upwards of twenty years.

The most important evidence on this point was that given by Theron Neilly, the plaintiff's predecessor in title. He says unequivocally that the fence ran to the tree in question and that this tree was a line tree. The defendant, Dodge, in his direct examination, sought to make it appear that the fence ran east of the tree, or on the east side of it, but on cross-examination he was asked if he would undertake to dispute Mr. Neilly's explicit statement on this point and he frankly declared he would not.

"Q. So far as you know, you accept it as correct? A. So far as I know."

Besides the fence which was urged by defendant as evidence of occupation is shewn by the evidence of Theron

Neilly and E. G. Dodge to have been down part of the time every year. Neilly, p. 10, says, that before he left Middleton the fence "was down; it was taken down by the freshet." Dodge, on p. 17 says, "They used to take the boards off in the fall."

A fence down part of the time will not, I conceive, be that continuous and uninterrupted adverse possession which will give title or cause loss of possession on the part of Peters.

In view of the evidence by the defendant himself I do not see what there was to submit to the jury on this point. If the jury were asked to disbelieve Mr. Neilly they could only have done so by disbelieving the defendant himself. There was really no issue between the parties on this question of occupation, and so the learned Judge told the jury. But the crucial question upon which the whole issue depended was clearly submitted to the jury. He says:—

"Now there is no dispute about the other oak trees and you will not trouble yourselves with any three except the one that stood partially on the line, if you find that it so stood. If you find, on the other hand, that the line did not intersect the tree; that it did not cut into the tree; if you find that the line crossed by the tree and threw the entire tree upon the property of the defendant Dodge you ought not to give the plaintiff a verdict because in such case he would have brought his suit without right."

This seems to me to submit every vital issue fairly and clearly to the jury and they found for plaintiff, which the evidence clearly warrants.

I think the law is clear that if the tree in question was a line tree it was the common property of both Peters and Dodge, and the latter had no right of his own motion to cut it down.

I think the motion for a new trial must be dismissed with costs.

DRYSDALE, J.:—This cause was tried by MR. JUSTICE LAURENCE with a jury and a verdict entered for the plaintiff. The question involved was wholly a question whether a certain oak tree cut down and carried away by defendant was a line tree, that is, a tree situate on the line separating the lands of plaintiff from the adjoining lands of defendant.

The defendant asserted that the tree was wholly on his property, whilst the plaintiff contended that the tree stood

directly on the true line separating the properties of the respective parties to this suit, and this was all that was involved in the action.

The case was, I think, fairly submitted to the jury by the learned trial Judge, and the jury accepted the plaintiff's contention, finding in his favour and assessing damages at twenty dollars.

We are now asked to direct a new trial, first, because of misdirection, secondly, because of non-direction, and thirdly, because the verdict is against the weight of evidence.

The contention as to non-direction arises out of the learned Judge's refusal to give a specific direction at the request of defendant's counsel in the following language:—

"If you find that the fence from the trees north ran east of the tree in question, and that the fence existed there for twenty years before the cutting in question and the adjoining proprietors occupied up to it during that time under a claim of right, your verdict must be for the defendant."

After an examination of the evidence, and reading the charge as put by the trial Judge, I think he was quite right in his refusal of this specific declaration or instruction.

There is no question in the case of acquiring land by possession. The sole and only question tried was whether a line that had been recognised and marked by an old fence and long user as the line fence between the respective parties intersected the tree in question or ran past it to the east. The parties do not differ as to this being the question. The defendant admits the old fence marked the line between the properties; that he and his neighbour, the plaintiff's predecessor in title, put it up about 1885 as the line fence and that the line so marked was not in dispute, and that the fence stood there for about twenty years. It has been down at the lower end where the tree in question stood for some time and the parties at the trial lent their energies on the question whether the old fence intersected the tree or passed it to the east, the former being plaintiff's contention and the latter that of the defendant. No doubt the whole dispute has arisen by reason of the fence having disappeared at the lower end some time ago. To my mind an examination of the evidence shews that the contention as above set out was really what was before the trial Judge, and after examining his charge to the jury as reported, I think it was unobjectionable. When the verdict is attacked as against the

weight of evidence I think defendant must fail. Neilly's evidence as to the location of the old established line, that is the line agreed upon by himeslf and the defendant, as the true line in 1885, and marked out by a fence put up by himself and the defendant and kept up as a true line between the properties by himself and the defendant for about twenty years is not shaken. He states in explicit terms that it ran to the tree and that it ran each way from the tree, and he is in direct language speaking of the tree in question. The defendant who stands alone on the questions of fact as his own witness does not seriously controvert Neilly's evidence. It is true there is some evidence that would lead one to suppose the boards had been nailed to the west side of the tree at some time, and some statements alleging that it passed on the east side, but these were all for the jury and they found for the plaintiff, and I think properly. Support is also I think, given to the plaintiff's contention in that the deeds conveying the plaintiff's property always, from 1863 down, in describing the division line, commence at a point at the road not in dispute and run southerly until it strikes a large oak tree near the river. This tree in dispute was the largest of three oaks only in that locality and the only oak trees standing practically within the memory of man anywhere on or near the line. The only witness that speaks of the age of the trees, says they were there forty years ago. He speaks of an old stump also that was an old stump forty years ago, immediately north of this tree and some speculation is indulged in that the tree that once stood on that old stump might be the oak tree referred to in the deeds. But when I find that the only witness that testifies about it saying that forty years ago the stump looked an old stump, then I cannot think deeds from 1863 down referring to the line running until it strikes a large oak tree near the river bank can refer to what was an old stump forty years ago. Oaks are of very slow growth. The one in question was the largest of three trees that stood near together as far back as the witness Dodge can remember (forty years, he puts it). No doubt in 1863 the largest one could only be called "a large oak tree" when taken relatively with the others. Of course if this tree could be said with certainty to be the large oak tree mentioned in the deeds it would settle the matter in plaintiff's favour. If Neilly is believed, that the fence in 1885 ran to and from this tree and it was then acquiesced

in as the line, it is pretty strong evidence that the parties interested, including the defendant, recognised it as the one referred to in the deeds. But my view is, if the point is left in uncertainty as to whether it is the tree or not mentoned in the deeds, the fact that a well-settled line had been agreed upon, located and lived up to (namely, the line marked by the old fence), for about twenty years between the respective owners of the lots, and when I find the enquiry below was directed solely as to whether that old line fence ran in relation to this tree, I am of opinion, under the evidence, we have here, the finding of the jury ought to settle the question.

I am of opinion that the motion for a new trial ought to be refused with costs.

MEAGHER, J., read an opinion not filed. He said in conclusion: "I agree generally with the opinion of my brothers on my right (LONGLEY and DRYSDALE, JJ.). I think the motion for a new trial should be refused." The result is the motion fails.

Motion refused.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. DECEMBER 15TH, 1910.

McDOWELL v. THE WENTWORTH GYPSUM CO. LTD.

Master and Servant—Negligence—Verdict for Plaintiff—Evidence—Contributory Negligence—New Trial.

Motion to set aside findings of the jury in favour of plaintiff, and for a new trial, in an action by plaintiff claiming damages for injuries received owing to negligence alleged on the part of defendant in the operation of defendants' quarry.

H. Mellish, K.C., in support of appeal.

J. J. Ritchie, K.C., contra.

The judgment of the Court was delivered by

LONGLEY, J.:—The defendants own and work a plaster quarry in the county of Hants. The seams of plaster are covered with mud and soil which have to be removed before the ore can be recovered. This is done by a steam shovel which removes this layer of soil above the seam of plaster and transfers it to cars which remove it. As the soil is removed the bed of plaster makes a platform on which the men may work.

The plaintiff was an employee of the company, and on the 17th day of March, 1909, was sent with another man named Phillips to work on the face of the bank—chiefly to bore a hole in the soil to place explosives which would break the hardness of the soil and render it easier for the shovel to act upon. These men were located near where the shovel worked. They were instructed when sent to this work, "to always keep away from the bank when the machine (the shovel) was in operation." These men continued to work at making a whole and putting in the explosive up to about nine o'clock in the morning. The steam shovel was not at work. The procedure is that the steam shovel operates to fill the train of cars which removes the dirt and rock, and then the train carries its load to its destination and returns when the shovel resumes work. At about 9 a.m. the cars returned and the shovel prepared to resume operations. Before, however, the machinery was put in motion, due warning was given to these two men working on the face. The warning was "come out boys" or "look out boys." The plaintiff says he did not hear this warning but Phillips did and paid no attention to it at first. Then the machinery began to work and a second warning was given which plaintiff admits he heard. It takes about 55 or 60 seconds from the time the shovel begins to scrape up its load until it has reached the top of the bank, about 18 feet, and there was abundance of time from this second warning for both plaintiff and Phillips to leave. Indeed two or three seconds would be ample to traverse the thirty feet necessary to safety. Neither of them moved on the second warning. They were working by the side of the face but not at the spot the shovel was working. But when the shovel had done its work and was eighteen feet up it swung on a crane over the place where the two men were working. As it was ten or twelve feet above their heads there was no absolute danger

in remaining. The shovel would pass well above their heads, and the only real danger was from the falling of stones or pieces of dirt from the shovel. Phillips says frankly, in his evidence, that he had concluded to chance it, but looking up at the shovel when it began to sway in their direction he noticed a lump of dirt hanging from the shovel. He immediately said to plaintiff who was standing beside him, "Come out, there is a lump dragging out of the dipper." Phillips went out and says there was no difficulty as to getting out in time. The plaintiff did not got out as Phillips did, though there is not a line of evidence to indicate any intelligent reason why he could not have gone out as quickly and as easily as Phillips. The result was that a lump of this dirt fell and struck plaintiff on the shoulders causing him some injury and much pain, from which he has happily recovered.

Plaintiff brought action against defendants for negligence. The cause was tried before Drysdale, J., and a jury. certain questions were submitted by the trial Judge to the jury and his instructions have not been brought in question. The questions submitted were as follows:—

"1. Q. Were the personal injuries sustained by the plaintiff caused by the negligence of William Malcolm? A. Yes.

And if so what did such negligence consist of? A. Reason, by not holding back the operation of the shovel until plaintiff was out of danger.

"2. Q. Could plaintiff with ordinary care have avoided the accident. A. No."

The jury awarded plaintiff $500 damages.

The defendants have appealed against these findings, and the judgment entered under them. The chief grounds relied on are absence of any proof of negligence on the part of defendants and contributory negligence on the part of plaintiff.

I accept, without any hesitation, the principles of law laid down by the learned counsel for the plaintiff as to the circumstances under which the findings of a jury may be set aside. These are lucidly set forth in Windsor Hotel Co. v. O'Dell, 39 S. C. C. 337, by Davies, J., "The question before me is not whether the verdict is in our opinion a right or just one under the evidence, but simply whether it is one which a jury could under all the circumstances, fairly find. While if acting as a juryman I might not have agreed with the conclusion reached by the majority of the jury, I am not sitting

here in a Court of Appeal, able to say that the verdict is one which reasonable men might not fairly, under the evidence, have found."

If I could find any evidence, whatever, of negligence in this case, any evidence upon which a jury as reasonable men could have found negligence against the defendants, I would not think of disturbing this verdict even though the general scope of the evidence was largely the other way. But after a careful perusal of the evidence I am unable to find any act or omission on the part of the defendants which was negligent in any reasonable definition of the word. The plaintiff was instructed, before he comenced work on the face of the quarry, to get out when the machine began to work. He was warned before the machine actually began to work, though he denies this. If it is answered that the jury had a right to believe him on this against his fellow-workman, and all the other witnesses, still he does not pretend to deny that he heard the warning just as the machine began to work. There was ample time to have gone ten times the distance to safety in the sixty seconds intervening between the warning and the occurrence of the accident. What pray, was defendants' negligence? What more could they, as reasonable men, have done? They gave warning after warning. The noise of the machine itself, which plaintiff admits he heard, gave him a whole minute's warning. What did defendant do that was negligent? What omit? The answer of the jury to this question will not stand for a moment. And while the law will allow the finding to stand upon any other reasonable theory disclosed by the evidence I can find no act done or omitted in the whole evidence upon which a finding of negligence can be based.

While I think a strong case of negligence has been made out against the plaintiff and the jury had no substantial ground for their finding on this point, it is not necessary for me to deal with this.

I think no negligence has been proved against defendant, and the verdict, therefore, cannot stand.

The appeal will be allowed, and a new trial granted with costs.