THE

ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING SEPTEMBER 19TH, 1903.)

VOL. II. TORONTO, SEPTEMBER 24, 1903. NO. 31

FERGUSON, J. SEPTEMBER 14TH, 1903.

CHAMBERS.

STANDARD LIFE ASSURANCE CO. v. VILLAGE OF TWEED.

Summary Judgment—Defence to Action—Municipal Debentures—By-law—No Provision for Payment of Principal —Application of Special Statute.

Appeal by plaintiffs from order of Master in Chambers (ante 731) dismissing application by plaintiffs for summary judgment under Rule 603 in an action to recover the amount due upon certain debentures issued by defendants and purchased by plaintiffs.

D. L. McCarthy, for appellants.

C. W. Craig, Tweed, for defendants.

FERGUSON, J.— . . . I think the provisions of sec. 432 have direct application to the case and to this motion. The interest on the debentures was paid for a long series of years, and there were no matured debentures on which the principal would have been paid. There were no debentures falling due till the debentures sued on matured. These matured at the same time, and to pay the principal on them would end the whole of the difficulty, for this is the very thing the plaintiffs sue for. I cannot see how the words in the section "and the principal of the matured debentures" can have any application or force, in the circumstances and facts of the case, and I think the by-law and the debentures sued on are declared to be valid and binding upon defendants. I am unable to see how there can be any substantial defence to the action, and I think the order asked for should go. . . .

SEPTEMBER 14TH, 1903.

DIVISIONAL COURT.

STRUTHERS v. CANADIAN COPPER CO.

Master and Servant—Liability of Master to Pay for Medical Attendance on Servant—Privity — Implied Authority— "Hospital Fund."

Appeal by defendants from judgment of MEREDITH, J., at North Bay, as regards $280, for which he directed judgment to be entered against the defendants, not to be paid by them personally, but out of what was called the "hospital fund." The claim of plaintiffs, who were practising physicians and surgeons having a hospital at Sudbury, was for surgical operations and surgical and medical attendance upon three men who were employed at the works of defendants and were injured while so employed. Menard, one of the men, was employed by defendants, but the other two were not; they were employees of a contractor for defendants, named McKinnon. The hospital fund was made up of contributions retained out of the men's pay, and was designed to provide medicine and medical attendance for the men when they required it. McKinnon's men were, it was admitted, entitled to the benefit of the fund. Menard was brought to plaintiffs for treatment by the master mechanic in the department of defendants' works in which Menard was employed, and the master mechanic, according to plaintiff Struthers, said that defendants "would be good" for Menard. The other two men were brought by McKinnon, Dr. Coleman, one of defendants' physicians in charge, accompanying him when Roy was brought.

W. Nesbitt, K.C., for appellants.

A. B. Aylesworth, K.C., for plaintiffs.

THE COURT (MEREDITH, C.J., MACLAREN, J.A.) held that there was nothing which entitled plaintiffs to recover as upon an express or implied retainer or employment of them by defendants to perform the services which were rendered, on the credit of defendants. One occupying the position of master mechanic in the employment of another has no implied authority to pledge his employer's credit for such services as were performed by plaintiffs, and there was no evidence that the man who brought Menard to plaintiffs had any express authority to do so. So with Dr. Coleman: and

McKinnon was not an employee of defendants. For the same reasons, there was no liability of defendants created to pay out of the hospital fund.

Appeal allowed with costs, and action so far as it relates to the $280 dismissed with costs.

SEPTEMBER 14TH, 1903.

DIVISIONAL COURT.

RE O'SHEA.

Will—Construction—Devise of Land—Direction to Devisees —Maintenance of Sisters.

Appeal by Susannah O'Shea from an order of STREET, J., in Chambers, ante 224, on an application by the executors of the will of Thomas O'Shea, under Rule 938, for a determination as to the rights of the appellant under the will, which directed "my said executors or my said two sons to give to their sisters, Bridget and Susannah, each a cow and a proper and sufficient bed and bedding in case of their marriage; until they marry, my said sons are bound to keep them in a suitable manner, free of expense; and I direct that so long as they or either of them keep house for their brothers they or she are to have full control of the poultry on the place and of the eggs, also of the butter each year after the factory closes, and until same re-opens again, all moneys derived from such sources to belong to them the said two girls for their own use and benefit share and share alike." The appellant's contention was that she might reside where she chose and that her brothers were bound to pay her a sufficient sum to enable her to maintain herself. Street, J., declared that the sons sufficiently complied with the will if they offered to support their sisters on the farm or in their home situate elsewhere.

R. R. Hall, Peterborough, for appellant.

G. Edmison, K.C., for respondents.

THE COURT (MEREDITH, C.J., MACLAREN, J.A.), held that the decision below was right, and dismissed the appeal with costs.

SEPTEMBER 14TH, 1902.

C.A.

CITY OF TORONTO v. BELL TELEPHONE CO. OF CANADA.

Constitutional Law—Incorporation of Companies—Dominion Objects—Interference with Property and Civil Rights in Province—Telephone Company—Right to Carry Poles and Wires along and across Streets—Consent of Municipalities—Dominion and Provincial Acts—Construction—Estoppel.

Appeal by the defendants from the judgment of STREET, J., 3 O. L. R. 465, 1 O. W. R. 192, in favour of plaintiffs, upon a special case stated by the parties, holding that the appellants had not the right to carry any poles or wires (whether above or under ground) along any street in the city of Toronto, without first obtaining the consent of the municipal council of the city.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and GARROW, JJ.A., on the 17th November, 1902.

W. Cassels, K.C., G. Lynch-Staunton, K.C., and S. G. Wood, for appellants.

C. Robinson, K.C., and J. S. Fullerton, K.C., for the plaintiffs.

ARMOUR, C.J.O., was appointed a Judge of the Supreme Court of Canada shortly after the argument, and died before judgment was given. Moss, J.A., became Chief Justice in December, 1902.

MOSS, C.J.O.—Upon the case stated by the parties two questions arise for decision.

The first is whether the work or undertaking for the prosecution of which the defendants were incorporated by the Act 43 Vict. ch. 67 (D.) is one falling within the description of a work or undertaking connecting the Province with any other of the Provinces or extending beyond the limits of the Province, within the meaning of clause 10 (a) of sec. 92 of the B. N. A. Act.

If this question is answered in the affirmative, then the work or undertaking falls within the exclusive legislative authority of the Parliament of Canada under clause 29 of sec. 91 of the Act, and thereupon arises the second question, viz.,

what, if any, effect has the Act 45 Vict. ch. 71 (O.), passed by the Legislature of Ontario at the instance of the defendants, upon the rights conferred upon them by their Act of incorporation, as amended by the Act 45 ch. 95 (D.)

Are these rights in any way curtailed or qualified by the provisions of the Ontario Act? Dealing with the first question, it is important to note the objects or purposes for which incorporation was sought and granted. These are set forth in sec. 3 of the Act 43 Vict. ch. 67 (D.), as amended by 45 Vict. ch. 95. Those enumerated in the beginning of the section, viz., the manufacture of telephones and other apparatus connected therewith, and their appurtenances and other instruments used in connection with the business of a telegraph or a telephone company, and such other electrical instruments or plant as the company may deem advisable, and the purchasing, selling or leasing of the same and rights relating thereto, are not to be considered as other than local. And if the defendants' purposes and objects were confined to operations of the kind mentioned, there would be no difficulty in saying that incorporation for such purposes might and should properly be sought from the Provincial authority.

But the difficulty is in respect to the other objects and purposes set forth in sec. 3. They are far wider and more extensive in their scope. Power is given to build, establish, construct, purchase, acquire, or lease, and maintain and operate, or sell or let, any line or lines for the transmission of messages by telephone in Canada or elsewhere, and to make connection for the purposes of telephone business with the line or lines of any telegraph or telephone company in Canada or elsewhere, and to aid or advance money to build or work any such line to be used for telephone purposes, with power to borrow money upon the company's bonds for carrying out any of the objects or purposes of the Act. Reading this language of the section, it is difficult to resist the conclusion that it was contemplated and intended that the defendants would extend their operations into more than one Province of the Dominion, and probably beyond the Dominion. It is true that they are placed under no compulsion to do so, but it is not unlikely that it was considered that the fames auri would be a sufficient incentive to them to avail themselves to the full extent of their powers. Doing so involves the construction or acquisition and operating of telephone lines extending across the boundaries of one Province into another, or the uniting with telegraph lines the wires of which cross the boundaries between Provinces. If, as seems to be the case with telegraphs, the wire is a sufficient link of connection between two Provinces, or at all events the carrying of a tele-

graph wire from one Province into another is an extension of the work or undertaking beyond the limits of one Province, it is difficult to deny the same effect to a telephone wire. And the conclusion must be that the work or undertaking authorized by sec. 3 of the defendants' Act of incorporation is one falling within clause 10 (a) of sec. 92 of the B. N. A. Act. And the question of the legislative jurisdiction must be judged of by the terms of the enactment, and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction, nor does it affect the validity of any incorporation or the status of the incorporated body as a corporation. As said by the Judicial Committee in Colonial Building and Investment Association v. Attorney-General for Quebec (1883), 9 App. Cas. at p. 165, "Surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one Province cannot affect its status or capacity as a corporation, if the Act incorporating the association was originally within the legislative power of the Dominion. The company was incorporated with power to carry on its business, consisting of various kinds, throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation."

The first question must, therefore, be answered in the affirmative.

It remains to consider the second question. The argument for the respondents is that, granting the legislative authority to be in the Parliament, and not in the Legislature, the defendants, having applied for and obtained legislation from the Legislature, must be held to have consented that in any conflict of the enactments those passed by the Legislature should prevail.

It may well be doubted whether there was any occasion for the Act (45 Vict. ch. 71, O.) The general objects and purposes for which the defendants were incorporated being such as came within the legislative authority of Parliament, it was proper that it should confer upon the defendants such general powers as were necessary to enable the works or undertaking to be effectually proceeded with, and this was the purpose of sec. 3 of the Act of Incorporation. The preamble of the Provincial Act, however, shews that its purpose apparently was to allay doubts in regard to those portions of the defendants' work and undertaking which were local, and did not extend beyond the limits of this Province. And the

legislation was sought as a measure of precaution rather than with the purpose or intention of giving up any powers or rights the defendants were entitled to under their Act of incorporation.

Nor is there anything on the face of the legislation to indicate that the defendants had entered into or were making a bargain to that effect. There is nothing there to prevent them from now insisting on such rights as were given them by the Parliament in respect of matters on which it had undoubted authority. Among these were the rights given by sec. 3 of the Act of incorporation, which enables them subject to the provisoes and conditions therein and in the amending Act 45 Vict. ch. 95 (D.) contained, to construct, erect, and maintain their line or lines of telephone along the sides of and across or under any public highway or street. These, having been granted in furtherance of objects or purposes properly authorized by the Parliament, could not be impaired by the action of the Provincial Legislature.

Therefore the defendants are entitled to the full benefit of the language of sec. 3 of their Act of incorporation as amended, notwithstanding the Act 45 Vict. ch. 71 (O.)

The result is, that the appeal should be allowed, and that instead of the declaration made by Street, J., it should be declared that the powers conferred by the defendants' Act of incorporation, 43 Vict. ch. 67 (D.), as amended by the Act 45 Vict. ch. 95 (D.), are not curtailed by the provisions of the Act 45 Vict. ch. 71 (O.), as regards the right to construct, erect, and maintain their lines or lines of telephone along the sides of and across or under any highway or street of the city of Toronto, subject, however, to the provisoes set forth and contained in sec. 3 of the Act of incorporation as amended.

Under the circumstances, there should be no costs of the litigation to either party.

Garrow, J.A., gave reasons in writing for the same conclusion as Moss, C.J.O.

Osler, J.A., also concurred.

Maclennan, J.A., concurred in holding that the defendant company was one to which Parliament could and did give not merely corporate powers, but certain powers to interfere with property and civil rights in the several Provinces of the Dominion.

He dissented, however, as to the effect of the Provincial Act, the concluding part of his opinion being as follows:—

A Dominion corporation may obtain its powers over property in a particular Province either from Parliament or from

the Legislature of the Province, or partly from one and partly from the other. In the present case, by sec. 26 of its Act of incorporation, the company obtained from Parliament power to purchase and lease property, but no power of expropriation; it might obtain the latter power, in any Province, from its Legislature. If that be so, it follows, I think, that a Dominion company may, by application to the Legislature of a Province, have its powers over property in that Province enlarged, diminished, varied, or qualified in any manner whatever, whether such powers were originally obtained from the Dominion or from the Province, or partly from the one and partly from the other.

For these reasons, I am of opinion that the company having applied for and procured this Act of the Legislature modifying its rights and powers on and over highways, etc., is as much bound thereby as the municipalities, and that the Act is binding on both.

That being so, the judgment appealed from is right and ought to be affirmed.

SEPTEMBER 14TH, 1903.

C.A.

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Ship—Charterparty — Breach — Failure to Deliver Cargo—Duty of Charterers—Time—Insurance—Failure to Carry Goods—Place of Loading—Terms of Contract — Custom of Port—Measure of Damages.

Appeal by defendants from judgment of MACMAHON, J., 1 O. W. R. 593, in favour of plaintiffs in an action for the alleged breach of a contract by defendants to furnish plaintiffs' steamer "Midland Queen" with a cargo of grain to be carried from Fort William to Goderich.

Plaintiffs alleged failure to load the grain on the ship. Defendants denied liability and counterclaimed for damages for breach of plaintiffs' agreement to carry the grain.

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

A. B. Aylesworth, K.C., and C. A. Moss, for appellants.

C. Robinson, K.C., and F. B. Hodgins, K.C., for plaintiffs.

Moss, C.J.O.—. . . As the case developed at the trial the controversy between the parties was reduced to the question of whether the defendants had performed their part of the contract by having, as it was shewn that they had, before and at the time specified for loading, a sufficient quantity of grain in the elevators at Fort William to have furnished a full cargo if the vessel had come under the spouts, or whether they were bound to go further and provide or secure for the vessel an unimpeded access to the spouts in time to enable her to load there within the time specified, or failing that to load her by some other means within the specified time. And this is the main question for decision on this appeal.

There is a further question, whether, if the defendants are liable at all, the damages awarded ought not to be reduced by the amount of the expense which would have been incurred by the vessel in carrying the cargo to Goderich.

In delivering judgment the learned trial Judge stated that these expenses should be deducted, but in settling the formal judgment the question was referred to him, and he directed that no reduction should be made.

The learned trial Judge found for the plaintiffs and directed judgment to be entered for the plaintiffs for the sum of $4,590, being the amount of the freight which would have been earned if the vessel had received her cargo.

The main facts are scarcely, if at all, in dispute. Both parties set up and rely upon a contract contained in a number of telegrams and some letters passing between one A. F. Read, of Montreal, who was admittedly acting for the plaintiffs, and one G. R. Crowe, of Winnipeg, with regard to whose position some doubt has been raised, but whom the learned Judge has found to have been acting for the defendant.

Two of the telegrams upon which a great deal of the controversy turns are dated the 23rd November, 1901, and are as follows:—

(1) Read to Crowe: "Playfair confirms charter Queen, Fort William to Goderich, loading about December 2nd, weather, ice, permitting, four and a half cents bushel. Confirm."

(2) Crowe to Read: "We confirm Midland Queen, four and half, Goderich, load Fort William on or before noon 5th December."

Following these was a letter from Read to Crowe, dated 23rd November, stating as follows: "Playfair wires confirming charter to you of steamer Queen to load at Fort William before noon December 5th to Goderich at four and a half cents per bushel. Please say who she is to be loaded account of and to whom captain will apply for grain." This letter,

which expressed the plaintiffs' understanding of the terms of the contract and their acceptance of them, was received by Crowe, and by him handed or read or the contents stated, to one Frederick Phillips, the defendants' general manager at Winnipeg and was accepted without objection.

The plaintiffs' vessel sailed for Fort William on the 30th November, and her departure was notified by Read, and Playfair, the plaintiffs' manager, to Crowe at Winnipeg.

In the autumn of 1901 there were at Fort William three working elevators, the property and under the control of the Canadian Pacific Railway Company, and beyond doubt fully answering the description of terminal warehouses within the definition of the Manitoba Grain Act, 63 & 64 Vict. ch. 39 (D.) They were situate up stream three-fourths of a mile or more from the mouth of the river. The one nearest the mouth was known as elevator C. About 200 feet further up was elevator A., and 1,000 or more feet further on was elevator B. There was also a steel or tank elevator situate still further up stream, but this was not available in December, 1901.

There are no special berths for vessels, but along the north bank of the river is a long continuous dock with a line of posts to which the vessels may tie up. And by the established practice of the port all vessels except the Canadian Pacific Railway Company's passenger steamers are required to wait their turn, and to come up to the elevators in the order of their arrival in the river. The only method of loading vessels with grain at Fort William was through the spouts of the elevators, and a vessel of the capacity of the Midland Queen, i.e., about 103,000 bushels, could be loaded in eight or nine hours from the time she came under the elevator spouts. Upon the arrival of a vessel the captain reported to the person in charge of the elevators, and without this person's leave the captain could not bring his vessel under the spouts of the elevators.

In the autumn of 1901 the elevators were in charge of one Sellers, to whose orders the vessels were subject as regards the order and time of their coming to load.

The Midland Queen arrived and tied up along the bank of the river on the afternoon of Tuesday the 3rd December. At that time of the year—within a couple of days of the close of the season—there is always a number of vessels waiting their turn, and there were eight vessels ahead of the plaintiffs' in course of being loaded or awaiting their turn at the elevators.

The plaintiffs' vessel was insured under two policies, in each of which was contained a warranty that she should not be engaged in navigation from 5th December, 1901, to 1st

April, 1902, but in the event of her being on a voyage at noon on the 5th December, 1901 (Chicago time), the policy was to continue until arrival at port of destination. This was not made known to the defendants, but they were aware that the usual conditions of insurance on hulls was to that effect. The defendants were covered by open policies on all shipments up to and inclusive of the 5th December in vessels reporting at an elevator ready to load at or before 6 o'clock in the afternoon, but this was not known to the plaintiffs otherwise than as they may have been aware of the general conditions of insurance upon cargoes carried on the upper lakes. . . . .

On the morning of the 5th the vessel had in due course reached a place in the river where she was within about 300 feet of elevator C. There was a vessel (the Rosedale) at the spouts, and the plaintiffs' vessel was next in order for them. It was supposed that the Rosedale would complete her loading about 9.30 in the morning. Before that hour Sellers told the captain of the plaintiffs' vessel that they could not fully load her before noon, but proposed that she should come under the spouts and he would start her load before dinner so as to save the insurance, and complete her that night. He knew that the vessels were hastening to get away before noon to save their insurance. At first the captain seemed disposed to meet the suggestion, but finally, on receipt by him of a telegram from the plaintiffs ordering him home, he left for Collingwood shortly before 11 o'clock, it being apparent, of course, that she could not load before noon.

From the time of her arrival until her departure both parties appear to have been exerting themselves to the utmost to get the vessel loaded.

The plaintiffs contend that the failure to do so was due to the defendants' default. The defendants, on the other hand, contend that they did everything that the contract required, and had the cargo at the place of loading ready to be loaded into the vessel before the time named in the contract, and that the failure to do so was owing to the default of the plaintiffs in not having their vessel at the place of loading ready to take the cargo on board within the time specified in the contract.

The defendants' duty under the contract was to furnish a cargo of wheat at the place of loading agreed upon, and upon the evidence it is beyond question that the place of loading contemplated and agreed upon by both parties was the elevators. There was no thought or intention in the minds of either of loading by any other means than through the elevator spouts. In fact there was no other method of loading

vessels with grain at Fort William, and this was perfectly well understood by the parties at the time of making their agreement.

In the contract in question, where the parties speak of Fort William, they must be deemed to be speaking of the elevators as the defined place at which the loading was to take place. And the proper way to read it is as if the words "at the usual place" were in the contract, for that is, in effect, what the parties contracted for.

The plaintiffs' contract, therefore, was to proceed to the usual place of loading and there receive the cargo and carry it to Goderich, the point of destination.

The defendants' contract was to have a cargo of grain at the elevators ready to deliver so as to enable the loading to be completed within the time limit. A question has been made as to the time at which the loading was to be completed, whether the contract required that it should be completed at or before noon of the 5th December, or whether it called for more than that the loading should be commenced at or before that hour.

It must be taken that Crowe's telegram to Read of the 23rd November, "We confirm Midland Queen four and a half Goderich, load Fort William on or before noon," was despatched on behalf of the defendants, and that the language was theirs or was adopted by them. Read's letter of the same day shewed his understanding of that telegram, and if the defendants' understanding was different it was their duty to have drawn attention to it, and have the matter put right before it was acted upon. The telegram and letter, fairly read, convey the meaning that the vessel was to get her load by noon, that is, that the defendants were to have the cargo at the elevators ready to deliver within such reasonable time before noon of the 5th as to enable the vessel to be loaded by that time. In that respect the defendants have made no default, for it is now beyond question that they had the grain at the elevators, and that the vessel could have been loaded in good time if she had come to them.

No liability as to loading attached to the defendants. The law in this respect appears to be as stated by Brett, L.J., in Nelson v. Dahl (1879), 12 Ch. D. at p. 582:—"The primary right of the charterer as to loading under a charterparty in ordinary terms seems to me to be that he cannot be under any liability as to loading until the ship is at the place named in the charterparty as the place whence the carrying voyage is to begin, and the ship is ready to load, and he, the charterer, has notice of both these facts; when these conditions are fulfilled, the liability of the charterer begins." In the present case,

if the true construction of the contract is that the place of loading was the elevators, then the vessel was never at the place named in the charterparty as the place whence the carrying voyage was to begin. The plaintiffs, however, contend that, not only were the defendants to have the cargo at the elevators ready to deliver within a reasonable time before the expiry of the time, but they were also bound to have and keep a clear road to the elevators, so as to enable the vessel to reach the elevators in sufficient time to enable her to receive her load before the expiry of the limit.

It may be that if the elevators and the ways were the defendants' property that would have been their duty. They would certainly not be justified in keeping obstructions in the vessel's way. But, to the knowledge of both parties, the elevators were terminal warehouses, not in any manner under the control of the defendants, and all vessels arriving were subject to the custom or practice of the port by which they must load in turn, though, even if the custom was not known to them, it would make no difference. In Postlethwaite v. Freeland (1880), 5 App. Cas. at p. 613, Lord Blackburn said, referring to a charterparty which contained a reference to the custom of the port: "I do not think that this alters the question, as the express reference to the custom of the port of discharge is no more than would be implied. For I take it that a charterparty, in which there are stipulations as to loading or discharging cargo in a port, is always to be construed as made with reference to the custom of the port of loading or discharge, as the case may be. See Hudson v. Ede, L. R. 2 Q. B. 566, L. R. 3 Q. B. 412, though it was expressly found in that case that the shipowner and his broker were not aware of the usage." Later on Lord Blackburn approved of the direction of Lord Coleridge to the jury that "custom" in the charterparty did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port.

The settled and established practice at Fort William in regard to loading vessels with grain is clearly shewn to be to load at the elevators in their turn. The defendants did nothing to cause any obstruction to the plaintiffs' vessel or to prevent her from reaching the elevators and being loaded according to the custom.

The principle that has been applied in regard to discharging, where by the custom of the dock the work was done by third parties independent of both the shipowner and the charterer, as in The Jaedereu, [1892] P. 351, ought in reason to be applicable to loading.

The plaintiffs having failed to shew that the defendants were in default are not entitled to succeed against them, and their action should have been dismissed.

It follows that the plaintiffs, having failed to perform their part of the contract, are liable for the consequences of the breach, unless they can excuse themselves on the ground of prevention by the other vessels. But they were aware when they made the contract of the chance of there being a block of vessels awaiting their turn for the last trip, and must be regarded as having undertaken the chances resulting from that condition of affairs. Their insurance was liable to be ended unless they were on a voyage at noon on the 5th December, and, knowing that and the probability of a block at Fort William, they should have made sure of the arrival of the vessel in time to enable her to load in time. And not having done so and having departed without the cargo, the defendants are entitled to such damages as they can shew to be such as may be considered to have fairly resulted from the breach of the contract, and to have been in the contemplation of the parties. The defendants make claim for loss of interest on the price of the cargo, for insurance, for extra freight, and for depreciation in price. They were relieved by McGaw, the purchaser, from the contract they had made to deliver the grain at Goderich, and they were, therefore, not called upon to forward the grain by other means of conveyance at an increased rate, and no charge on that account can be maintained. The damages are, therefore, to be measured by the injury suffered by the cargo being left on the defendants' hands: Mayne, 3rd ed., p. 259.

It appears that the price that was to be paid by McGaw was regulated by the price of Chicago May wheat, and, although the defendants say there was a loss to them of profit by reason of such sale being given up, their manager, Mr. Phillips, was unable to put it into figures.

Besides, the defendants disposed of a considerable part, if not all, of the quantity to be carried, at the elevators or at Fort William, not long after the plaintiffs' breach, at figures which Phillips rather vaguely puts at from 3 to 4 cents a bushel below the price on the 5th December, but he furnishes no satisfactory data, and on the evidence it is not possible to say that the price realized was not equal to the price to be ultimately paid at Goderich, less the 4 1-2 cents per bushel for freight. The fact of the sales and that Mr. Phillips found it impossible to separate the grain intended for Goderich from the other grain in the elevators, upon which he had to pay storage and insurance, reduce the claim for interest, storage, and insurance to a small sum, which does not appear to

be capable of separation from the other claims and the amount of which is not stated.

On the whole, in view of the circumstances and the nature of the evidence on the question of damage, the defendants should be confined to nominal damages for breach of the contract, say $50.

The appeal is allowed and the plaintiffs' action is dismissed with costs. There will be judgment for the defendants on their counterclaim for $50 damages with costs.

The plaintiffs must pay the costs of the appeal.

GARROW and MACLAREN, JJ.A., concurred.

MACLENNAN, J.A., dissented.

SEPTEMBER 14TH, 1903.

SKILLINGS v. ROYAL INS. CO.

Fire Insurance—Notice to Company Terminating Policy—Registered Letter—Wrong Address — Receipt after Loss—Statutory Conditions.

Appeal by defendants from judgment of LOUNT, J., 4 O. L. R. 123, 1 O. W. R. 411, in favour of plaintiffs for $8,-661.67 and costs in an action to recover the amount of an insurance against fire upon a stock of lumber at Parry Sound.

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

C. Robinson, K.C., and C. S. MacInnes, for appellants.
W. R. Riddell, K.C., and A. Fasken, for plaintiffs.

GARROW, J.A.—This is an appeal from the judgment of Lount, J., who tried the case without a jury, and directed a judgment in favour of the plaintiffs for the amount claimed.

The action is upon an insurance policy, dated 24th January, 1901, to run one year from the hour of noon of that day, for $10,000, at the premium of $165, paid in cash on the delivery of the policy.

The property covered by the policy, which consisted of lumber, was destroyed by fire on the night of 5th June, 1901, and the material question in dispute is whether the policy was on foot when the loss occurred, or whether it had been can-

celled and surrendered by a written request from the assured to cancel, sent by mail before, but not received by the defendants until after, the fire.

The facts are fully stated in the former report of the case, and it is, therefore, unnecessary to repeat them here.

An argument addressed to us by the learned counsel for the defendants, apparently for the first time, or at all events not referred to in the judgment as reported, was that the plaintiffs had, in addition to the statutory right of surrender and cancellation, a similar common law right, and that if they had not well executed their statutory right they had at least executed the alleged common law right, by executing and mailing the written surrender and cancellation on 30th May. But granting the common law right to disclaim and renounce at any time a benefit which is unaccompanied by any corresponding burden or duty, it seems a complete answer to say that as a matter of fact there is no evidence upon which to found such an argument. There was no absolute cancellation and surrender on 30th May. What was done on that day was at most conditional, or, in other words, preparatory to a desired cancellation to take place on 5th June. The indorsement must be read with the letter which accompanied it, in which the plaintiffs say, "We desire to cancel as of June 5th."

It would, it appears to me, be a wholly unwarrantable liberty to take both with the documents, and the plain intention, to read the indorsement itself as amounting to an immediate cancellation as of 30th May. It is quite apparent that the plaintiffs intended to continue to be insured under the policy until 5th June, and equally apparent that from that date they intended to claim a refund of the unearned premium, a right which could not have been claimed except under the statute.

And this was the view of the defendants themselves when framing their statement of defence, that is, that the plaintiffs were proceeding in what they did under the statutory conditions, and not in the assertion of any common law right.

The real question must, therefore, I think, continue to be, did what took place amount to a statutory surrender and cancellation at the instance of the insured, so as to put an end to the policy before the fire?—a question which has been answered, I think properly, in the negative, by the learned Judge at the trial, in a careful and well reasoned judgment, which, in my opinion, leaves very little to be usefully said.

This case is not, in my opinion, to be distinguished from the case of Crown Point Iron Co. v. Aetna Insurance Co., 127 N. Y. St., a unanimous judgment of the State Court of Appeals, reversing the considered judgment of the State Su-

preme Court, and, therefore, a decision, under the circumstances, of high authority, although not of course binding upon this Court, where it was held that the insurance company, under a state of facts not unlike those in the present case, must prove that the notice to cancel was received by the company before the fire, and that a notice sent before, but not received until after, the fire, was wholly ineffectual, the rights of the parties having under the contract been vitally altered by the intervening fire.

I adopt this view of the law as sound. Giving such a notice is wholly the voluntary act, and for the exclusive benefit, of the insured. So long as it rests in intention the insurer has no power or control over the matter whatever. The notice may be recalled up to the last moment before it reaches its statutory home in the hands of the insurance company, and what is equivalent to a recall may be accomplished by indirect, as well as by direct, interference on the part of the insured, as in this case by an erroneous address upon the letter intended for the defendants, but retarding its delivery.

I think the appeal fails, and should be dismissed with costs.

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

Moss, C.J.O., and Maclaren, J.A., also concurred.

September 14th, 1903.

C. A.

SAUNBY v. LONDON WATER COMMISSIONERS.

Water and Watercourses—Injury by Dam—Statutory Authorization—Water Commissioners—Notice of Action—Limitation of Actions—Easement—Prescription — Laches — Injunction—Damages.

Appeal by defendants from judgment of Falconbridge, C.J., 1 O. W. R. 567, in favour of plaintiff for an injunction and damages in respect of the penning back, by a dam erected by defendants on the river Thames, of water needed for the purposes of plaintiff's mill in the city of London.

A. B. Aylesworth, K.C., and T. G. Meredith, K.C., for appellants.

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

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

MACLAREN, J.A.—This action was brought by the proprietor of a mill on the river Thames, in the city of London, against the water commissioners of that city, for damage caused to his water power by defendants' dam at Springbank, some four miles lower down the river, and for an injunction. Defendants were incorporated by the Ontario statute 36 Vict. ch. 102, for the purpose of supplying water to the inhabitants of London, and in 1879 built the dam in question. and also acquired another mill privilege between that and plaintiff's for the purpose of furnishing power to pump to the city the water for its use, which was obtained from another source.

Defendants denied the injury to plaintiff and claimed that they were authorized to do what they had done by the Act of 1873; that a month's written notice of the action should have been given; that the action was barred by the lapse of more than a year under sec. 31 of the above Act; that plaintiff by laches, acquiescence, and delay had disentitled himself to relief; and that defendants, by themselves and their predecessors in title, had acquired a prescriptive right to dam up the stream as they had done.

The action was by consent referred to Messrs. Wisner and Kennedy, two hydraulic engineers, to examine and report whether the water was prevented from flowing from plaintiff's tail-race and lands by defendants' dam and flashboards, and if so to what extent. After they had made their report the case came on for trial before Falconbridge, C.J., without a jury. . . . Upon the report and evidence he held that plaintiff was entitled to an injunction, and ordered a reference to determine what damages he had suffered during the six years preceding the institution of the action.

By sec. 5 of the Act of 1873 the commissioners were authorized to enter upon any lands in the city of London or within fifteen miles of the city and to survey, set out, and ascertain such parts thereof as they might require for the purposes of the water works; and also to divert and appropriate any river, pond, spring, or stream of water therein, and to contract with the owner or occupier of such lands for the purchase thereof or of any part thereof, or of any privilege that might be required for the purposes of the commissioners, and in case of disagreement the matter was to be determined by arbitration.

Section 31 of the Act provides that if any action be brought against any person for anything done in pursuance of the Act, it shall be brought within six months after the act committed, or in case there shall be a continuation of damages then within one year after the original cause of such action arising.

It is to be observed that the water of the river Thames is not conveyed to the city by the waterworks; the use made of it by the commissioners is the generating of power to pump to the city the water obtained from another source. No authority is given to the commissioners by the Act to interfere with any other occupied water power on the river for obtaining such power. It is also worthy of note that in the general statute passed in the same year (ch. 40) for the improvement of water privileges for manufacturing, milling, or hydraulic purposes, it is specially provided that no occupied mill privilege or water power shall be in any manner interfered with or encroached upon under the authority of that Act, without the consent of the owner.

I am of opinion that the defendants had no authority by virtue of their special Act or the general law to back the water up on the plaintiff as they have done, and that their doing so was not something done in pursuance of their special Act within the meaning of sec. 31 so as to enable them to set up the short limitation of six months or twelve months.

By sec. 17 of the special Act the commissioners are to have the like protection in the exercise of their respective offices and the execution of their duties as justices of the peace. and they claim that they were entitled to a month's notice in writing before the bringing of the action, which was not given them. What has just been said about the short limitation is equally applicable to this point; and in addition it is to be observed that this is an action to restrain defendants from continuing a nuisance or trespass. It is well settled that the provision requiring such notice is not applicable where an injunction is sought: Attorney-General v. Hackney Local Board, L. R. 20 Eq. 626; Sellers v. Matlock Bath Local Board, 14 Q. B. D. 928. This rule applies even when damages are also claimed: Flower v. Local Board of Low Leyton, 5 Ch. D. 347; Bateman v. Poplar District Board, 33 Ch. D. 360.

Defendants also claimed that they had acquired the right to dam the water as they had done by prescription, and that in any event plaintiff had disentitled himself to relief by laches, acquiescence, and delay. Defendants' dam was erected in 1879, the injury which plaintiff claims he has suffered began in 1880, when defendants placed flashboards upon their

dam. The use of these flashboards was, however, only intermittent. They were kept up only during low water and not always then, especially for a considerable period after the steamboat disaster of 1881. The present action was begun on the 19th August, 1897, so that the prescription of twenty years claimed by defendants cannot be maintained.

Nor is plaintiff disentitled to relief on the ground of laches, acquiescence, or delay. All that can be alleged against him on this head is his delay in bringing his action. He complained from time to time, but was tardy in seeking redress. But mere lapse of time is no bar to an injunction sought to restrain the invasion of a legal right unless the legal right itself is barred: Radenhurst v. Coate, 6 Gr. 139; Fullwood v. Fullwood, 9 Ch. D. 176.

At the trial and in this Court it was strongly urged on behalf of defendants that the injury plaintiff suffered from back water was caused by an obstruction in the tail-race a short distance below his mill. The engineers, Wisner and Kennedy, speak of this obstruction as extending from a point 50 feet below plaintiff's mill to about 120 feet below the mill, and say that the back water does not rise above the obstruction until the water surface at defendants' dam at Springbank is raised by the flashboards 3.85 feet above the crest of the dam. This obstruction at its highest point is several inches above the level of the floor under plaintiff's wheel, and its effect is said to be to cause a pool of water to be retained immediately below the wheel. There is a conflict of testimony as to the origin and nature of this obstruction. Defendants claim that it has always been there, the digging of holes shewing that it is part of the original bed. Plaintiff, on the other hand, claims that it was caused by a land slide which was only partly cleaned out, and the experiments by his witnesses would go to establish this theory. So far as this may be material, the weight of evidence would appear to be on the side of the plaintiff. But, even if defendants' theory is correct, it would not be a complete answer to the action. They have no right to back the water up plaintiff's tail-race, even if it does not rise above and pass over this obstruction. The obstruction does not extend to the lower boundary of plaintiff's land, and he would still be entitled to bring an action to prevent defendants acquiring a prescriptive right to this flooding, even if it never passed over the obstruction or reached his wheel. At the most it would apply only to the quantum of damage, and not to the injunction or the right of action.

On the whole, I think the judgment appealed from is right and should be affirmed.

SEPTEMBER 14TH, 1903.

C. A.

OTTAWA ELECTRIC CO. v. CONSUMERS' ELECTRIC CO.

Municipal Corporations—Contracts with Electric Light Companies—Use of Streets—Poles and Wires—Proximity—Rival Companies—Injunction—Apprehension of Danger—Judgment—Limiting Relief.

Appeal by plaintiffs from judgment of MACMAHON, J., 1 O. W. R. 154, in so far as it was against plaintiffs in an action brought to restrain defendants from erecting or maintaining poles and wires in certain streets in the city of Ottawa, in such proximity to those of plaintiffs' as to interfere with the proper working of their system, or to constitute menace and danger to plaintiffs or to their employees or to the general public. The judgment was in favour of plaintiffs as prayed, but in settling the judgment a clause was inserted (by direction of the Judge) allowing defendants to maintain their wires on certain streets within the distance otherwise prohibited by the judgment, upon insulators being provided. The plaintiffs appealed from this part of the judgment. Defendants, by way of cross-appeal, contended that the action should be dismissed altogether.

A. B. Aylesworth, Q.C., and G. F. Henderson, Ottawa, for plaintiffs.

W. Nesbitt, K.C., and Glyn Osler, Ottawa, for defendants.

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

GARROW, J.A.—This is an appeal by the plaintiffs from the judgment of MacMahon, J., awarding to the plaintiffs an injunction restraining the defendants, a rival electric company, from so placing their poles, wires, etc., as to interfere with the poles, wires, etc., of the plaintiffs, the elder company; but, as the plaintiffs allege, unduly limiting the injunction in paragraphs 7 and 8 of the judgment. And a cross-appeal by the defendants against the whole judgment.

Dealing first with the latter, I am of the opinion, after a perusal of the evidence, that, while the case can scarcely be called a strong one, the apprehension on the plaintiffs' part

that the defendants' works as projected would or might injuriously affect or interfere with those of the plaintiffs, was well grounded and that, therefore, the injunction was properly granted. The plaintiffs were not, in my opinion, obliged to wait until the defendants' works were completed, but might reasonably assume from what was already done, in the planting of posts, the placing of cross-arms, the cutting of gains, etc., that these works, when completed upon the foundation thus laid for them, would be an injurious and illegal interference. The plaintiffs are and for some time have been in occupation. They have a fully established plant, established with the consent of the municipal authorities, and they have by reason of such occupation a legal right as against the defendants to be protected in a reasonable user of the public streets, not only against any actual but any threatened interference by reason of the new works projected by the defendants. The use by the plaintiffs of the public streets must of course be reasonable, as is well pointed out in the judgment of the learned trial Judge, and only in so far as their user is reasonable are they entitled to protection. There is nothing, however, in the judgment of the learned Judge to indicate that in his opinion the plaintiffs had acted or were acting unreasonably in their mode of occupation. This disposes of the cross-appeal, which should, I think, be dismissed.

With reference to the plaintiffs' appeal, I am of the opinion that the clauses objected to do unduly limit the relief to which the plaintiffs are, under the circumstances, entitled. The learned trial Judge in a careful review of the evidence came to the conclusion, wholly justified, that a safe distance to be maintained by the wires of the respective companies was three feet between primary wires as between themselves, and between primary wires and secondary wires; and six inches between secondary wires and secondary wires. That being, as I think, the conclusion which the evidence warrants, I have been wholly unable to see why an exception in the interest of the defendants should be made by the introduction of the clauses 7 and 8, which, it may be observed, formed no part of the original judgment as pronounced; indeed, these clauses seem to me to be a distinct departure from that which had been earlier adjudicated as the respective rights and duties of the parties. It is said that the change was made because otherwise it would be difficult or perhaps impossible for the defendants to occupy Slater street, already occupied by the plaintiffs.

It is not necessary to determine the point, but I think, from looking at the plan, and from what I gather from the evidence, that the defendants can obtain access to the heart

of the city by using, if necessary, other streets than Slater street. It is a matter apparently of expense or of convenience, and such considerations ought not to outweigh the prior right to protection to which the earlier sections of the judgment properly declare the plaintiffs to be entitled. Without the paragraphs objected to, the defendants are not, I think, barred from Slater street itself, because it appears to me to be quite possible for both companies, acting, as they are bound to act, reasonably, to use that street and yet keep their wires at the proper distance; although I do not proceed upon that, but upon this, that no sufficient reason is shewn why an exception should be made in the case of that street.

I also think it is objectionable that by these clauses the defendants are to be permitted to handle the plaintiffs' wires, and to confine them to the novel and untried insulation proposed. The plaintiffs ought not, I think, to be compelled to consent to such in interference with their property; nor should the plaintiffs' right to apply to the Court in case of breach be intercepted, and in effect taken away, by compelling a reference of a dispute to the city engineer as proposed.

Upon the whole, I am of the opinion that the judgment originally pronounced was correct; that the cross-appeal should be dismissed with costs; and the plaintiffs' appeal allowed with costs.

SEPTEMBER 14TH, 1903.

C. A.

EARLE v. BURLAND.

Interest—Charging Accounting Party with—Money Paid to Manager of Company in Excess of Salary—Trustee—Statute of Limitations—Reference—Powers of Master.

Appeal by defendant G. B. Burland from judgment of MEREDITH, C.J., 1 O. W. R. 527.

The facts are stated in the judgment.

W. D. Hogg, K.C., and G. F. Shepley, K.C., for appellant.

A. H. Marsh, K.C., and C. J. R. Bethune, Ottawa, for plaintiffs.

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

MOSS, C.J.O.—Appeal by the defendant George B. Burland from the judgment of Meredith, C.J.,. upon an appeal from the report of the Master at Ottawa and on hearing on further directions.

The ground of appeal is that the learned Chief Justice erroneously determined that the appellant was chargeable with interest upon a sum of $58,556.25 which the Master, upon taking the accounts directed to be taken by him, found to be due by the appellant in respect of sums withdrawn by him from the British American Bank Note Co., as salary, in excess of the salary to which he was entitled as general manager.

The appellant has been for many years the president and general manager, as well as the principal shareholder, of the company. On the 24th April, 1888, a resolution was, at his instance, passed by the board of directors providing for an increase of salary to the "staff," equal to 5 per cent. on the capital stock held by each of them. The reason of this was that it was in contemplation to remove the operative part of the business from Montreal to Ottawa, and some of the employees made representations as to the difficulties and expense to them arising out of the removal. And by the resolution it was left with the appellant to make the best arrangements he could with reference to the assistance to be given the employees. Commencing on the 1st August, 1889, and thenceforward until December, 1900—a period of over 11 years—the appellant withdrew from the company at the rate of $5,025 per annum as salary, in addition to $12,000 per annum to which he was entitled. And he claimed to be entitled to the benefit of the resolution as one of the staff.

By the judgment of this Court, affirmed in this respect by the Judicial Committee of the Privy Council, it was held that the resolution was never intended to apply to the appellant, and it was declared that the appellant was liable to account for all sums so withdrawn, and it was referred to the Master to take an account of what was due from the appellant upon that and other accounts.

The appellant admitted having withdrawn altogether $58,556.25 and with this sum he was charged by the Master. The Master was requested to charge the appellant with interest, but declined to do so, and at the plaintiffs' request ascertained the amount of interest and reported the same at the sum of $22,540.67.

Upon appeal and hearing on further directions, Meredith, C.J., held the appellant chargeable with the interest.

We think the judgment is right and should be affirmed. As regards these moneys, the appellant's position was and is that of trustee for the company. His position is the same or similar to that of the appellants in the case In re Exchange Banking Co., Flitcroft's Case (1882), 21 Ch. D. 519. The case is even stronger against the appellant than the case cited, for there the appellant had paid away to others a great portion of the moneys of the company which were sought to be recovered back, while here the sums were withdrawn and retained by the appellant for his own use. Yet in Flitcroft's case the appellants were held liable as trustees, and were ordered to repay the amount with interest. And on the ground that they were trustees, it was held that the Statutes of Limitation did not apply.

Here, notwithstanding his plea of the Statute of Limitation, the appellant has been held liable to repay moneys received in and since the year 1889, more than 6 years before action, and this could have been upon no other ground than that he is a trustee. That being so, there is no reason for relieving him from the payment of interest. There is no valid justification for his act in withdrawing the moneys from the company's funds and appropriating them to his own use. His position in the company required that he should exercise a careful supervision over the payments to be made to members of the staff under the resolution, and it is plain from the circumstances leading to the passing of it and the reasons why it was called for, as well as from the language itself, that it was only intended to apply to employees under him who were to be under the necessity of removing to Ottawa. The appellant does not pretend that he was to remove or that he did remove to Ottawa, and, as held by this Court and the Judicial Committee, it was not intended to include him. If it was not intended to include him, no person could have been better aware of it than he was, and there was nothing to warrant him in putting such an interpretation upon it. The case is one in which the ordinary rule of requiring restoration of trust funds with interest should be enforced.

Under the terms of the reference and the wide powers conferred upon the Master by Con. Rules 666 and 667, he had full power and jurisdiction to charge the appellant with interest. By Rule 666 it is expressly provided that in order to enable the Master to exercise the powers conferred upon him by the following Rules it is not necessary that the judgment or order of reference should contain any specific direction in respect thereof. The silence of the judgment upon the subject of interest in therefore no reason for not charging it. On the contrary, the Master is bound to proceed

under the Rules, unless there is something in the judgment or order of reference expressly limiting his powers in the particular case.

There is nothing of the kind in this case.

Even if the Master was not empowered to deal with the question, it was competent for the Court to deal with it on further directions.

The reasons stated by the learned Chief Justice and the authorities cited by him fully support his judgment.

The appeal is dismissed with costs.

If the appellant was not within the rule as to trustees, he would still be liable for interest from the date of the commencement of the action.

There was then a demand for restitution of the moneys withdrawn, but he wrongfully or without title retained them, and has not yet restored them.

C.A.

SEPTEMBER 14TH, 1903.

GLASGOW v. TORONTO PAPER MANUFACTURING CO.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Defect in Machine—Unsatisfactory and Inconsistent Findings of Jury—New Trial.

Appeal by defendants from judgment of BRITTON, J., in favour of the plaintiff, upon the findings of the jury, in an action for damages for injuries sustained by plaintiff while in the employment of defendants owing to the alleged negligence of defendants, under the Workmen's Compensation Act and at common law.

H. Cassels, K.C., and R. S. Cassels, for appellants.

G. I. Gogo, Cornwall, and H. Beattie, Clinton, for plaintiff.

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

OSLER, J.A.—. . . The plaintiff, a young man of 19 years of age, went into defendants' employment in the month of June, 1902. He was put to work at a paper cutting ma-

chine . . . in the use and management of which he was instructed by defendants' foreman. The purpose of the machine is to cut and trim blocks of paper. . . . The operator standing in front of it places upon the table of the machine the block or pad of paper intended to be cut. By a double movement of the throw-off handle by the operator parts of the machinery are set in motion by means of which the power is communicated; a clamp descends which fastens the block firmly in position; this is followed immediately by the knife which makes the cut required. When the double movement of the handle has been completed, it is at once released by the operator, the cut is made and the clamp and knife return to their former position, automatically, as the witnesses say, or in the course of the motion imparted to the shaft by the driving gear. In the upward movement, the machine is thrown out of gear or locked . . . ready to be again set in motion by a repetition of the double movement of the throw-off handle.

On the 19th June, 1902, when plaintiff had been working at the machine for a week, he placed a block of paper on the table, cut it in the usual way, and as the knife was ascending proceeded to take out or turn round one of the parts in order to trim the edges by another cut. In doing this his hands were necessarily under or partly under the knife, which, unexpectedly and without having been set in motion by him, fell, severing one of his hands and mutilating the other. The knife had never come down in this way before, while he was working the machine, without using the handle, and from his instructions as to its user and mode of operation he had no reason to expect that it would do so. . . .

[The learned Judge referred at length to the evidence.]

Questions were put to the jury, which, with their answers, are as follows:—

(1) Was the personal injury caused to the plaintiff by any defect in the condition or arrangement of the defendants' paper cutting machine? Ans. Yes.

(2) What was the defect in the condition or arrangement of that machine? Ans. We cannot answer.

(3) Was this defect known to Shepherd, the superintendent employed by the defendants, of this machine and the working of it? Ans. Yes.

(4) Was this defect not remedied owing to the negligence of the defendants or of some person intrusted by them with the duty of seeing that the condition of the machine was proper? Ans. Was not remedied owing to the negligence of the defendants.

(5) Was this machine as operated when accident occurred dangerous to operate by reason of liability of it not to lock when knife went up? Ans. Yes.

(6) Was plaintiff ignorant of the existence of this danger? Ans. Yes.

(7) Were defendants aware of the existence of this danger? Ans. Yes.

(8) Could plaintiff by the exercise of ordinary care have avoided the accident? Ans. No.

(9) What damages do you find? Ans. $2,500.

(10) Were the defendants guilty of negligence by reason of which plaintiff sustained damages? Ans. Yes.

(11) What is the negligence you find, if any? Ans. By not repairing the machine.

(12) Was plaintiff himself guilty of negligence which contributed to the accident? Ans. No.

The case for plaintiff must rest upon secs. 3 (1) and 6 (1) of the Workmen's Compensation Act and upon proof that the injury he sustained was caused by reason of a defect in the condition or arrangement of the machinery or plant used in the business of his employers. As the case was presented to the jury upon the evidence on both sides, it appears to me to have been an extremely difficult one for them to deal with in arriving at a conclusion as to how the accident happened and what was the cause of it, and the first four questions submitted to them have not been answered in such a way as to admit of judgment being entered thereon in the plaintiff's favour. Although the jury have found that the injury was caused by a defect in the condition or arrangement of the machine which was known to the defendants' superintendent, Shepherd, and which was not remedied owing to defendants' negligence, they were unable to find or determine what the defect in question was. That was the first thing which it was essential for plaintiff to prove, and, as he failed to do so, the other answers of the jury relate only to a defect not proved, and are therefore fruitless. The answers to the other questions, in view of the fact that the jury were unable to answer the second question, appear to me unsatisfactory and inconsistent, and leave it quite doubtful whether the jury were able to understand or appreciate the evidence as to the construction and operation of the machine. This, I must say, was left in a state of considerable obscurity not merely to the jury, but also to the trial Judge and counsel on both sides. Why the knife fell, whether owing to some defect in the machine itself, which plaintiff's own witnesses were unable to point out, or to the speed at which the knife

shaft was revolving, did not appear. Plaintiff . . gave no evidence of defective construction, and, so far as the evidence for the defence explained the construction, it went to shew that the knife could not fall unless the shaft was revolving at too high a rate of speed. Whose neglect that would be, whether of plaintiff himself or some other person, there was no evidence, or whether in fact the machine was being run at too great a speed, nor was there any evidence of any defect, repair of which might have prevented the accident.

There should, in my opinion, be a new trial, and it would be more satisfactory, I think, that on the second trial the jury or the Judge, if the case is tried without a jury, should see the machine itself and the operation of its several parts in order to understand and apply the evidence. It may be that a clearer view of the operation of what is spoken of as the friction clutch and the spring or springs which it works with, will point to a cause of the accident and suggest the possibility of a condition of things in which the power might not be disconnected and the machine thrown out of gear in the complete revolution of the driving wheel.

The costs of the appeal and of the last trial to abide the event.

CARTWRIGHT, MASTER. SEPTEMBER 18TH, 1903.

CHAMBERS.

BUCKINDALE v. ROACH.

Security for Costs—Costs of Former Action Unpaid—Instructions Given by Same Plaintiff—Action Brought in Name of Wrong Person.

Motion by defendant for security for costs or to stay proceedings until the costs of a former action should be paid. Two years earlier an action for malicious prosecution had been brought against defendant in the name of Josiah Buckindale, the father of William Buckindale, the present plaintiff. This was a mistake of the solicitor, who had been instructed by the present plaintiff and only by him. On the action coming on for trial on 6th March, 1903, it was necessarily dismissed with costs. These costs were taxed at $91.80, and had not been paid. On 26th March the present action was begun. The case was ready for trial when the motion was made. No reason was given for the delay in moving,

nor was any argument based on it. It was conceded that the motion could succeed only on the ground that both actions were substantially those of the present plaintiff. In plaintiff's affidavit filed in answer to this motion, he stated that the first action was his action, brought on his instructions, but, by mistake, in the name of his father.

J. W. McCullough, for defendant.

S. B. Woods, for plaintiff.

THE MASTER held that it was equitable that the defendant should have the costs of the first action paid, or security for costs of the second with a stay until security given or costs paid. The defendant was certainly being harrassed a second time at the instance of the same person for the same cause of action. If any hardship must fall on one of two innocent persons, the person whose action caused the difficulty must not complain if he had to bear it. It certainly should not be thrown on defendant, who was not responsible for the mistake. The following authorities were referred to:—Rule 1198 (d); May v. Werden, 17 P. R. 530; Re Payne, 23 Ch. D. 288; Martin v. Earl Beauchamp, 25 Ch. D. 12; McCabe v. Bank of Ireland, 14 App. Cas. 413; Re United Service Association, [1901] 1 Ch. 97.

SEPTEMBER 19TH, 1903.

C.A.

REX v. NOEL.

Criminal Law—Evidence—Right of Prisoner's Counsel to Re-examine Witness—Statement to Crown Counsel on Cross-examination—Voluntary Statement — Repetition of Conversation.

The prisoner was convicted before MEREDITH, C.J., at the Assizes at Ottawa, in May, 1903, upon an indictment, under the provisions of the Criminal Code, for shooting at one Larocque with intent to commit murder, and was sentenced to five years' imprisonment in the penitentiary.

A motion was made on his behalf to this Court for leave to appeal as on a reserved case, and two objections were taken to the proceedings before and at the trial. The first was as to the constitution of the grand and petit juries; and the second was as to the refusal of MEREDITH, C.J., to allow the prisoner's counsel to re-examine a witness named Pepin, who was called for the prisoner.

On the 2nd June, 1903, the Court gave the desired leave (ante 488), and the case was argued on the 14th September, 1903.

E. E. A. DuVernet, for the prisoner.
J. R. Cartwright, K.C., for the Crown.

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

MOSS, C.J.O.—As we are of opinion that on the second question the prisoner is entitled to a new trial, we do not deal with the first question. It is one that is not likely to arise again, and, as it is conceded that the utmost relief that the prisoner is entitled to in any event is a new trial, it is not necessary to deal with it in order to the disposition of this appeal.

On the other branch of the appeal we are of opinion that the prisoner's counsel should have been allowed to re-examine the witness Pepin upon the statement, made by him upon cross-examination by counsel for the Crown, of what the prosecutor Larocque said to him the day after the alleged shooting, about the prisoner being the person who shot at him. In his testimony at the trial the prosecutor, Larocque, fixed the time at which the shot was fired as 7.30 o'clock in the evening of Sunday the 1st March, 1903, and swore that the prisoner was the person who shot at him. Pepin testified in chief that at 7.15 that evening he had seen the prisoner and conversed with him at the corner of Friel and St. Patrick streets, about three-fourths of a mile from the place where the shot was fired. On cross-examination by counsel for the Crown, in reply to a question of what person he had first talked to about seeing the prisoner on the Sunday evening, he said he talked with Larocque. Asked, "when," he said, "The day after Larocque came to me and said Noel had shot him. I said, what time was it? He said, half-past seven. I said I saw Noel at the corner of Friel street." The counsel for the Crown allowed the matter to rest there.

It can scarcely be doubted that the statement so made was likely to produce an impression on the minds of the jury unfavourable to the prisoner as tending to substantiate the prosecutor's testimony.

The prisoner's counsel desired to re-examine with respect to it, but was not allowed to do so, on the ground that no foundation had been laid for doing so. The prisoner's counsel submitted that he was entitled to ask the witness on re-examination with regard to what was brought out in cross-examination, but the question was ruled out.

As the evidence stood at that time, we think the re-examination should have been allowed. No doubt, what Pepin had stated was in strictness not evidence, but the jury were not aware of that. It had come from him in the course of cross-examination, and counsel for the Crown had not asked that it should be struck out; nor were the jury informed that it was not evidence, and that they must disregard it. That being so, the prisoner was entitled to get, by further examination, every part of the conversation that related to the statement concerning the prisoner being the person who shot at the prosecutor. It was argued for the Crown that the witness volunteered the statement, and that in any case it was not evidence.

The right to re-examine follows upon the exercise of the right to cross-examine, and even if inadmissible matters are introduced in cross-examination, the right to re-examine remains—and the rule holds good where the witness volunteers the statement. If it was desired to avoid re-examination upon it, it should have been expunged at the instance of the Crown. While it remained as part of the testimony, the right to re-examine upon it also remained. In Blewett v. Tregoming, 3 A. & E. 554, where the point was fully argued, all the Judges agreed that, however the evidence came in during the cross-examination, whether voluntarily or in answer to a question by counsel, the other party was entitled to pursue it on re-examination, unless the cross-examining party got it struck out. See also Phipson on Evidence, p. 454.

We cannot judge of the effect that the statement, unqualified by other portions of the same conversation, or by any explanation, may have had on the minds of the jury, nor estimate to what extent it may have prejudiced the prisoner. There was, no doubt, other evidence as to the identity of the prisoner on which the jury might have convicted without reference to Larocque's evidence on that point, but, in view of the way in which the statement came out in Pepin's testimony, and of the discussion on the question of re-examination, the jury were not unlikely to have attached considerable importance to it.

We think, therefore, that there should be a new trial.